Oral argument not yet scheduled

No. 20-4165

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Michael Threat, Margerita Noland-Moore, Lawrence Walker, Reginald Anderson, and Pamela Beavers
Plaintiffs-Appellants,
v.

City of Cleveland, Ohio, and Nicole Carlton, personally and in her official capacity as Commissioner,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Ohio

No. 1:19-cv-2105 (Gwin, J.)

OPENING BRIEF OF PLAINTIFFS-APPELLANTS MICHAEL THREAT ET AL.

Jared S. Klebanow
KLEBANOW LAW, LLC
850 Euclid Ave. Suite 701
Cleveland, Ohio 44114
(216) 621-8230
jklebanow@klebanowlaw.com

Avery Friedman
AVERY FRIEDMAN & ASSOCIATES
850 Euclid Ave. Suite 701
Cleveland, Ohio 44114
(216) 621-9282
avery@lawfriedman.com

Brian Wolfman
GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 661-6582
wolfmanb@georgetown.edu

Michael J. Amato
Emma R. Anspach
Austin M. Donohue
Student Counsel

Counsel for Plaintiffs-Appellants Michael Threat et al.

December 28, 2020

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 20-4165 Case Name: Threat, et al. vs. City of Cleveland, et al.

Name of counsel: Brian Wolfman

Pursuant to 6th Cir. R. 26.1, Michael Threat, et al.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on December 28, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Brian Wolfman

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTRODUCTION

In the district court's words: "Defendant Carlton admitted that she racially discriminated against a subordinate." Her actions, the district court emphasized, "were repugnant to modern sensibilities." Yet the court held that Carlton's on-the-job discrimination did not violate Title VII of the Civil Rights Act of 1964. As explained below, Carlton's actions were not only repugnant, but unlawful, and the district court was wrong to conclude otherwise.

Plaintiffs are five longtime Emergency Medical Service captains who have been subjected to relentless workplace discrimination because they are Black. Faced with racially motivated demotions and denials of overtime, training, and other work privileges, they continued to serve the City of Cleveland as first responders. In their decades of service, they have also made the workplace fairer by successfully challenging discriminatory employment policies. Yet the discrimination persists: To breakup shifts comprised of Black captains only, their boss, Defendant Carlton, instituted a race-based scheduling policy, which the City endorsed.

In implementing this policy for the 2018 schedule, Defendant Carlton relegated a Black captain to a night shift, giving the coveted day shift to a white captain with less seniority. Carlton made her race-based intent clear when she explicitly told Plaintiffs that she could not have a shift of all Black captains. And when Plaintiffs filed a grievance

to stop this latest workplace discrimination, Defendants retaliated, trying to bully them into dropping their grievance.

Title VII of the Civil Rights Act of 1964, its Ohio-law counterpart, and the Equal Protection Clause protect Plaintiffs from Defendants' discriminatory behavior. The district court's holding that Carlton's admittedly discriminatory conduct was lawful is wrong. This Court should reverse.

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument. Argument would aid the Court in understanding this important appeal and the lengthy record.

STATEMENT OF JURISDICTION

Plaintiffs sued Defendants in the Northern District of Ohio under Title VII, the Fourteenth Amendment, and the Ohio Civil Rights Act. The district court had subject-matter jurisdiction under 28 U.S.C. § 1331, 42 U.S.C. § 2000e-5(f), and 28 U.S.C. § 1367(a). The district court's July 31, 2020 order granting partial judgment on the pleadings to Defendants and its October 8, 2020 order granting summary judgment to Defendants together disposed of all claims of all parties. (RE 35, J. on the Pleadings Opinion & Order, PageID 1193; RE 53, Summ. J. Opinion & Order, PageID 1513-14.) Plaintiffs filed a timely notice of appeal on October 22, 2020. (RE 54, Notice of Appeal, PageID 1515.) This Court has jurisdiction under 28 U.S.C § 1291.

STATEMENT OF THE ISSUES

I. Title VII of the Civil Rights Act of 1964 and the Ohio Civil Rights Act make it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" on the basis of race. 42 U.S.C. § 2000e-2(a)(1); *see* Ohio Rev. Code Ann. § 4112.02(A). The Equal Protection Clause of the Fourteenth Amendment prohibits governmental discrimination based on race. The district court held that Defendants did not discriminate when they set aside Plaintiffs' seniority-based work schedules in favor of explicitly race-based transfers.

The first issue is: Whether Defendants violated Title VII, Ohio law, and the Equal Protection Clause when they used a race-based scheduling system to prohibit shifts comprised of Black captains only.

II. After Plaintiffs filed charges about Defendants' race-based shift-assignment policy, Defendants filed an unfair labor practice charge against Plaintiffs, admitting that they did so to coerce Plaintiffs into dropping their discrimination charges. Then, Defendants disciplined Plaintiff Beavers for trivial violations of City policies that white captains had violated without consequence.

The second issue is: Whether Defendants retaliated against Plaintiffs for filing discrimination charges in violation of Title VII's and the Ohio Civil Rights Act's anti-retaliation provisions.

STATEMENT OF THE CASE

I. Factual background

Plaintiffs Michael Threat, Margerita Noland-Moore, Lawrence Walker, Reginald Anderson, and Pamela Beavers are Emergency Medical Service (EMS) supervisors, commonly known as captains. (RE 33-2, Second Carlton affidavit, PageID 919, 921.) They are Black, and each has between nineteen and thirty years of experience serving the City of Cleveland. (*Id.* PageID 921; RE 31-3, Threat Deposition, PageID 438; RE 31-5, Noland-Moore Deposition, PageID 546; RE 31-4, Walker Deposition, PageID 504; RE 31-1, Anderson Deposition, PageID 369; RE 31-2, Beavers Deposition, PageID 398.)

A. The City's history of discrimination

Black EMS employees have long faced discrimination. Plaintiff Threat, a 28-year EMS veteran, recalls City officials in the 1990s saying his high score on the captain's oral exam "defied logic" because "historically blacks have had poor verbal ability." (RE 31-3 PageID 437.) Throughout his tenure, he has experienced countless "reminder[s] of how worthless I am to this division because I'm an African American." (*Id.* PageID 438.)

Discrimination against Black employees worsened when Defendant Nicole Carlton became EMS Commissioner in 2011. (RE 29, Carlton Deposition, PageID 211-13; *see, e.g.*, *id.* PageID 255, 259-60; RE 31-3 PageID 468-69.) As Commissioner, Carlton oversees the EMS department and manages captains and paramedics. (*See* RE 33-2

PageID 918.) After Carlton assumed the role, Plaintiffs Noland-Moore and Beavers were passed over for teaching opportunities with overtime pay. (RE 31-2 PageID 416-18; RE 31-5 PageID 571-72.) They consistently volunteered, but EMS gave white captains the opportunity to sign up for the sought-after teaching roles on a separate paper calendar that Plaintiffs did not know about until the slots were filled. (RE 31-2 PageID 417-18; RE 32-9, Noland-Moore interrogatories, PageID 697.)

Plaintiffs were also prohibited from attending trainings to obtain professional certifications, prevented from attending award ceremonies, blocked from Commander promotions, and given lower employee-evaluation scores than white captains without explanation. (RE 32-9 PageID 697; RE 31-5 PageID 564, 571, 573, 576, 577-78, 581-82, 587; RE 31-2 PageID 416-17; RE 31-4 PageID 514-15, 519.) Defendant Carlton also inserted herself outside the chain of command to unfairly scrutinize Plaintiffs as compared to white captains. (RE 33-9, Investigative Report, PageID 1093-97.) Discriminatory treatment has been so commonplace that it has led each Plaintiff to seek out mental-health counseling for emotional distress. (RE 31-1 PageID 380; RE 31-2 PageID 411-15; RE 31-3 PageID 468; RE 31-4 PageID 511; RE 31-5 PageID 556.)

The City's EMS captains frequently seek advice from Plaintiffs Threat and Noland-Moore, who are union stewards with knowledge of anti-discrimination law. (RE 31-3 PageID 439, 454; RE 31-5 PageID 547, 553.) Because the City often ignores grievances from Black captains, Threat and Noland-Moore are careful to fight only the battles

"worth something," and they always try to resolve matters informally. (RE 31-3 PageID 474; RE 31-5 PageID 570.) When they push back against the most egregious workplace inequities, management accuses them of "play[ing] the race card" (RE 31-3 PageID 474), and makes plain that grievances won't "do any good." (RE 31-5 PageID 570.)

B. Commissioner Carlton designs and implements a race-based scheduling system.

EMS captains are union members. (RE 33-3, Collective bargaining agreement, PageID 929.) Their employment is governed by the union's collective bargaining agreement with the City. (*Id.*) Absent the racial discrimination at issue here, EMS uses a seniority-based bidding system to assign captain work schedules. (RE 29 PageID 226-27.) Captains work every other day in 12-hour day or night shifts. (RE 33-2 PageID 919.) The collective bargaining agreement states that "seniority" is "used to determine shift and work week bids" (RE 33-3 PageID 944), but gives the EMS Commissioner authority to make four shift changes during the bidding process. (*Id.* PageID 947.)

EMS captains prefer the day shift for the reasons that most people prefer working during the day. Day shifts are healthier, allowing regular sleeping and eating habits (RE 31-2 PageID 402), and are less likely to interfere with family obligations and civic and social engagements. (*See* RE 31-1 PageID 379.) Day shifts are also preferred because there are fewer opportunities for sought-after overtime pay at night. (RE 31-2 PageID 418.) At EMS, the day shifts involve less idle time and allow more captains to work together. (RE 31-3 PageID 469.) Because those with the longest tenure are assigned the

preferred day shifts, captains commonly have the same shift for many years, giving everyone stability in their lives and schedules. (*Id.* PageID 446; RE 31-1 PageID 379; RE 31-2 PageID 399.)

In 2013, early in Carlton's tenure as Commissioner, Plaintiffs noticed that Carlton was making discriminatory assignments. (RE 31-3 PageID 468-69.) First, she changed a female captain's shift with a male captain to prevent a single-sex shift. (RE 29 PageID 255, 259-60.)

That same year, Plaintiff Walker was assigned to a shift of majority Black captains but was abruptly transferred. (RE 31-3 PageID 469; RE 31-5 PageID 562.) Threat later asked Carlton why she had disregarded the seniority-based schedule. (RE 32-17, Threat interrogatories, PageID 774.) Carlton said she had reassigned Walker during the 2013 bid to prevent multiple Black captains from serving on the same shift. (*Id.*; RE 32-9 PageID 692.)

2017-2018 Bid. In September 2017, the EMS captains bid on their 2018 shift assignments. (RE 33-8, Shift bid list, PageID 1046-58.) As detailed in the Addendum to this brief (at 1a), out of the thirteen captains, only four ranked the night shift as their first choice, including the captain with the least seniority, who knew he would have to work the less-desirable night shift in any event. (RE 33-2 PageID 921; RE 33-8 PageID 1046-58.) Even that captain included in the comment section of his bid that his true first choice was a day shift. (RE 33-8 PageID 1049.)

The bidding process generated a schedule with Plaintiffs Noland-Moore, Anderson, and Walker working a day shift together. (*See* RE 29-2, Captain shift bid, PageID 322; RE 33-2 PageID 922.) To break up this shift of three Black supervisors, Carlton removed Anderson from his first-choice shift, replacing him with Captain Nicholas Kavouras, who is white, and relegating Anderson to his third-ranked shift, a different day shift. (RE 29-2 PageID 322; RE 31-1 PageID 370-72; *see also* Addendum at 1a.)

Kavouras told Threat that he could not work the new shift assignment because his children lived out of state and his visitation agreement required that he pick them up on specific days. (RE 31-3 PageID 478.) Threat called Carlton to resolve the problem. (*Id.* PageID 450-51.) But Carlton told Threat that she would not revert to the seniority-generated schedule because she was unwilling to implement "a shift of all black" captains. (*Id.* PageID 451.)

Threat was frustrated by Carlton's demand for race-based assignments. (RE 31-3 PageID 452.) He worried about the consequences of speaking with Carlton again given that he had raised the issue with her in 2013 to no avail. (*Id.* PageID 469; RE 32-17 PageID 774.) But Threat was determined to "plead the case of [his] colleague" Kavouras and hoped that "[m]aybe a face-to-face" conversation would resolve the matter. (RE 31-3 PageID 451.)

During their in-person conversation, Carlton repeated that she transferred Kavouras to ensure a white presence on each captain shift. (RE 31-3 PageID 451-52.) Threat

explained that shift changes based on race or sex were unlawful and probed Carlton about why she thought the changes were justified. Carlton responded by throwing around terms "about strength and weakness, lazy, and stupid." (*Id.* PageID 451, 469.) Threat shared the details of this conversation with Plaintiff Noland-Moore, the deputy union steward. Noland-Moore could not believe that Carlton had admitted to making race-based changes (*id.* PageID 452), and she and Threat wanted to get to the bottom of "which race" Carlton was implying "is the lazy one, which race is stupid." (*Id.* PageID 451.) Noland-Moore emailed Carlton expressing these concerns. (RE 32-9 PageID 692.) Carlton did not respond. (*Id.*) They soon got their answer, however, when they learned that although Carlton would not tolerate all-Black shifts, all-white shifts "definitely did occur," and Carlton does not recall ever breaking them up. (RE 29 PageID 254-56, 260.)

Grievance process. After Carlton shut down informal discussions, in October 2017, Plaintiffs filed a union grievance against Carlton and the City. (RE 31-3 PageID 454.) On November 15, 2017, Threat also filed a discrimination charge with the Ohio Civil Rights Commission (OCRC) and the federal Equal Employment Opportunity Commission (EEOC) on behalf of himself and others, including Plaintiffs Noland-Moore, Walker, Anderson, and Beavers. (RE 32-3, Discrimination charge, PageID 646-50.) For "type of discrimination," Threat checked the box "Other (Specify)" and wrote in "Terms and conditions: work/shift assignments." (*Id.* PageID 646.)

The parties met several times in Fall 2017 to discuss ending race-based shift assignments, but Defendants insisted that the union contract gave Carlton the power to make shift changes based on race. (RE 32-4, Unfair labor practice charge, PageID 653.) It did not. (RE 33-3 PageID 944, 947; RE 29-3, Conciliation Agreement, PageID 325-26.)

During a November 2017 grievance meeting, Carlton's supervisor, EMS Assistant Director Edward Eckart, complained that Threat and Noland-Moore "made it hard for business to be handled" and that "no one wants to deal with you two continuously protesting race issues." (RE 32-17 PageID 776.) Taking a different approach to discouraging Plaintiffs, Eckart also told Threat and Noland-Moore he was "embarrassed" for them (*id.*), and "felt sorry" for Plaintiffs when he learned about their grievance because it was "stupid" of them to think that the race-based decisions were improper. (RE 31-3 PageID 454.) Carlton's "only mistake," Eckart said, "was admitting" to the no-all-Black-shift practice. (*Id.* PageID 467.) As Plaintiffs continued to challenge Defendants' race-based policy, Anderson heard a different City official call the Black captains "militant," which he understood to mean that the City believed he and other Black captains were "obstructionist" and "derelict to society." (RE 31-1 PageID 384.)

In another December 2017 grievance meeting, Carlton warned Noland-Moore to "be mindful before you accuse me of being punitive, retaliatory, and racist." (*See* RE

32-17 PageID 775; RE 32-9 PageID 694.) *See also* Ed Gallek & Natasha Anderson, *Cleveland EMS Supervisors File Lawsuit Against City Over Race Used in Scheduling*, Fox 8 (Sept. 13, 2019).[1]

Kavouras's demotion and 2018 re-bid. Meanwhile, Kavouras's schedule remained untenable. Needing a quick resolution (RE 31-3 PageID 477), he gave up his captain title and pay, self-demoting to paramedic so that he could be on a shift that did not interfere with his family obligations. (RE 29 PageID 282-83.) To be clear: This self-demotion occurred only because of Defendants' insistence on overriding the seniority process to prohibit all-Black shifts. (RE 31-3 PageID 477.)

Kavouras's demotion left an available day shift. Customarily, vacancies are automatically filled with the next senior captain who ranked the open shift as her first choice. (RE 31-3 PageID 477.) Filling the vacancy this way would have again resulted in the all-Black shift of Plaintiffs Anderson, Noland-Moore, and Walker. (*See* RE 29-2 PageID 322; Addendum at 1a.) Instead of following the custom, and undeterred by the ongoing grievance proceedings, in January 2018, Carlton forced a second round of bidding for every captain with less seniority than Kavouras. (RE 33-2 PageID 922; RE 31-2 PageID 400; RE 33-8 PageID 1046-69; *see also* Addendum at 2a.) During the rebid process, all the captains besides the lowest-ranked captain, who knew he wouldn't win

[1] https://fox8.com/news/i-team-cleveland-ems-supervisors-file-lawsuit-against-city-over-race-used-in-scheduling/.

a day shift because of his lack of seniority, bid on day shifts as their first choice. (RE 33-8 PageID 1059-69.) Initially, however, no white captains bid on the day shift that Kavouras's demotion made available, instead requesting to work a different day shift. (*See id.*) But after emailing with Carlton and stopping by her office to discuss whether the "order of [his] shift choices" would "change the possible outcome," Warren James, a white captain, changed his bid so that the Kavouras-vacated day-shift was listed as his first choice. (*Id.* PageID 1065.)

Despite Carlton's efforts, Anderson nonetheless emerged as the winner of the available day shift based on his seniority. (RE 33-2 PageID 919.) But, once again, Carlton interfered. To implement the race-based system this time, Carlton assigned the available day shift to James, the only white captain to bid for the shift, even though he had less seniority than three Black captains (including Plaintiffs Anderson and Beavers) who were relegated to night shifts. (RE 29 PageID 283; RE 33-7, 2018 schedule, PageID 1042; *see also* Addendum at 2a) Although the vacancy created by Kavouras's forced demotion—which itself was created by Defendants' race-based assignments—should have benefited Anderson by providing him his preferred day shift (RE 31-3 PageID 477), it instead led to what was, in effect, a demotion. (RE 31-1 PageID 384-85.) Anderson had been on a day shift for almost two decades. (*Id.* PageID 379.) And he "centered [his] family life and schedule around being on day shift," especially because he has "two younger children." (*Id.*)

Before Anderson learned about the new schedule, Plaintiff Beavers noticed the latest race-based assignments. (RE 31-2 PageID 402.) She questioned the schedule's fairness, especially because working the night shift had begun to affect her health and she had thus requested to transfer to a day shift. (*Id.*) Carlton offered the same brazen rationale as before: She needed to assign a white captain to the open day shift to avoid having an all-Black shift. (RE 29 PageID 285.)

Probable-cause finding. In July 2018, the OCRC found probable cause that the Defendants violated Ohio anti-discrimination law. (RE 32-3 PageID 646-49.) OCRC findings of probable cause are rare. *See* Ohio Civil Rights Commission, *2018-2019 Annual Report*, at 14 (June 30, 2019) (reporting 84 probable-cause findings out of 3,646 case closures in 2018-2019). The EEOC adopted the OCRC findings. (RE 32-3 PageID 650.) Plaintiffs received notice of their right to sue on September 3, 2019. (*Id.*)

C. Defendants bully Plaintiffs with an unfair labor practice charge.

After the OCRC probable-cause finding, a local news station ran a story about Carlton's race-based shift policy using information obtained through a public-records request. (RE 31-3 PageID 463-66.) *See* Ed Gallek, *Race and Sex Used to Schedule EMS Bosses*, Fox 8 (Aug. 3, 2018).[2] The story quoted Carlton warning Noland-Moore, at the

[2] https://fox8.com/news/i-team-race-and-sex-used-to-schedule-ems-bosses/.

grievance meeting described above, to "[b]e mindful before you accuse me of being punitive, retaliatory, and racist." *Id.*

Unfair labor practice charge. Defendants were frustrated that the news coverage highlighted their race-based practice and "place[d] the City, the Division of EMS, and the Commissioner in a negative light." (RE 32-4, Unfair labor practice charge, PageID 653-56; RE 31-5 PageID 554; RE 32-9 PageID 694.) So, to pressure Plaintiffs to drop their OCRC charges, Defendants filed an unfair labor practice charge with the Ohio State Employment Relations Board alleging that Plaintiffs and their union violated the collective bargaining agreement and labor laws. (RE 32-4 PageID 654; RE 32-10, Defs.' Deposition Exhibit K: Dileno mediation statement, PageID 707, 708, 709.)

The charge was brought by Defendants, listing the City as the "party filing the charge," with Carlton's email address listed as the "filer's email." (*See* RE 32-4 PageID 651; RE 33-19, Dileno declaration, PageID 1162, 1164, 1176.) It complained about "the Union representatives," Threat and Noland-Moore. (RE 32-4 PageID 654.) Plaintiffs felt that it was another attempt by Defendants to prevent them from challenging unfair workplace treatment—something several had already been reluctant to do because they feared retaliation. (RE 32-9 PageID 693.)[3]

[3] (*See also* RE 31-1, Anderson Deposition, PageID 383; RE 31-2, Beavers Deposition, PageID 408; RE 31-4, Walker Deposition, PageID 508; RE 31-3, Threat Deposition, PageID 464; RE 31-5, Noland-Moore Deposition, PageID 550.)

Sometimes, union members will bring unfair labor practice charges against their union, alleging that the union failed to fairly represent them. *See* Ohio Rev. Code. Ann. § 4117.11(B)(6). Here, however, *Defendants* alleged that Plaintiffs and the union failed "to fairly represent" the union's members. (RE 32-4 PageID 655, 656 (citing Ohio Rev. Code. Ann. § 4117.11(B).)

Despite the rare OCRC probable-cause finding and Carlton's admission to making race-based shift assignments, Defendants alleged in the unfair labor practice charge that Plaintiffs' discrimination claim "was meritless on its face." (RE 32-4 PageID 653.) Plaintiffs' participation in the grievance process violated labor law, Defendants surmised, because it undermined Carlton's purported "authority to change" employees' shifts. (*Id.* PageID 653, 655-56.)

According to the charge, Threat and Noland-Moore led the grievance meetings on all union members' behalf only to "wage a news media campaign against the City and the Commissioner," which "squelched the free exchange" of ideas and "had the effect of diminishing the rights and benefits normally derived by employees." (RE 32-4 PageID 654-55.) The charge described how, with the City's permission, Threat and Noland-Moore had recorded the grievance meeting at which Carlton made her "be mindful" comment. (*Id.* PageID 654.) The charge acknowledged that a court reporter also transcribed the meeting but alleged that Threat and Noland-Moore violated labor law by not providing their recording to the City. (*Id.*) Defendants accused Plaintiffs of

"unilaterally releasing the audio tape of the grievance meeting to the media." (*Id.* PageID 655.)

Even after Plaintiffs provided Defendants with emails proving that they did not leak the recording to the media (RE 31-3 PageID 463-66), Defendants continued to press the labor charge. (*Id.* PageID 465.) While admitting that "we have nothing" to support the charge (*id.*), Defendants explained that the charge was always intended to leverage Plaintiffs into dropping their discrimination claims. (*Id.* PageID 464-66; RE 32-15, Retaliation charge, PageID 763; RE 31-5 PageID 552-53.) A City representative divulged to Noland-Moore and Threat: "The City does not trust the Union," because "several OCRC complaints" are "pending for its members" and "[w]e want to use the ULP [unfair labor practice charge] to create some movement on" the pending OCRC discrimination claims. (RE 32-10 PageID 707, 708, 709.) He continued to Threat: "The fact is you must think you are getting some money. The reality is you are not going to get any money from the complaints. If you drop the OCRC I will think about dropping the ULP, Mike I know you can't speak on behalf of everyone, but are you willing to drop the OCRC? The only thing that will allow this side to attempt to trust you, is to drop the OCRC, will you do that?" (*Id.*)

To resolve the unfair labor practice allegations, the union agreed to a settlement requiring that it continue to refrain from "disseminat[ing] recordings or transcripts of grievance meetings." (RE 33-19 PageID 1174-76.) Though Plaintiffs felt frustrated by

the agreement (*see* RE 31-3 PageID 465; RE 31-5 PageID 549, 550), they had long recognized "it wasn't doing any good" to challenge every instance of Defendants' combativeness. (RE 31-5 PageID 570.)

Defendants later entered a conciliation agreement with Plaintiffs and the OCRC not to interpret the collective bargaining agreement "in a manner in which race or any other protected class is a factor in the assignment or awarding of any employees[']work shifts." (RE 29-3 PageID 325-26.)

D. Defendants target Plaintiff Beavers.

Defendants continued their campaign against Plaintiffs by singling out Plaintiff Beavers, who, as described above, first complained to City supervisors after Carlton forced a second round of bidding and implemented another race-based shift change. (RE 31-2 PageID 402, 405.) Plaintiffs received the previously mentioned OCRC probable-cause finding in July 2018 (RE 32-3 PageID 646-50), and openly discussed their plan to also challenge the September 20, 2018 unfair labor practice charge as retaliatory in the weeks after Defendants levied the charge. (RE 32-4 PageID 651; *see* RE 31-2 PageID 398, 407.)

At the same time Plaintiffs were challenging Defendants' broader discrimination and retaliation, Beavers received a pre-disciplinary hearing letter from Carlton on October 15, 2018, alleging that Beavers violated the City's sick- and tardy-leave policy by being "late/miss[ing] punch for duty" three times for a total of about 10.2 minutes.

(RE 32-21, Beavers Retaliation Charge, PageID 800; RE 32-25, Beavers pre-disciplinary letter, PageID 828; RE 31-2, PageID 409; RE 29-6, Carlton second letter to Beavers, PageID 339; RE 29 PageID 300-01.)

Beavers disputes that she was ever late. (RE 31-2 PageID 411.) In any event, many captains—white and Black—had occasional time violations because the City's system required them to swipe in after 5:54 am or after 5:54 pm (for shifts starting at 6:00 am or 6:00 pm, respectively), even though they could be called away for tasks if they arrived at the office early before they were allowed to punch in. (*Id.*) Beavers tried to avoid these hiccups by clocking in early, but was warned that her cautious approach somehow violated City policy. (*Id.*) And despite taking care not to clock in late, Beavers received notice of a pre-disciplinary hearing for alleged de minimis violations while multiple white captains with more egregious policy violations, such as longer tardy periods or improper sick-time off, remained undisciplined. (*Id.* PageID 409, 411; RE 33-2 PageID 921; RE 31-5 PageID 566.) These white captains "weren't even reviewed, brought in, talked to, or anything." (RE 31-5 PageID 566.) So, Beavers filed an OCRC retaliation charge alleging she had been unfairly disciplined. (RE 31-2 PageID 409; RE 32-21 PageID 800.) To make it appear that discipline was being fairly doled out, the City then sent pre-disciplinary hearing letters to the white captains with violations. (RE 31-2 PageID 409.)

But while Carlton found Beavers guilty at her pre-disciplinary hearing and placed her on an 18-month discipline schedule, the white captains with more serious violations faced no consequences whatsoever. (RE 29-6 PageID 341; RE 32-25 PageID 829; *see* RE 31-2 PageID 414; RE 33-6, Policy violations list, PageID 1036; RE 31-5 PageID 566.)

Retaliation charges. Plaintiffs filed dual OCRC/EEOC charges alleging retaliation against them and all union members based on the unfair labor practice charge. (RE 32-15, Retaliation charge, PageID 763.) Plaintiffs received notices of their rights to sue for these retaliation claims. (RE 32-15 PageID 766; *see also* RE 32-3 PageID 650.) Beavers filed a separate dual OCRC/EEOC charge and also received notice of the right to sue. (RE 32-21 PageID 800.)

II. Procedural background

Plaintiffs sued Defendants for discrimination and retaliation under Title VII of the Civil Rights Act of 1964 and the Ohio Civil Rights Act. (RE 1 PageID 1-23.) They also alleged Fourteenth Amendment Equal Protection and Due Process Clause violations under 42 U.S.C. § 1983 and a claim for intentional infliction of emotional distress. (*Id.*) As Defendants have acknowledged, Plaintiffs' third count, the Fourteenth Amendment claim, was "an alleged 42 U.S.C. § 1983 denial of equal protection" claim "despite its caption" referencing only a due-process violation. (RE 33, Defs.' Mot. for Summ. J., PageID 880.)

Defendants moved for partial judgment on the pleadings, seeking dismissal of some but not all of Plaintiffs' claims. (RE 19 PageID 123.) During discovery, Carlton admitted that she implemented the race-based assignment policy underlying Plaintiffs' discrimination and equal-protection claims. (RE 29, Carlton Deposition, PageID 235-36, 254-56, 260.) She also claimed for the first time that the race-based shift changes were an attempt to "complement [] a diverse workforce." (*Id.* PageID 232.) She did not assert that the system was part of an affirmative-action plan, testifying that although she has "heard the phrase," she does not know what it means. (*Id.* PageID 224.)

After discovery, Plaintiffs moved for partial summary judgment on their discrimination and equal-protection claims. (RE 30-1 PageID 344.) Defendants cross moved for summary judgment on all of Plaintiffs' claims with their motion for judgment on the pleadings still pending. (RE 33-1 PageID 898, 917.)

Before the parties responded to the cross-motions for summary judgment, the district court granted in part Defendants' motion for judgment on the pleadings, dismissing Plaintiffs' retaliation, due-process, and intentional infliction of emotional distress claims. (RE 35 PageID 1193.) In dismissing Plaintiffs' third count, the court analyzed only whether Plaintiffs alleged a substantive-due-process claim (*Id.* PageID 1189-90.) The Complaint, however, begins by stating that the suit is brought "under the Equal Protection Clause of the Fourteenth Amendment" (RE 1 PageID 2), and the third count encompassed both of Plaintiffs' Fourteenth Amendment claims. (RE 33

PageID 880.) Plaintiffs' motion for summary judgment on their equal-protection claim, moreover, was pending when the district court dismissed all of Count Three. (RE 30-1 PageID 357-58.) As to the retaliation claims, the district court concluded that the Complaint failed to allege Plaintiffs suffered a "significant personal detriment." (RE 35 PageID 1188-89.) The court did not consider at all the factual allegations supporting Beavers's separate retaliation claim. (*See* RE 35 PageID 1183-1193.)

The district court later granted Defendants' motion for summary judgment on Plaintiffs' discrimination claims and denied Plaintiffs' motion for partial summary judgment. (RE 53 PageID 1506-14.) The court found that Defendants' race-based policy did not constitute an adverse employment action, which it viewed as an element of Plaintiffs' discrimination claims. (*Id.* PageID 1511-12.)

The district court then denied Defendants' motion to recover costs because "Carlton admitted that she racially discriminated against a subordinate" and her "actions were repugnant to modern sensibilities." (RE 57 PageID 1529.)

SUMMARY OF THE ARGUMENT

For Defendants, a shift of only Black captains was intolerable. So, Defendants altered shift assignments based on race and then punished Plaintiffs for trying to remedy this wrong. This discriminatory conduct violated Plaintiffs' rights under Title VII, its Ohio law analogue, and the Equal Protection Clause.

I. According to Defendants, there should never be a shift of only Black captains at the City's EMS. Because of that policy, Defendants changed when, and with whom, Plaintiffs worked, altering the terms, conditions, or privileges of their employment, thus discriminating against them in violation of Title VII and analogous Ohio law. *See* 42 U.S.C. § 2000e-2(a)(1). The City's discriminatory policy also fails the strict scrutiny demanded by the Equal Protection Clause, entitling Plaintiffs to relief under 42 U.S.C. § 1983.

II. Defendants also violated Title VII's and Ohio law's anti-retaliation provisions by filing an unfair labor practice charge to interfere with Plaintiffs' efforts to secure enforcement of Title VII's basic guarantees. With the same retaliatory purpose, Defendants targeted Plaintiff Beavers, selectively disciplining her purported trivial tardy-policy violations as white captains went unpunished.

STANDARD OF REVIEW

This Court reviews district court grants of summary judgment and for judgment on the pleadings de novo. *Laster v. City of Kalamazoo*, 746 F.3d 714, 726 (6th Cir. 2014); *Roger Miller Music, Inc. v. Sony/ATV Publishing, LLC*, 477 F.3d 383, 389 (6th Cir. 2007).

ARGUMENT

I. Defendants' race-based shift-assignment policy violated Title VII, the Ohio Civil Rights Act, and the Equal Protection Clause.

A. Defendants' discrimination altered Plaintiffs' terms, conditions, or privileges of employment, violating Title VII and the Ohio Civil Rights Act.

The district court held that Defendants' actions were lawful, reasoning that a discriminatory "change to night shift" does not violate Title VII "without some reduction in pay, prestige, or responsibility." (RE 53, Summ. J. Opinion & Order, PageID 1511-12) (citing *Harper v. Elder*, 803 F. App'x 853, 857 (6th Cir. 2020)). In making this determination, the court asked the wrong legal question. It considered only whether Defendants' conduct constituted a narrowly defined "adverse employment action," rather than applying the statutory text.

The text is clear: Title VII of the Civil Rights Act of 1964 prohibits Defendants' discriminatory actions. Under Section 703(a)(1) of the Act, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Ohio law even more broadly prohibits race-based employment discrimination, making it unlawful to discriminate "with respect to

hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Ohio Rev. Code Ann. § 4112.02(A).[4]

1. By deciding when, and with whom, Plaintiffs worked based on race, Defendants discriminated as to the terms, conditions, or privileges of Plaintiffs' employment.

To understand the district court's error and Title VII's complete list of prohibited conduct, we begin with definitions of the statutory terms contemporaneous to Title VII's enactment and the Supreme Court's interpretations of those terms. *See Perrin v. United States*, 444 U.S. 37, 42 (1979).

Title VII prohibits an employer from discriminating on the basis of race and other characteristics. 42 U.S.C. § 2000e-2(a)(1). To "discriminate" is "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit." *Discriminate*, Webster's Third Dictionary 647-48 (1961). The "normal definition of discrimination" is any "differential treatment of similarly situated groups." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J. concurring). Put simply, discrimination is any "less favorable" treatment. *Newport News Shipbuilding & Dry Dock*

[4] This case involves claims under both Title VII and its Ohio-law analogue, the Ohio Civil Rights Act (OCRA). Because the statutes are textually similar, in general, we analyze the Title VII and OCRA anti-discrimination and anti-retaliation claims together. *See, e.g.*, *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n,* 421 N.E.2d 128, 131 (Ohio 1981). OCRA is broader in one respect applicable here. Individuals like Defendant Carlton may be held personally liable for OCRA violations. *Genaro v. Cent. Transp., Inc.*, 703 N.E.2d 782, 784-85 (Ohio 1999). So, Plaintiffs seek to hold Carlton personally liable under OCRA.

Co. v. EEOC, 462 U.S. 669, 682 n.22 (1983). Whenever an employee demonstrates that an action is taken "because of the employee's race," that action "plainly constitutes discrimination." *Ortiz-Diaz v. U.S. Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (Kavanaugh, J., concurring) (applying this principle to lateral job transfers). Here, when Defendant Carlton assigned Plaintiffs' shifts in a manner different from how she assigned white captains' shifts, she treated Plaintiffs differently because of their race and thus discriminated against them.

An employer may not discriminate with respect to "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Compensation means "payment for value received or service rendered." *Compensation*, Webster's Third Dictionary 463 (1961). Terms, conditions, and privileges, on the other hand, encompass the entire spectrum of the employer-employee relationship. "Terms" are "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement." *Terms*, Webster's Third Dictionary 2358 (1961). "Condition[s]" are "something established or agreed upon as a requisite to the doing or taking effect of something else." *Condition*, Webster's Third Dictionary 473 (1961). A "privilege" means to "invest with a peculiar right, immunity, prerogative, or other benefit." *Privilege*, Webster's Third Dictionary 1805 (1961).

Taking "terms, conditions, or privileges" together, then, Title VII reach is quite broad. It is not limited only to injuries that employers or courts view as particularly harmful. The statute does not establish a minimal level of actionable harm.

Quite the contrary. "[I]n enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices *in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 763 (1976) (emphasis added). Section 703(a)(1) "strike[s] at the entire spectrum of disparate treatment," covering the full gamut of workplace requirements, obligations, customs, and benefits that an employer imposes on, or grants to, an employee, whenever they are imposed or granted on a discriminatory basis. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (citation omitted). "The emphasis of both the language and the legislative history of the statute is on *eliminating* discrimination in employment," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977) (emphasis added), meaning that "Title VII tolerates no racial discrimination," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796 (1973). In sum, the statutory phrase "terms, conditions, or privileges" is simply a catchall for all incidents of an employment relationship. The district court's contrary decision has effectively "rewrit[ten] the statute that Congress has enacted." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018); *accord Ortiz-Diaz*, 867 F.3d at 81 (Kavanaugh, J., concurring).

***When* EMS captains work is a term or condition of employment.** Under this straightforward understanding of Title VII's text, employers may not discriminate with respect "to hours of work, or attendance since they are terms, conditions, or privileges of employment." EEOC Compliance Manual, § 613.3, 2006 WL 4672703 (2009). Put differently, "the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of … terms and conditions of employment." *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of N. Am., AFL–CIO v. Jewel Tea Co.,* 381 U.S. 676, 691 (1965) (quotation marks omitted) (observing that *when* an employee works is a term or condition of employment governed by collective bargaining under the National Labor Relations Act).

Here, Defendants decided when Plaintiffs had to work based on race. Captains are required to work 12-hour day or night shifts on alternating days. (RE 33-2, Second Carlton affidavit, PageID 919; RE 29, Carlton Deposition, PageID 226-27; RE 33-3, Collective bargaining agreement, PageID 947.) Should the captains fail to work their assigned shifts, the City may terminate their employment. (RE 33-3 PageID 945.) The particular days and hours during which captains must work are governed by their employment contract, which is used "for the purpose of establishing rates of pay, wages, hours and *other conditions of employment*." (RE 33-3, Collective bargaining agreement, PageID 933 (emphasis added); *see also id.* PageID 948). If for no other reason than that

Carlton's discriminatory policy grew out of an unlawful interpretation of Plaintiffs' employment contract, that policy necessarily affected the terms or conditions of Plaintiffs' employment.

***Who* EMS captains work with is a term or condition of employment.** Discriminatory restrictions on supervisory responsibilities violate Title VII. *Judie v. Hamilton*, 872 F.2d 919, 921 (9th Cir. 1989) (finding that supervisory responsibilities are terms, conditions, or privileges of employment); *Czekalski v. Peters*, 475 F.3d 360, 364 (D.C. Cir. 2007). Under their contract, three to four EMS captains are assigned to the same shift to supervise paramedics together. (RE 33-2 PageID 922.) Defendants, however, beginning at least as early as 2013, prohibited Black captains from supervising paramedics without a white person on each shift. (RE 31-3, Threat Deposition, PageID 469; RE 31-5, Noland-Moore Deposition, PageID 562.)

This policy diminished Plaintiffs' supervisory responsibilities by categorically treating Black captains differently from white captains. As previously described, Carlton left all-white shifts intact. (RE 29 PageID 254-55, 260.) Defendants apparently believed Black captains incapable of supervising paramedics without assistance from a white colleague. This conclusion is reinforced by the suggestion that Carlton regarded Black captains as "weak[], lazy, and stupid" compared to white captains. (RE 31-3 PageID 451, 469.) Likewise, some City officials did not want Black captains to serve together because they viewed Black captains as "militant" (RE 31-1, Anderson Deposition,

PageID 384), and believed Plaintiffs "made it hard for business to be handled" by "continuously protesting race issues." (RE 32-17, Threat interrogatories, PageID 776.)

Whether Defendants stopped Black captains from working together because they feared their organizing power or because of invidious racial stereotypes or something else, the discrimination was indisputably based on race and altered Plaintiffs' terms and conditions of employment, violating Title VII.

***Seniority* is a term, condition, or privilege of EMS employment.** "[B]enefits that are part of an employment contract" are terms, conditions, or privileges of employment. *Hishon v. King & Spalding*, 467 U.S. 69, 74 (1984). Here, the employment contract defines seniority, and captains via their union enter into the agreement understanding that seniority is "used to determine shift and work week bids." (RE 33-3 PageID 944.)

Though the contract does not say that captains will receive their first-choice bid, it does not need to. A benefit may be a privilege of employment even if it is not expressed in an agreement, but simply accorded by custom. *Hishon*, 467 U.S. at 75. After all, an employment benefit "may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Id.* Here, until Carlton implemented the race-based policy, captains with the longest tenure were assigned their first-choice bids. (RE 31-1 PageID 379; RE 31-3 PageID 446; RE 31-2, Beavers Deposition, PageID 399; *see also* RE 29-2, Captain shift bid, PageID 322.) When Carlton forced a rebid after Kavouras's demotion, only those

captains with less seniority than Kavouras were asked to resubmit their choices. (RE 31-2 PageID 400; RE 33-8 PageID 1063.) That is because it was assumed, based on their seniority, that the higher-ranking captains would remain in their preferred shifts. In sum, a privilege existed entitling more-senior captains to receive their desired shifts, and that privilege was altered by Defendants' discriminatory policy.

2. Title VII reaches beyond employment actions with economic consequences.

The district court's suggestion that Title VII is limited to remedying reductions in compensation or other injuries with economic consequences (*see* RE 53 PageID 1510-11) renders the phrase "terms, conditions, or privileges" nearly meaningless. Courts are required "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche,* 348 U.S. 528, 538-39 (1955)). This adherence to Title VII's text is why then-Judge Kavanaugh observed that "transferring an employee because of the employee's race (or denying an employee's requested transfer because of the employee's race) plainly constitutes discrimination with respect to 'compensation, terms, conditions, or privileges of employment' in violation of Title VII." *Ortiz-Diaz*, 867 F.3d at 81 (Kavanaugh, J., concurring).

The Supreme Court recognizes that "compensation" is separate from other aspects of employment. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991) (noting that Title VII "prohibits

sex-based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's status"). For that reason, "Title VII is not limited to 'economic' or 'tangible' discrimination." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Instead, it encompasses even hostile-work environments that alter employment conditions, but do not impose immediate pocketbook harms. *Id.*; *see also Jackson v. Quanex Corp.*, 191 F.3d 647, 666 (6th Cir. 1999).

If Congress had wanted Title VII to remedy only pocketbook or similar injuries it would have said so, as it has in other employment laws. For example, the Equal Pay Act remedies only compensation-based injuries that flow from sex discrimination. 29 U.S.C. § 206(d)(1). The Immigration Control and Reform Act, too, does not prohibit discrimination broadly affecting terms, conditions, and privileges, instead focusing solely on hiring and recruiting. 8 U.S.C. § 1324a(a)(1). Title VII itself does not reach all workplace discrimination. It bans discrimination based on some characteristics, but not on others, such as weight or familial status, which are protected under other employment statutes, *see, e.g.,* Mich. Comp. Laws Ann. § 37.2102; and it does not apply, for instance, to certain religious entities or to employers with under fifteen employees, 42 U.S.C. §§ 2000e-1(a), 2000e(b).

The district court's holding that Title VII allows an employer to impose discriminatory workplace terms or conditions so long as they do not result in "some

reduction in pay, prestige, or responsibility" (RE 53 PageID 1512), not only runs roughshod over the statutory text, but conflicts with longstanding EEOC guidance. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 (2002) (EEOC interpretations entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "The phrase 'terms, conditions, and privileges'," the agency has said, "has come to include a wide range of activities or practices which occur in the work place." EEOC Compliance Manual, § 613.1, 2006 WL 4672701 (2009). Thus, even a "request for a temporary change of scheduled days off falls within this language." *Robert L. Weaver, Appellant*, EEOC DOC 01883168, 1988 WL 920346, at *1 (Nov. 16, 1988).

3. Defendants' race-based shift assignments constitute an "adverse employment action" even under the district court's impermissibly narrow understanding of Title VII.

We have already shown that the conduct at issue here altered the "terms, conditions, or privileges" of Plaintiffs' employment, which is all that Title VII's text and controlling precedent demands. But even if employees must prove an "adverse employment action"—a phrase that appears nowhere in the statutory text—and do so on the district court's terms, this Court's precedent demonstrates that a shift change qualifies. Reassignments are particularly adverse when, as here, the evidence shows that the employee received "a less distinguished title, a material loss of benefits," or "significantly diminished material responsibilities." *Kocsis v. Multi-Care Mgmt., Inc.,* 97 F.3d 876, 886 (6th Cir. 1996).

Carlton's race-based shift policy made the title "captain" mean something different for Black and white employees. Put differently, because of Carlton's discriminatory assignments, all Black captains had "less distinguished title[s]," *Kocsis,* 97 F.3d at 886, than their white counterparts. Moreover, by assigning shifts based on race, Carlton disqualified Plaintiffs from performing their "material responsibilities"—overseeing paramedics—without a white supervisor present. *Id.*

For those captains who were discriminatorily kept off the shift their seniority entitled them to, the practice led to formal and effective demotions, diminished work responsibilities, significant impacts on child-rearing schedules, health problems, and fewer overtime opportunities. For example, Carlton's scheme forced Kavouras, a white captain, to self-demote and sacrifice his captain rank, pay, and prestige. (RE 29 PageID 282-83; RE 31-3 PageID 453, 458, 477.)

As to Plaintiff Anderson, the district court determined that relegating him to the night shift "merely temporarily affected when he worked and who he worked with." (RE 53 PageID 1512.) For the reasons already discussed, changing when and with whom an employee works because of his race violates Title VII. In any case, the district court drastically downplayed the actual impacts of the race-based policy. Anderson had been on the day shift for almost twenty years. (RE 31-1 PageID 379.) He "centered [his] family life and schedule around being on day shift" and arranged his schedule to care for "two younger children." (*Id.* PageID 369, 379.)

Likewise, Beavers was also eligible for the open day shift and specifically requested to be moved from the night shift because it had started affecting her health. (RE 31-2 PageID 402.) Decisions that subject an employee to unhealthy conditions are adverse actions. *See Deleon v. Kalamazoo Cnty. Road Comm'n*, 739 F.3d 914, 921 (6th Cir. 2014); *see also Herrnreiter v. Chicago Hous. Auth.*, 315 F.3d 742, 744-45 (7th Cir. 2002) (categorizing decisions that expose employees to "unsafe" or "unhealthful" conditions as adverse actions); *Ginger v. District of Columbia*, 527 F.3d 1340, 1344 (D.C. Cir. 2008) (switching police officers to rotating schedule was an adverse action, in part because it negatively affected sleep schedules). In *Deleon v. Kalamazoo Cnty. Road Commission*, for example, this Court held that a lateral transfer, which did not change the employee's pay or job responsibilities, was nonetheless materially adverse because his conditions of employment became "more arduous and dirtier," affecting his health. 739 F.3d at 919-20.

Even when a transfer to a night shift does not result in any immediate salary or work-hour changes, it will often be adverse. *Ralph J. Lehmann, Appellant*, EEOC DOC 01860673, 1989 WL 1008741, at *4 (Feb. 22, 1989) (finding that employee was subjected to an adverse action when assigned to the night shift). In *Spees v. James Marine, Inc.*, 617 F.3d 380 (6th Cir. 2010), this Court held that when an employer moved an employee to the night shift, the impact on her childcare schedule and the "inconvenience resulting from a less favorable schedule" rendered the move adverse.

Id. at 392 (quoting *Ginger*, 527 F.3d at 1344); *see also Borough of Tinton Falls Police Dep't*, 98 F.3d 107, 116 (3d Cir. 1996) (assigning employee to an undesirable schedule can be adverse). The transfer in *Spees* was also adverse because, judged from the perspective of a reasonable employee in the plaintiff's position, it felt like "a demotion" and left the employee "unchallenged and bored." *Spees*, 617 F.3d at 392.

So too here. For EMS captains, night-shift work was undesirable and less professionally satisfactory—that is, materially worse than the day shift. *See Burns v. Johnson*, 829 F.3d 1, 10 (1st Cir. 2016) (holding shift change materially adverse when it resulted in menial tasks for senior, experienced employees). The day shift involves less idle time, so is fairly considered more interesting than the night shift (*see* RE 31-3 PageID 469), and working nights interferes with childcare. (*Id.* PageID 478; RE 31-1 PageID 379.) In other words, the night shift comes with the "inconvenience resulting from a less favorable schedule." *Spees*, 617 F.3d at 392 (quoting *Ginger*, 527 F.3d at 1344). Also, like the shift change in *Spees*, Anderson's shift change felt like a demotion. *Id.* (RE 31-1 PageID 384-85.) Reassignment to the night shift here, if anything, created greater adversity than was present in *Spees*: For Plaintiffs, fewer overtime opportunities are available at night, meaning working nights adversely affects the captains' paychecks. (RE 31-2 PageID 418.)

Beyond all the obvious reasons EMS captains would prefer the day shift, in many jobs, a specific shift may be coveted because a reasonable employee would consider

that shift more prestigious or a gateway to recognition or unofficial benefits. *Kocsis,* 97 F.3d at 886; *see* Kevin Seifert, *First All-Black NFL Officiating Crew to Work Monday Night Football Game*, ESPN (Nov. 17, 2020).[5]

Here, captains reasonably perceived the night shift as less prestigious and reducing their work responsibilities. That explains, in part, why during the 2017-2018 initial bid, only a few captains ranked the night shift as their first preference. (RE 29-2 PageID 322-23.) Less-senior captains understood they would often be assigned to night shifts because the day shift was coveted by more-senior captains, and "that was just the process of how it went at EMS." (RE 31-2 PageID 399.) So, when the less-senior captains rebid after Kavouras's forced resignation, all captains—save the captain with the lowest rank—requested day shifts. (*See* Addendum at 2a.)

Carlton's decision to assign shifts based on race, not seniority, also negatively affected EMS captains' scheduling stability. Because more-senior captains received their desired shifts, captains commonly had the same shift for many years or generally knew which shift they would be assigned, enabling them to organize their work and home life around an established schedule. To be sure, some EMS captains must work at night. But Defendants may not, consistent with Title VII, consign Black captains to the night shift because they are Black.

[5] https://www.espn.com/nfl/story/_/id/30335214/first-all-black-nfl-officiating-crew-work-monday-night-football-game.

B. Defendants classified Plaintiffs by race, violating their rights to equal protection under Section 1983.

The Fourteenth Amendment's Equal Protection Clause seeks to eradicate government-imposed racial discrimination. *See Loving v. Virginia*, 388 U.S. 1, 10 (1967). Governmental racial classifications in employment thus violate the Clause. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 272-73, 284 (1986).

The district court erred in dismissing Plaintiffs' equal-protection claim. Because the factual record is fully developed, and no genuine dispute of material fact remains, this Court should reverse the district court's dismissal of Plaintiffs' equal-protection claim with instructions to grant Plaintiffs' motion for partial summary judgment on that claim.

1. The district court erred in dismissing Plaintiffs' equal-protection claim.

The district court dismissed Plaintiffs' Section 1983 claim under the perhaps understandable, but mistaken impression that it was only a due-process claim and not also an equal-protection claim. (RE 35 PageID 1189-90.) Although Count Three of the Complaint did not mention equal protection in its caption, Defendants understood that the claim, "despite its caption, is an alleged 42 U.S.C. § 1983 denial of equal protection." (RE 33, Defs.' Mot. for Summ. J., PageID 880.) As previously explained (at 20-21), the Complaint's first sentence pleads an equal-protection legal theory: "This is an action instituted, *inter alia*, under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States." (RE 1 PageID 2; *see also id.* PageID 3, 4, 21.)

In any case, federal pleading rules require only *factual* allegations supporting a plausible claim for relief—a plaintiff is not required to identify any *legal* theory at all. *See Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (per curiam). The Complaint includes ample factual material to support its equal-protection claim, rendering any mislabeling of Count Three irrelevant. (RE 1 PageID 2, 3, 4, 21.) For this reason, the district court should not have dismissed Plaintiffs' equal-protection claim without considering Plaintiffs' pending motion for partial summary judgment, which thoroughly argued that claim.

2. Defendants violated Plaintiffs' equal-protection rights as a matter of law.

To prove an equal-protection claim, a plaintiff must show that "he suffered purposeful or intentional" racial discrimination. *Smith v. City of Salem, Ohio*, 378 F.3d 566, 577 (6th Cir. 2004). Here, the proof is irrefutable: Carlton changed Plaintiffs' "work shifts on racial grounds." (RE 57, Order denying costs, PageID 1527.) According to the district court itself, "Carlton admitted she racially discriminated against a subordinate." (*Id.* PageID 1529.)

To pass constitutional muster, race-based classifications must be justified by a compelling governmental interest narrowly tailored to achieve that purpose. *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995).

After Plaintiffs sued Defendants, Carlton suggested for the first time that the race-based shift changes were an attempt to "complement [] a diverse workforce," (RE 29

PageID 30, *see id.* PageID 232-47), a pretext that she had never even hinted at in her discussions with Plaintiffs or at any other time. A post hoc rationalization formed during litigation cannot be a compelling interest. *United States v. Virginia*, 518 U.S. 515, 533 (1996). In any event, Carlton's post hoc rationalization makes no sense. To achieve the goal of diversifying shifts, Carlton would have had to bar all-white shifts as well as all-Black shifts. All-white shifts, however, "definitely did occur." (RE 29 PageID 254, 260.)

Carlton, moreover, never asserted that she implemented the race-conscious policy to remedy past discrimination at EMS. *See United Black Firefighters v. City of Akron*, 976 F.2d 999, 1009 (6th Cir. 1992) ("a state actor possesses a compelling state interest when its concern is with remedying past discrimination."). Rather, she admitted that she does not know what affirmative action is. (RE 29 PageID 224-25.) Even if Carlton had applied her race-based policy neutrally (and she did not), diversifying work shifts is not a form of affirmative action; it does not extend opportunities to individuals who have experienced past discrimination, and Carlton never claimed that was what she was trying to do anyway.

The City is liable. Because Carlton's race-based policy violated equal protection, the City of Cleveland (as well as Carlton) is liable under Section 1983. Cities are liable under Section 1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and

promulgated by that body's officers." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978); *see Ellis v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006).

Applying the *Monell* framework, the City is liable for Carlton's race-based classifications. Carlton had final policymaking authority. She was (and remains) the City's EMS Commissioner and had control over captains' schedules. (RE 29 PageID 230; RE 19-1, First Carlton affidavit, PageID 142.)

Moreover, once the City learned of Carlton's discriminatory practices, it endorsed them. *See Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005). Carlton's boss, Assistant Director Eckart, demeaned Plaintiffs' efforts to secure the law's basic guarantees, saying he "felt sorry" for Plaintiffs when they filed their grievance because it was "stupid" of them to think that the race-based decisions were improper. (RE 31-3 PageID 454; *see also* RE 32-17 PageID 776.) Carlton's "only mistake," he said, "was admitting" to the practice. (RE 31-3 PageID 467; *see also* RE 32-9 PageID 694.) And as discussed further below, by filing a retaliatory unfair labor practice charge against Plaintiffs, the City reinforced support for Carlton's race-based practice, arguing that the contract included "clear language," which "unequivocally bestow[ed]" on Carlton the discretion to make discriminatory assignments. (RE 32-4, Unfair labor practice charge, PageID 653.)

Carlton is not entitled to qualified immunity. Qualified immunity protects government officials sued in their individual capacities when their conduct "does not

violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Though qualified immunity is a *defense* to liability, we discuss it here because Carlton sought immunity below. (*See* RE 33-1, Defs.' Mem. in Support of Mot. Summ. J. PageID 914.)

Courts evaluating assertions of qualified immunity at summary judgment ask (1) whether, viewing the facts in the light most favorable to the nonmoving party, a constitutional violation occurred; and (2) whether the plaintiff's right was clearly established at the time of the incident. *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013).

Plaintiffs' right to be free from intentional race discrimination, which Carlton violated for the reasons just described, was clearly established. To determine if a right is clearly established, this Court looks to binding Supreme Court and circuit precedent. *Wright v. City of Euclid, Ohio*, 962 F.3d 852, 869 (6th Cir. 2020). The "existing precedent" need not be "directly on point," so long as it "placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011).

In 2017, it was clearly established that the Equal Protection Clause and federal and state law afforded the captains the right to be free from employment decisions based on race, like the intentional racial classification employed by Carlton here. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 239-41 (1976). If any right is "clearly established" under federal law, it is the "right to be free from racial discrimination." *Williams v.*

Richland Cnty. Children Serv., 489 F. App'x 848, 854 (6th Cir. 2012); *see Smith v. Lomax*, 45 F.3d 402, 407 (11th Cir. 1995). To the extent that Plaintiffs' rights were not clearly established during the nearly 100-year gap between the Fourteenth Amendment's passage and the enactment of the Civil Rights Act of 1964, Title VII left no doubt that racial discrimination in the workplace would not be tolerated.

* * *

The district court should not have granted summary judgment to Defendants on Plaintiffs' discrimination claims under Title VII, the Ohio Civil Rights Act, and the Equal Protection Clause. And, because no genuine issues of material fact exist regarding Defendants' racial classifications, the district court should not have denied Plaintiffs' motion for partial summary judgment. This Court should reverse, instructing the district court to grant judgment in Plaintiffs' favor as to liability for the Title VII discrimination claim against the City and the Ohio Civil Rights Act and Equal Protection Clause claims against both Defendants. These claims should proceed to trial only as to remedy.

II. Defendants retaliated against Plaintiffs in violation of Title VII and the Ohio Civil Rights Act.

After Plaintiffs sought to enforce Title VII's non-discrimination guarantee, Defendants retaliated against them in violation of Title VII and state law. *See* 42 U.S.C. § 2000e-3(a); Ohio Rev. Code Ann. § 4112.02(l). The district court, however, granted Defendants partial judgment on the pleadings on Plaintiffs' federal and state-law retaliation claims. (RE 35 PageID 1189.) Before the court granted that motion,

Defendants also moved for summary judgment on the retaliation claims. (RE 33 PageID 880-82.) Because Plaintiffs supported their retaliation claims with direct evidence sufficient under both the standard applicable to motions for judgment on the pleadings and motions for summary judgment, this Court should reverse the judgment on the pleadings and instruct the district court to deny Defendants' motion for summary judgment. *See English v. Dyke*, 23 F.3d 1086, 1091 (6th Cir. 1994).

Plaintiffs presented direct evidence of Defendants' retaliatory motive: Defendants filed their unfair labor practice charge hoping to bully Plaintiffs into dropping their discrimination grievances. (RE 32-15, Retaliation charge, PageID 763; RE 32-10, Defs.' Deposition Exhibit K: Dileno mediation statement, PageID 707, 708, 709.) But the district court improperly analyzed Defendants' retaliation under a third-party reprisal rule inapplicable here. The district court, moreover, failed to consider the record evidence demonstrating that Defendants retaliated against Plaintiff Beavers because she complained to City supervisors after Carlton forced a second round of 2018 bidding and instituted another race-based shift change. (RE 1 PageID 12; *see* RE 31-2, Beavers Deposition, PageID 402.)

A. Defendants retaliated against all Plaintiffs, trying to bully them into dismissing their discrimination claims.

1. Defendants' admissions that the unfair labor practice charge was filed as leverage is direct evidence of retaliation.

The district court failed to analyze Plaintiffs' primary retaliation claim under the direct-evidence standard. Title VII authorizes two paths for proving a retaliation claim: Plaintiffs can provide direct evidence of retaliation or establish a prima facia case under the *McDonell Douglas* framework applicable when only indirect evidence is present. *Kline v. Tenn. Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997); *see Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003). Direct evidence is "evidence which, if believed, requires no inferences to conclude that unlawful retaliation was a motivating factor in the employer's action." *Imwalle v. Reliance Medical Prods., Inc.*, 515 F.3d 531, 543-44 (6th Cir. 2008); *Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 879 (6th Cir. 1991). For example, an employer's statement "[i]f you hadn't [taken] some legal action prior to this, this [discipline] might not have occurred" is direct evidence of retaliation. *Christopher*, 936 F.2d at 873-74, 879; *see Curry v. Brown*, 607 F. App'x 519, 524 (6th Cir. 2015).

When a plaintiff presents direct evidence of an employer's retaliatory intent, the "plaintiff's case-in-chief is met, and the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive." *Yazdian v. ConMed Endoscopic Techs., Inc.,* 793 F.3d 634, 648 (6th Cir. 2015). In the summary-judgment context, direct evidence that retaliatory intent was

"at least a motivating factor" driving the employer's conduct, *Peeples v. Detroit*, 891 F.3d 622, 633 (6th Cir. 2018), creates "at least a genuine dispute of material fact that precludes summary judgment for the defendant on her retaliation claims," *Daniels v. Pike Cnty. Comm'ns*, 706 F. App'x 281, 291-93 (6th Cir. 2017). As we now show, that is the situation here, so Plaintiffs are entitled to take their retaliation claims to trial.

Plaintiffs pleaded that Defendants filed the unfair labor practice charge to push Plaintiffs to withdraw their pending OCRC charges. (*See* RE 1 PageID 11-12 ¶¶ 66-68.) And the record supports that allegation. (RE 32-10 PageID 707, 708, 709; RE 31-3, Threat Deposition, PageID 464-66; RE 31-5, Noland-Moore Deposition, PageID 552-53.)

Defendants' counsel told Threat: "If you drop the OCRC I will think about dropping the ULP," the unfair labor practice charge. (RE 32-10 PageID 707, 708, 709.) He admitted that "[t]he City does not trust the Union" because of their civil-rights complaints and that "[w]e want to use the ULP to create some movement on these issues"—the pending discrimination charges before the Ohio Civil Rights Commission. (*Id.*)[6]

[6] Counsel's statement cannot be protected by mediator testimonial privilege. (*See* RE 33-1 PageID 902.) Defendants did not assert the privilege when they introduced the statement while taking Plaintiff Noland-Moore's deposition nor when they voluntarily placed the statement in the district-court record. (*See* RE 31-5 PageID 552; RE 32-10, Defs.' Deposition Exhibit K: Dileno mediation statement, PageID 707); *see, e.g.*, *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992) (no privilege when party "voluntarily produced medical records [at issue] but did not assert the privilege").

A phantom media leak served as Defendants' purported legitimate basis for filing the unfair labor practice charge. But Plaintiffs produced evidence that they had not leaked anything to the media (RE 31-3 PageID 463-66), which Defendants conceded took "the wind out of" their "sails." (RE 31-3 PageID 464.) "We have nothing," they said. (*Id.* PageID 465.) Even if (counterfactually) Plaintiffs had leaked to the media, Defendants would still "have nothing" to support the notion that the unfair labor practice charge was anything other than retaliatory. *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000) (Title VII's anti-retaliation provision protects employees who complain to the media about discrimination). Despite acknowledging that protesting the imaginary media leak was an implausible pretext for their retaliation, Defendants did not drop the unfair labor practice charge. (RE 31-3 PageID 465.)

Ultimately, the statements by the City's attorney lead to one conclusion only: Defendants filed the unfair labor practice charge with the unlawful retaliatory intent to pressure Plaintiffs "to drop" their discrimination charges. (RE 32-10 PageID 707, 708, 709.)

2. Plaintiffs' retaliation claims should proceed to trial even under the indirect-evidence rule.

Instead of applying the direct-evidence standard, the district court dismissed Plaintiffs' retaliation claims, concluding that Plaintiffs failed to show that the retaliation resulted in material adversity. (RE 35 PageID 1188.) That was error, as explained above,

because material adversity is not an element under the direct-evidence standard. *See Yazdian v. ConMed Endoscopic Techs., Inc.,* 793 F.3d 634, 648 (6th Cir. 2015).

But even assuming that the district court did not err in applying the indirect-evidence standard, Plaintiffs' retaliation claim should proceed to trial. Under the *McDonnell Douglas* burden-shifting framework applicable when the record includes only indirect evidence of retaliatory intent, a plaintiff must establish a prima facia retaliation claim by showing "(1) she engaged in a protected activity; (2) her exercise of such protected activity was known by the defendant; (3) thereafter, the defendant took an action that was materially adverse to the plaintiff; and (4) a causal connection existed between the protected activity and the materially adverse action." *Rogers v. Henry Ford Health Sys.*, 897 F.3d 763, 775 (6th Cir. 2018) (quotation marks omitted). Material adversity was the only element analyzed by the district court and the only element that could possibly be disputed under *McDonnell Douglas*.

In the retaliation context, an employer's action is materially adverse if it "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006); *see Thompson v. North American Stainless, LP*, 562 U.S. 170, 174-175 (2011). Retaliation by an employer against a third party—that is, someone who did not suffer or oppose the discrimination—may thus be actionable when a reasonable worker might well be dissuaded by reprisals against, for example, a spouse or family member. *See Thompson*,

562 U.S. at 174-175. According to the district court, however, "the relationship between Plaintiffs and their union [wa]s not close enough to support a third-party retaliation claim," so Defendants' retaliation was not materially adverse. (RE 35 PageID 1188-89.)

The third-party retaliation rule from *Thompson* is inapplicable here because Defendants engaged in first-party, not third-party, reprisal. Plaintiffs filed discrimination charges, and Defendants retaliated against *them*. The form that the retaliation took—an unfair labor practice charge that sought to restrict Plaintiffs' ability to oppose Title VII discrimination—does not change this analysis. (*See* RE 32-4, Unfair labor practice charge, PageID 651-56; RE 31-5 PageID 548, 549, 500, 553, 554; RE 31-3 PageID 463-65.) Although Defendants tried to cloak their retaliation in a pretextual guise by directing it at Plaintiffs' union, their true target was Plaintiffs themselves, as Defendants admitted. They offered Plaintiffs, in their individual capacities, a choice: "drop the OCRC" and "I will think about dropping the ULP." (RE 32-10 PageID 707, 708, 709.)

In any case, the district court's analysis fails on its own terms. Even if retaliation against the union for its representation of Plaintiffs constituted a third-party reprisal (RE 35 PageID 1188-89), the relationship between union members and EMS captains is easily "close enough" under *Thompson*, which "decline[d] to identify a fixed class of relationships for which third-party reprisals are unlawful." 562 U.S. at 175. Plaintiffs make up more a third of the bargaining unit that represents Cleveland EMS captains;

Threat is the chief steward, Noland-Moore is the deputy steward, and the unfair labor practice charge alleged that Plaintiffs' actions as union representatives were labor-law violations. (RE 32-4 PageID 655.)

The district court also erred by heightening the material-adversity requirement, which does not impose a high burden. As noted above, the employee need show only that the employer's conduct "might well" dissuade a "reasonable worker" from engaging in Title VII-protected opposition. *Burlington*, 584 U.S. at 67-71. Even "a supervisor's failure to invite an employee to lunch could, under certain circumstances, amount to materially adverse retaliation." *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 596 (6th Cir. 2007). But, here, the district court required Plaintiffs to show "significant personal detriment." (RE 35 PageID 1189.)

The evidence shows that a reasonable worker may well have been dissuaded from engaging in protected activity by Defendants' filing of the unfair labor practice charge. Defendants hoped that the charge would compel Plaintiffs to drop their discrimination claims. In other words, the whole point of Defendants' action was to dissuade Plaintiffs from using the anti-discrimination laws, as *Defendants themselves* acknowledged. (RE 32-15, Retaliation charge, PageID 763.) That easily meets the *Burlington* standard. Defendants' cycle of discrimination and retaliation, moreover, led each Plaintiff to seek out mental-health counseling and some to face health problems stemming from the stresses of Defendants' Title VII violations. (RE 31-1 PageID 380; RE 31-2 PageID

411-15; RE 31-3 PageID 468; RE 31-4 PageID 511; RE 31-5 PageID 556.) It is an understatement to say that a reasonable worker who believes that her efforts opposing workplace discrimination won't "do any good" (RE 31-5 PageID 570), and—worse—will lead to future Title VII violations, anxiety, and health problems driving her to seek professional help, might well be dissuaded from challenging discrimination in the first place.

B. Defendants unlawfully retaliated against Beavers for complaining about the race-based shift changes.

As described above (at 13), Beavers was the first to notice that Carlton had elevated a lower-ranked white captain to the day shift while scheduling three Black captains with more seniority for night shifts. Beavers engaged in protected activity by reporting that misconduct to EMS management and to her union stewards. (RE 31-2 PageID 402.) In response, Defendants singled out Beavers for selective enforcement of City tardy policies. (RE 1 PageID 12; RE 31-2 PageID 409; RE 32-25, Beavers Letter, PageID 828; RE 32-20, Beavers retaliation charge, PageID 796.) Yet, the district court dismissed Beavers's claim without even mentioning the Complaint's detailed rendition of Defendants' retaliation against her. (RE 35 PageID 1189; *see* RE 1 PageID 12, 14-15, ¶¶ 68-72, 87-94.)

The evidence supports each element of Beavers's prima facie case under the *McDonnell Douglas* burden shifting framework, so the claim should proceed to trial. *See Laster v. City of Kalamazoo*, 746 F.3d 714, 729-30 (6th Cir. 2014).

First, Defendants knew that Beavers engaged in Title VII-protected activity because she filed a formal discrimination grievance against Carlton. (RE 31-2 PageID 402; RE 32-23, Beavers interrogatories, PageID 811.)

As for material adversity, Defendants' unfair discipline meets *Burlington*'s "relatively low bar," *Michael*, 496 F.3d at 596, because a reasonable employee would be dissuaded from reporting Title VII violations if she knew her employer would discipline her after she filed a discrimination claim. (RE 32-25 PageID 829-30); *Burlington*, 548 U.S. at 67-71. That is what happened in *Laster*, 746 F.3d at 732, where the plaintiff established a prima facie retaliation case after being singled out for "violating at least two department policies that were selectively enforced against him." And in *Michael*, "brief placement on paid administrative leave and the 90-day performance plan" was held materially adverse. 496 F.3d at 596.

The retaliation against Beavers is even more serious than the retaliation experienced by the plaintiffs in *Laster* and *Michael* because it also took the form of race-based disparate treatment. Beavers discovered that three white captains were "grossly abusive of the sick abuse policy" but "weren't even reviewed, brought in," or "talked to" until after Beavers filed a complaint. (RE 31-5 PageID 566; *see* RE 31-2 PageID 409-13.) And even after Plaintiffs challenged the disparate treatment, the white captains were not disciplined save for receiving pre-disciplinary hearing letters. (*See* RE 31-2 PageID 414;

RE 33-6, Policy violations list, PageID 1036.) Beavers, on the other hand, was placed on an 18-month discipline schedule. (RE 32-25 PageID 829.)

Finally, Defendants' steady discrimination and retaliation against Plaintiffs formed an interrelated campaign, so a causal connection existed between Beavers's efforts to ensure that shift assignments were non-discriminatory and Defendants' retaliation. *Laster*, 74 F.3d at 730; *see also Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). That this scare-tactics campaign extended to Beavers is enough to meet the "minimal" burden required to "raise the inference that her protected activity was the likely reason for the adverse action." *Dixon v. Gonzalez*, 481 F.3d 324, 333 (6th Cir. 2007) (citing *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997)).

Defendants warned Plaintiffs that their discrimination grievances were "taking it too far." (RE 32-9 PageID 694.) They filed their spurious unfair labor practice charge on September 20, 2018 (RE 32-4 PageID 651), after which Plaintiffs widely discussed among themselves that they would file retaliation charges. (RE 31-2 PageID 407.) With every anti-discrimination measure taken by Plaintiffs leading to retaliation by Defendants, Carlton sent Beavers the pre-disciplinary hearing letter alleging the policy violations in the midst of Plaintiffs' ongoing efforts to stop Defendants' retaliation and discrimination. (RE 32-21, Beavers retaliation charge, PageID 800.)

Temporal proximity between an employee's exercise of rights and the employer's alleged retaliation can alone be sufficient for finding causation. *Rogers*, 897 F.3d at 776.

And any absence of immediacy between the protected action and alleged retaliation "does not disprove causation." *Dixon*, 481 F.3d at 335. Despite the City's idiosyncratic clocking-in policy, which led to frequent nominal violations, the City's sick and tardy policies had not been enforced against *any* white EMS captain until Beavers was targeted. (*See* RE 31-2 PageID 414; RE 33-6 PageID 1036.) Beavers helped bring Carlton's discrimination forward, and, despite worse infractions by white captains, Defendants punished only Beavers. (RE 31-2 PageID 402, 409; RE 32-23 PageID 811; RE 33-2 PageID 921.) The timing of Beavers's placement on the discipline schedule following her discrimination complaints, coupled with Defendants' relentless campaign against Plaintiffs' attempts to challenge discriminatory employment policies, is sufficient to establish a prima facia case of retaliation.

CONCLUSION

This Court should reverse the district court's judgment in favor of Defendants on Plaintiffs' Title VII, Ohio Civil Rights Act, and Equal Protection Clause claims. It should also reverse the district court's denial of Plaintiffs' motion for partial summary judgment on their Title VII discrimination claims against the City and their Ohio Civil Rights Act and Equal Protection Clause claims against both Defendants, and instruct the district court to grant judgment in Plaintiffs' favor as to liability on those claims. Finally, the Court should remand the retaliation claims for trial.

Respectfully submitted,

/s/Brian Wolfman

Brian Wolfman
GEORGETOWN LAW APPELLATE
COURTS IMMERSION CLINIC
600 New Jersey Avenue, NW
Washington, D.C. 20001
(202) 661-6582
wolfmanb@georgetown.edu

Student Counsel
Michael J. Amato
Emma R. Anspach
Austin M. Donohue

Jared S. Klebanow
KLEBANOW LAW, LLC
850 Euclid Ave. Suite 701
Cleveland, Ohio 44114
(216) 621-8230
jklebanow@klebanowlaw.com

Avery Friedman
AVERY FRIEDMAN & ASSOCIATES
850 Euclid Ave. Suite 701
Cleveland, Ohio 44114
(216) 621-9282
avery@lawfriedman.com

Counsel for Plaintiffs-Appellants
Michael Threat et al.

December 28, 2020

CERTIFICATE OF COMPLIANCE

This document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i)'s type-volume limitation because it contains 12,478 words, excluding parts of the brief exempted by Rule 32(f).

The brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type-style requirements because it has been prepared in a proportionally spaced typeface using Garamond, 14-point, in Microsoft Word.

December 31, 2020 /s/ Brian Wolfman
Brian Wolfman

DESIGNATION OF RELEVANT DOCUMENTS

Under Sixth Circuit Rules 28(b) and 30(g), Appellants designate the following filings in the record as entries that are relevant to this appeal:

Description of entry	Docket No.	PageID	Date
Complaint	RE 1	1-23	9/12/2019
Notice of Appeal	RE 54	1515-1516	10/22/2020
Defendants' Motion for Judgment on the Pleadings			
Mot. for J. on the Pleadings	RE 19	121-137	4/29/2020
Attachments to Mot., including First Carlton affidavit	RE 19-1	138-163	4/29/2020
Pltfs.' Opposition	RE 20	165-175	5/13/2020
Defs.' Reply	RE 22	179-189	5/27/2020
Plaintiffs' Motion for Partial Summary Judgment			
Carlton Deposition	RE 29	203-318	7/16/2020
Captain shift bid	RE 29-2	322-323	7/16/2020
Conciliation Agreement	RE 29-3	324-328	7/16/2020
Carlton second letter to Beavers	RE 29-6	339-341	7/16/2020
Pltfs.' Mem. in Support	RE 30-1	344-364	7/16/2020
Defs.' Opposition	RE 37	1214-1223	7/30/2020

Beavers pre-disciplinary letter	RE 32-25	824-830	7/30/2020
Defendants' Motion for Summary Judgment			
Mot. for Summ. J.	RE 33	880-883	7/30/2020
Defs.' Mem. in Support	RE 33-1	884-917	7/30/2020
Second Carlton affidavit	RE 33-2	918-928	7/30/2020
Collective bargaining agreement	RE 33-3	929-1000	7/30/2020
Policy violations list	RE 33-6	1036	7/30/2020
Exhibits re shift selection process	RE 33-7	1037-1045	7/30/2020
Shift bid list	RE 33-8	1046-1086	7/30/2020
Investigative Report	RE 33-9	1087-1102	7/30/2020
Dileno declaration	RE 33-19	1162-1178	7/30/2020
Pltfs.' Opp. to Summ. J.	RE 36	1194-1213	8/11/2020
Defs.' Reply Mem.	RE 39-1	1236-1245	8/20/2020
Opinions & Orders			
J. on the Pleadings Opinion & Order	RE 35	1183-1193	7/31/2020
Summ. J. Opinion & Order	RE 53	1506-1514	10/8/2020
Order denying costs	RE 57	1527-1529	11/4/2020

ADDENDUM OF 2018 BIDS

Initial Bid - 2018 Schedule								
Seniority	**Race**	**Captain**	**First Bid**	**Second Bid**	**Third Bid**	**Fourth Bid**	**Win[1]**	**Assignment[2]**
1	White	Laurie Walworth	A Day[3]	B Day	N/A	N/A	A Day	A Day
2	Black	Margerita Noland-Moore	B Day	A Day	B Night	A Night	B Day	B Day
3	Black	Michael Threat	A Day	B Day	A Night	B Night	A Day	A Day
4	White	Ellen Kazimer	A Day	B Day	A Night	B Night	A Day	A Day
5	White	Robert Raddell	B Night	A Night	N/A	N/A	B Night	B Night
6	White	Nicholas Kavouras	A Day	B Day	A Night	B Night	A Day	B Day
7	White	Carol Cavin	A Night	B Night	B Day	A Day	A Night	A Night
8	Black	Lawrence Walker	B Day	A Night	B Night	N/A	B Day	B Day
9	Black	Reginald Anderson	B Day	A Night	A Day	N/A	B Day	A Day
10	Black	Orlando Wheeler	A Night	B Day	B Night	N/A	A Night	A Night
11	Black	Pamela Beavers	B Day	B Night	N/A	N/A	B Night	B Night
12	White	Warren James	B Day	A Night	B Night	N/A	A Night	A Night
13	White	Patrick Cotter[4]	B Night	N/A	N/A	N/A	B Night	B Night

(RE 29-2 PageID 322; RE 33-8 PageID 1046-58; RE 33-2 PageID 921, 922.)

[1] "Win" refers to the shift assignment that a captain received from the automated system based on seniority.
[2] "Assignment" refers to the shift assignment that a captain received after Defendant Carlton intervened.
[3] Captains work day or night shifts on alternating days, that is on A days or B days. (RE 33-2, Second Carlton affidavit, PageID 919.)
[4] Cotter included in the comment section of his bid that his true first choice was A Day. (RE 33-8, Shift bid list, PageID 1049.)

Partial Rebid - 2018 Schedule								
Seniority	**Race**	**Captain**	**First Bid**	**Second Bid**	**Third Bid**	**Fourth Bid**	**Win**	**Assignment**
7	Black	Lawrence Walker	B Day	A Day	B Night	A Night	B Day	B Day
8	Black	Reginald Anderson	B Day	A Day	A Night	B Night	B Day	A Night
9	Black	Orlando Wheeler	A Day	B Day	A Night	B Night	A Night	A Night
10	Black	Pamela Beavers	B Day	A Day	B Night	A Night	B Night	B Night
11	White	Warren James[5]	B Day	A Day	A Night	B Night	A Night	B Day
12	White	Patrick Cotter	B Night	A Day	A Night	B Day	B Night	B Night

(RE 29-2 PageID 323; RE 33-8 PageID 1059-67; RE 33-2 PageID 919, 921, 922.)

[5] During the rebid, James initially bid for "A Day, B days, A nights then B nights" (RE 33-8, Shift bid list, PageID 1063), but later emailed Commissioner Carlton: "I apologize if I made a mistake but I'm just curious if my order of shift choices will change the possible outcome. I would like to switch my bid to B Days, A days, A nights and then B nights. I'll peek into your office tomorrow if you're in if that's ok. Thank you." (*Id.* PageID 1065.)

CERTIFICATE OF SERVICE

I certify that on December 31, 2020, I filed this brief with the Clerk of the Court electronically via the CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

December 31, 2020 /s/ Brian Wolfman
Brian Wolfman