IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JEFFREY E. WIGGINTON,	)	
	)	**Civil Action No. 4:12CV51-SA-JMV**
Plaintiff	)	
	)	
v.	)	
	)	
WASHINGTON COUNTY, MISSISSIPPI; SHERIFF MILTON GASTON, in his official and individual capacities; and WASHINGTON COUNTY SHERIFF'S DEPARTMENT	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Boiled down to its simplest terms, this is a case about a subservient black deputy who used his election as the first black sheriff to obtain retribution for the racism he claimed he suffered in silence. It is about a sheriff who claimed no whites wished to work for him because he was black and it is about a sheriff that viewed whites in Mississippi as inherently racist. After 27 years of being under whitey's thumb within the sheriff's department, this black sheriff changed history, was elected the first black sheriff, and the racial tide turned. Whites were purged from the department and Plaintiff, a white deputy, was a casualty of that consequence.

FACTS

Jeffrey Wigginton (hereinafter "Plaintiff") was hired to fill the position of Road Deputy by the Washington County Sheriff's Department (hereinafter "WCSD") in 2006.[1] He had submitted an application with the department and was interviewed by Chief Deputy Jerry Redman, the

[1] *See* Deposition of Jeffrey Wigginton, p. 14, 16, attached to Plaintiff's Response to Defendant's Motion as Exhibit "1." *See also* WCSD Law Enforcement Job Description, attached to Plaintiff's Response to Defendant's Motion as Exhibit "2."

department's second in command, and Assistant Chief Billy Barber, the department's third in command.[2] Milton Gaston, (hereinafter "Gaston"), the black sheriff of the WCSD, was not intimately involved in the hiring of Plaintiff.[3] Prior to joining the WCSD, Plaintiff worked as a patrolman for the Leland Police Department.[4] Moreover, Plaintiff had completed a GED program and attended some college.[5]

Plaintiff was employed with the WCSD from 2006 until his termination in 2011. During this time, the WCSD hindered Plaintiff's professional development. First, the WCSD never awarded Plaintiff his "stripes."[6] Deputies, similar military personnel, were awarded stripes to indicate what rank they held. The vast majority of law enforcement agencies in Mississippi awarded stripes based on objective criteria, i.e. tests, but the WCSD awarded stripes based on subjective criteria, i.e. the personal opinions of Gaston.[7]

Second, Plaintiff repeatedly asked for transfers within the department but such requests were denied.[8] Transfers would have permitted Plaintiff to leave the road deputy beat and join the narcotics or investigations divisions.[9] This would permit Plaintiff to become a well-rounded officer.[10] Moreover, Plaintiff recalled that in five out of the seven times he requested a transfer, a black deputy was awarded the transfer.[11] In addition, Plaintiff was not the only white deputy Gaston refused to transfer, as Charles Stillman, a white former WCSD deputy, repeatedly requested transfers that Gaston denied.[12] Gaston's refusal to transfer Stillman forced the white deputy to resign.[13]

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[2] *See* Wigginton Depo., pp. 14-15. *See also* Deposition of Milton Gaston, p. 22, attached to Plaintiff's Response to Defendant's Motion as Exhibit "3."
[3] *See* Wigginton Depo., p. 14-15. Plaintiff only had a brief conversation with Gaston prior to his offer of employment.
[4] *See* Wigginton Depo., p. 14.
[5] *Id.*, p. 13.
[6] *Id.*, p. 23.
[7] *Id.*, pp. 16-23.
[8] *Id.*, pp. 24-30.
[9] *Id.*
[10] *Id.*
[11] *Id.*, pp. 31-34.
[12] *See* Declaration of Charles Stillman, ¶¶ 5-7, attached to Plaintiff's Response to Defendant's Motion as Exhibit "4."
[13] *Id.*, ¶ 10.

Gaston, however, did permit black deputies to rise quickly within the department ranks. Black deputy Mack White, who started around the same time as Plaintiff and Stillman, quickly jumped from road deputy to shift supervisor.[14] White was able to do this because Gaston approved his transfer requests and awarded him stripes, something Gaston did not do for the white Plaintiff and Stillman.[15]

Make no mistake; the factual evidence is not a compilation of conclusory allegations, but, as demonstrated, consists of a collection of statements and first hand experiences of Plaintiff and former and current employees of WCSD. It is evidence worthy of a jury.

A. No Shades of Grey at WCSD.

From 2006, the time Plaintiff was hired, until 2011, the time Plaintiff was terminated, the racial composition of the WCSD changed dramatically.[16] In 2006, when Plaintiff was hired and shortly after Gaston's election as sheriff, there were 18 white deputies and 16 black deputies.[17] Just five (5) years later, the number of white deputies **plummeted** to 10 and the number of black deputies **skyrocketed** to 29.[18]

Plaintiff testified that during his five (5) years at WCSD, Gaston kicked eleven (11) whites to the curb.[19] This was done by either terminating the white employee or asking them to resign.[20] In addressing the sharp decline of white deputies, Plaintiff explained, "I mean, if you've got – if it's 50/50 and you're letting people go and you're terminating people that's white, and you're rehiring everybody that's black, it pretty much speaks for itself."[21] Gaston could not argue with this logic.

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[14] *See* Deposition of Mack White, p. 6-7, attached to Plaintiff's Response to Defendant's Motion as Exhibit "5."
[15] *Id.*
[16] *See* WCSD's Position Statement to the Equal Employment Opportunity Commission, attached to Plaintiff's Response to Defendant's Motion as Exhibit "6." *See also* Gaston Depo., p. 12.
[17] *Id.*
[18] *Id.*
[19] *See* Wigginton Depo., p. 39.
[20] *Id.*, pp. 39-40. *See also* Stillman Declaration, ¶ 10 and White Declaration, ¶ 17.
[21] *See* Wigginton Depo., p. 39.

Gaston testified that the drop could only be explained by his prejudicial notion that white citizens did not want to work for the WCSD's first black sheriff unless they, i.e. the whites, had no other choice.[22] Here is Gaston in his own words:

> "And I think that's probably anywhere that you go in the Mississippi Delta. And as being as a black-elected officials, you check probably all the way around in there, that many whites probably not gonna ask for employment unless they can't find something elsewhere."[23]

Gaston did not shy away from this statement and made it clear that the WCSD "does not receive applications from the white race" and that white applications dropped since he was elected sheriff.[24]

Ann White, a former dispatcher for Gaston, stated that Gaston removed five employees immediately after his election and the employees were **all white**.[25] Moreover, White's tenure as a dispatcher was short lived, as Gaston demoted her after his election and replaced her with a black.[26] White has no reason to lie because even **Gaston admitted she was a trustworthy person**.[27]

Moreover, Gaston is aware of the white flight created by his tenure as sheriff. After the filing of this lawsuit, **Gaston was told to hire more white people**.[28]

B. Race Becomes Revenge.

Though a tad blunt, Plaintiff best explained the conditions facing white deputies at the WCSD when he stated "the whites get treated like s***."[29] The question, thus, became why?

When Gaston first started as a deputy with the WCSD 27 years ago, there were very few black deputies.[30] Gaston testified that whites routinely outnumbered blacks even though Washington

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[22] *See* Gaston Depo., pp. 17-18.
[23] *Id.*, p. 17.
[24] *Id.*, pp. 17-18.
[25] *See* Declaration of Ann White, ¶ 5, attached to Plaintiff's Response to Defendant's Motion as Exhibit "7."
[26] *Id.*, ¶ 4.
[27] *See* Gaston Depo., p. 62.
[28] *See* Declaration of Dondi Gibbs, ¶ 5, attached to Plaintiff's Response to Defendant's Motion as Exhibit "8." Mr. Gibbs was not specifically mentioned in Plaintiff's core disclosures because Plaintiff's counsel did not know of his existence, though Plaintiff's disclosures did reference unknown employees of the WCSD. Mr. Gibbs reached out to Plaintiff's counsel while this brief was being prepared. Because he holds vital information, his declaration was attached to Plaintiff's response.
[29] *See* Wigginton Depo., p. 48.

County is 75% black.[31] Gaston admitted that he was not treated fairly by his white supervisors when he worked as a black deputy.[32] The first black sheriff, however, did not complain and why he did not complain is intriguing. Here is Gaston in his own words:

> A: I know where I live at and where I come from.
> Q: What do you mean by that?
> A: Well, I'm in Mississippi. I'm in the South. So, you know, we all was selected for different things, different types, So ….
> Q: The only reason I ask, I'm not from Mississippi. I'm from New Jersey. So, if you could explain to me what you mean by being in Mississippi in the South.
> A: Basically in Mississippi and the south, we understood racist. But I did not never complain about nothing racist….[33]

Times changed in the 27 years since Gaston joined the WCSD and in 2011, the time Plaintiff was terminated, Gaston was sheriff, the three men next in command were all black, and whites became a minority within the WCSD.[34]

Despite having a black sheriff, racism remained at the WCSD, but this time it was black on white. Ann White, as well as black deputies Marquita Redfield and Dondi Gibbs, stated that racism was tolerated by officials in the WCSD.[35] Redfield stated that Assistant Chief Billy Barber, third in command, told her that whites treated blacks poorly when they were in power.[36] Redfield further stated the current black-on-white racism is rooted in the mindset that black viewed Gaston's election as an opportunity to repay whites for the unfair treatment blacks had suffered.[37] To further support this fact, Plaintiff testified that Redman had stated that blacks were treated poorly until they became the supervisors.[38]

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[30] *See* Gaston Depo., p. 6, 9.
[31] *Id.*, pp. 19, 22.
[32] *Id.*, pp. 7-8.
[33] *Id.*, p. 8.
[34] *Id.*, p. 22. *See also* Exh. "F."
[35] *See* White declaration, ¶ 10. *See also* Declaration of Marquita Redfield, ¶¶ 2-3, attached to Plaintiff's Response to Defendant's Motion as Exhibit "9" and Gibbs declaration, ¶ 2.
[36] *See* Redfield Declaration, ¶¶ 5-6. *See also* Gaston Depo., p. 22.
[37] *See* Redfield Declaration, ¶ 4.
[38] *See* Wigginton Depo., p. 147.

In addition, black leaders did not hide their contempt for whites. Ann White, the former dispatcher, stated that Jerry Redman, the department's second in command, routinely made racially insensitive comments.[39] Redman had told White that: (i) her people, i.e. white, held his people, i.e. blacks, as slaves, (ii) to go back to Arkansas because she was white and not welcomed at the department, and (iii) openly mocked her for leaving the department to go and work for a white man.[40]

Gibbs also corroborates the racially charged environment that was fostered at the WCSD. Gibbs stated that he heard Redman openly mock whites at the WCSD.[41] He stated that Redman would describe the systematic removal of whites from the department as "white out."[42] He further stated that he confronted Redman about the racially charged comments and said that such comments were against the law.[43] In response to the complaint, Redman told Gibbs to "shut up."[44]

Gibbs, Redfield, and White stated that Redman's comments were widely known in the WCSD.[45] Again, White and Redfield have no reason to lie and Gaston testified they were **trustworthy**.[46] Nor does Gibbs have any reason to lie.

There was a constant tension/animosity between whites and blacks and Gaston even took issue with Plaintiff playing the role of a deputy in a low budget film.[47] A producer had asked Plaintiff if he would play the bit-part of a deputy in a movie being filmed in Washington County.[48] Plaintiff said he had to ask Gaston for permission.[49] When Plaintiff called Gaston, Gaston became irate.[50] He said the producer should have asked for a black deputy and further questioned if the producer was

[39] *See* White Declaration, ¶¶ 12-14. *See also* Gaston Depo. p. 22.
[40] *See* White Declaration, ¶¶ 12-14.
[41] *See* Gibbs Declaration, ¶¶ 3-4.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*, ¶ 15. *See also* Redfield Declaration, ¶ 8 and Gibbs Declaration ¶ 3.
[46] *See* Gaston Depo., pp. 61, 62.
[47] *See* Wigginton Depo., p. 131-38.
[48] *Id.*, pp. 131-32.
[49] *Id.*
[50] *Id.*

racist.[51] He said this was his county and only a black man would play the part.[52] Plaintiff turned down the role and a black deputy eventually assumed the movie role.[53]

Gaston also feared white deputies, specifically their lack of respect. Gaston even conceded he believed that white deputies did not respect him.[54] In turn, black supervisors routinely talked down to white subordinates, publicly ridiculed them, and reprimanded them disproportionately.[55] Ironically, one of Plaintiff's questionable reprimands was based on the notion that Plaintiff disrespected his black superior. Plaintiff's crime? He called a tow truck when his patrol car broke down.[56] Such remnants of past racism created an irrational fear which led to the WCSD's new black supervisors reprimanding whites more frequently than blacks and for the stupidest of reasons.[57]

When Plaintiff complained to Mack White, his black supervisor, that whites got treated like crap and were reprimanded too frequently, White told him he was just following Gaston's orders.[58] Gaston admitted that he had the final say on all reprimands.[59]

C. Plaintiff Terminated.

Until the filing of this lawsuit, Gaston always stated that Wigginton was terminated for one reason – conduct unbecoming an officer in relation to an alleged speeding incident.[60] This, not the other red herring disciplinary actions referenced by Defendants in their motion, was the **only** reason Plaintiff was fired.[61]

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[51] *Id.*, pp. 132, 134, 138.
[52] *Id.*
[53] *Id.*, p. 137.
[54] *See* Gaston Depo., p. 10.
[55] *See* Wigginton Depo., p. 49-50, 50-58, 60, 117-18. Plaintiff testified that Gaston and Redman routinely cussed out white employees. *Id.*, p. 50. Usually the cussings were over nit-picky incidents such as being a few minutes late **after** fixing a flat tire on a patrol car. *Id.*, pp. 117-18.
[56] *Id.*, pp. 80-86. *See also* Reprimand dated January 6, 2011, attached to Plaintiff's Response to Defendant's Motion as Exhibit "10."
[57] *Id.*, pp. 49-50.
[58] *Id.*, p. 120.
[59] *See* Gaston Depo., p. 53.
[60] *See* Gaston Depo., p. 26. *See also* Law Enforcement Termination/Reassignment Report, attached to Plaintiff's Response to Defendant's Motion as Exhibit "11."
[61] *Id.*

Gaston, based on the reports of a "concerned citizen" and a Greenville police officer, claimed that Plaintiff "was observed leading a Greenville Police Department Officers in a high speed chase…."[62] Due to this, Plaintiff was fired.[63]

Plaintiff, however, **was never ticketed** for any offense connected with the alleged "high speed chase."[64] Gaston also admitted there was no proof that Plaintiff had engaged in a "high speed chase" or that Plaintiff was trying to evade the officer.[65] Though Plaintiff admitted he was going over the speed limit, he repeatedly stated he never saw the Greenville officer.[66] Plaintiff fully cooperated with the officer when he was stopped.[67]

D. Defendants' Use of Disciplinary Red Herrings.

Defendants claim that Plaintiff was fired for a collection of reprimands he was issued from 2007 until the final reprimand on August 31, 2011.[68] This is a misrepresentation of the facts. As explained *supra*., the only reason Gaston gave, prior to this lawsuit, for Plaintiff's termination concerned the alleged speeding incident.[69]

Defendants' use of three additional reprimands – (i) a 2007 reprimand concerning the discharge of a weapon, (ii) a January 2011 reprimand concerning an incapacitated patrol car, and (iii) a August 2011 reprimand concerning a lunacy transport – are nothing more than mere distractions. Plaintiff has denied wrongdoing in all reprimands.[70] Moreover, they tend to support Plaintiff's claims that black supervisors would harass white employees with reprimands to force them to resign.

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[62] *See* Exh. 11.
[63] *Id.*
[64] *See* Report of Officer Keith Jackson, attached to Plaintiff's Response to Defendant's Motion as Exhibit "12."
[65] *See* Gaston Depo., p. 30.
[66] *See* Wigginton Depo., pp. 103, 107.
[67] *Id.*, 103-12. Defendants insinuate that Plaintiff lied to Officer Jackson when Officer Jackson asked what car he drives. Plaintiff initially responding a "truck," the vehicle he usually drives, but then quickly told the officer he was in a yellow car today. *Id.*, p. 106. Though Plaintiff's literal response to Officer Jackson's question was an attempt at humor, it was not a lie.
[68] *See* Defendants' Memorandum in Support of its Summary Judgment Motion (**Doc. 42**), p. 2 ("Plaintiff's conduct on and off the job, as well as his failure to follow the Department's policies, necessitated his termination").
[69] *See* Gaston Depo., p. 26. *See also* Exh. "10."
[70] *See* Wigginton Depo., pp. 74-79 (2007 reprimand), 83-93 (January 2011 reprimand), 94-101 (August 2011 reprimand).

Ann White stated that she personally witnessed Gaston target employees for termination. She stated that Gaston harassed these employees until they could not tolerate working under such conditions.[71] Charles Stillman confirms this version of the facts and states WCSD used reprimands, which Gaston stated he had the final say on, to get rid of whites.[72] Gaston often wanted the whites to resign.[73] Even more compelling, when Gaston felt that he had Plaintiff over a barrel, he told Plaintiff that he needed to resign.[74] Only after Plaintiff refused to succumb to such tactics did Gaston fire him.[75]

On a side note, Defendants make an issue of Plaintiff not knowing the policy and procedures manual.[76] Ironically, Gaston testified that he is the individual who must enforce the policy and procedures of the WCSD. But when asked to explain this policy in his handbook – "Disciplinary actions are based on the concepts of equality and equity" – Gaston admitted he had no idea what such a core policy meant.[77]

E. Gaston's Malicious Interference.

Since his termination for WCSD, Plaintiff has been black-balled from law enforcement. Plaintiff applied for a job with the Leland Police Department, but that job was denied.[78] The police chief hiring him told Plaintiff that the WCSD was fighting his hire.[79] Plaintiff applied for a position with the Greenville Police Department, but the police chief there stated, "I don't want any problems with anybody."[80] Plaintiff also applied for a job with the Indianola Police Department and had taken

[71] *See* White Declaration, ¶ 16.
[72] *See* Stillman Declaration, ¶¶ 8-9. *See also* Gaston Depo., p. 53.
[73] *Id.*
[74] *See* Gaston Depo., pp. 40-41.
[75] *Id.*
[76] *See* (**Doc. 42**), p. 4.
[77] *See* Gaston Depo., pp. 45-46.
[78] *See* Wigginton Depo., pp. 151, 153.
[79] *Id.*
[80] *Id.*, p. 154.

a drug test, but was told by the department that his hire was canceled after Gaston personally intervened.[81]

In addition to Plaintiff, former deputy Stillman stated that Gaston harassed him after he resigned. Stillman stated that he had firsthand knowledge that Gaston personally interfered with his post-WCSD job search with the levee board.[82] Stillman also stated that after he posted a criticism of Gaston performance as sheriff on Facebook, Gaston attempted to have him terminated.[83]

STANDARD OF REVIEW

"[S]ummary judgment is an extreme and drastic measure which courts should use sparingly and only in the clearest of cases."[84] The party seeking summary judgment carries the burden of demonstrating that there is no evidence to support the non-movant's case.[85] "Although summary judgment is a useful device, it must be used cautiously or it may lead to drastic and lethal results."[86] In ruling on a motion for summary judgment, the Court is not to make credibility determinations, weigh evidence, draw inferences from the facts, or draw from the facts legitimate inferences for the movant.[87] Rather, the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor.[88]

The United States Supreme Court reversed the Fifth Circuit in an employment discrimination case in *Reeves v. Sanderson Plumbing Products, Inc.*,[89] and held the bench cannot substitute its own judgment in lieu of the juries.[90] Juries, thus, play a paramount role in employment cases and in evaluating evidence. **The role of the jury prevents also federal courts from using the**

[81] *Id.*, p. 155.
[82] *See* Stillman Declaration, ¶¶ 12-13.
[83] *Id.*, ¶¶ 14-18.
[84] *Printy v. Crochet & Borel Services*, 196 F.R.D. 46, 50 (E.D. Tex. 2000).
[85] *Celotex Corporation v. Catrett*, 477 U.S. 317, 325 (1986).
[86] *Murrell v. Bennett*, 615 F.2d 306, 309 (5th Cir. 1980). *See also, Jackson v. Cain*, 864 F.2d 1235, 1241 (5th Cir. 1989).
[87] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *See also Deville v. Marcantel*, 567 F.3d 156, 163-64 (5th Cir. 2009)
[88] *Anderson*, 477 U.S. at 255.
[89] 530 U.S. 133 (2000).
[90] *Reeves*, 530 U.S. at 153.

summary judgment standard to turn employment cases into de facto bench trials.[91] "Trial courts must be particularly cautious about granting summary judgment in discrimination cases, because in such cases the employer's intent is ordinarily at issue."[92]

This is especially true in employment cases when a material issue is the intent behind an employer's actions.[93] Thus, "**[W]hen state of mind is at issue, summary judgment is less fashionable because motive or intent is inherently a question of fact which turns on credibility**."[94]

In order to present a dispute of material facts, the non-movant cannot rely upon "some metaphysical doubt as to the material facts,"[95] by "conclusory allegations,"[96] by "unsubstantiated assertions,"[97] or by only a "scintilla" of evidence.[98] **The Courts, however, cannot use the "conclusory allegation" terminology as a catch-all to dismiss an employment case**.

A conclusory allegation is just that – a conclusion upon which no factual evidence was proffered to bolster its validity.[99] A conclusory allegation, thus, is treated as a "bald assertion."[100] In other words, it is an end without means. "In reviewing the evidence, the court must 'refrain from making credibility determinations or weighing the evidence.'"[101]

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[91] *Id.* at 133
[92] *Peralta v. Cendant Corp.*, 123 F.Supp.2d 65, 75 (D. Conn. 2000) (*citing Chertkova v. Connecticut General Life Insurance Co.*, 92 F.3d 81, 87 (2d Cir. 1996)).
[93] *Pasco v. Knoblauc*, 223 Fed. Appx. 319 (5th Cir. 2007).
[94] *Bodenheimer v. PPG Indus., Inc.* 5 F.3d 955, 956, fn. 3 (5th Cir. 1993).
[95] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).
[96] *Lujan v Nat'l Wildlife Fed'n,* 497 U.S. 871, 871-73 (1990).
[97] *Hopper v. Frank*, 16 F.3d 92 (5th Cir.1994)
[98] *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082 (5th Cir.1994)
[99] *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633, 645 (5th Cir. 1985).
[100] *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805, 814 (5th Cir. 1991)
[101] *Deville v. Marcantel*, 567 F.3d 156, 163-64 (5th Cir. 2009)(*quoting Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007)).

Finally, "a motion for summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances."[102]

ARGUMENT

Defendants moved for summary judgment and assert Plaintiff cannot meet his legal burden in regards to the following claims: (i) race discrimination, (ii) retaliation, and (iii) the state law tort of malicious interference with employment.

In its briefing, Defendants spend an inordinate amount of time addressing a disparate impact claim Plaintiff never raised. Defendants are confused. Plaintiff did spend a great deal of time developing evidence of disparate treatment. As this Court has previously recognized, evidence of disparate treatment is a useful tool in satisfying a plaintiff's *prima facie* case and showing pretext.[103] Defendants' motion, thus, is not well taken and should be denied.

I. RACE DISCRIMINATION

Plaintiff's Title VII claim of race discrimination can be broken down into the following categories: (i) reverse-race discrimination, (ii) hostile work environment, and (iii) retaliation.

A. Reverse-Race Discrimination.

Title VII discrimination claims may be proven with either direct or circumstantial evidence.[104] Plaintiffs traditionally lack any sort of "smoking gun" evidence of discrimination and must resort to proving their case circumstantially through the burden-shifting framework established in *McDonnell Douglas v. Green*.[105] Once the prima facie case is established, the Defendant must proffer a non-discriminatory reason for the termination and the Plaintiff must then show such an

[102] *Gibson v. Henderson*, 129 F.Supp.2d 890 (M.D. N.C. 2001).
[103] *See Finnie v. Lee County Jail, et al.,* No.: 1:10cv64-A-S (N.D. Miss. 2012).
[104] *Fierros v. Texas Dept. of Health*, 274 F.3d 187, 192-92 (5th Cir. 2001).
[105] 411 U.S. 792, 802 (1973).

explanation is pretextual or discrimination was a substantial motivating factor in Defendant's decision.[106]

1. *Prima Facie* Case.

In order to make a circumstantial *prima facie* case of unlawful race discrimination, Plaintiff need only introduce evidence that: (i) he is a member of a protected class; (ii) he is qualified; (iii) he experienced an adverse employment decision; and (iv) he was replaced by someone outside the protected class or he was treated less favorably than employees outside the protected class.[107] "To establish a prima facie case, [the plaintiff] need only make a very minimal showing."[108]

In its motion papers, Defendants concede that Plaintiff is a member of a protected class and suffered an adverse employment decision.[109] At issue, then, is whether Plaintiff satisfied the second and fourth prongs of the *McDonnell-Douglas* framework.

a. Second Prong – Qualifications.

To satisfy the second prong of the *McDonnell Douglas* test a plaintiff must show that he "was performing [his/her] duties satisfactorily."[110] It is universally understood that to require more than a showing that the plaintiff "possesses the basic skills necessary for the job ... unnecessarily collapses the steps suggested by *McDonnell Douglas* by shifting considerations which are more appropriate to the employer's rebuttal phase to the earlier requirement that the employee demonstrate competence to perform the specified work."[111] The Courts, therefore, hold that "[t]o satisfy the second element of the test, the plaintiff need not demonstrate that his performance was flawless or superior. Rather,

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[106] *Id.*
[107] *Id.*, at 802; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993); *Reeves*, 530 U.S. 133.
[108] *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38, 41 (5th Cir. 1996).
[109] *See* (**Doc. 42**), p. 12.
[110] *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir.1994).
[111] *Powell v. Syracuse University*, 580 F.2d 1150, 1155 (2d Cir.1978).

he need only demonstrate that he 'possesses the basic skills necessary for performance of [the] job.'"[112]

Even more importantly, it is **reversible evidence** for this Court to consider Defendants' evidence regarding Plaintiff's work performance when determining whether the employee has made a *prima facie* case of employment discrimination.[113] Rather, a plaintiff may establish his *prima facie* case by presenting "credible evidence that [he] continued to possess the objective qualifications [he] held when [he] was hired, or by [his] own testimony that [his] work was satisfactory, even when disputed by [his] employer, or by evidence that [he] held [his] position for a significant period of time."[114]

In this case, Defendants are trying to use their alleged non-discriminatory reason for termination as evidence to defeat Plaintiff's *prima facie* case. This they cannot do. Instead, the Court must look to the object criteria that Plaintiff was qualified for his job. Plaintiff has denied that his termination, as well as his reprimands, was meritorious.[115] As explained by the *MacDonald* Court, Plaintiff's own testimony that he was performing his job function is **credible evidence** in determining whether the second prong was satisfied, as well as the fact Plaintiff was employed by the WCSD for **five years**.[116]

Furthermore, Plaintiff **was never** ticketed for the alleged incident Defendants are seeking to use to defeat Plaintiff's *prima facie* case. There is no objective evidence that Plaintiff did anything wrong. Instead, we have one citizen who made a complaint absent an official action. Thus, according to Defendants, an unsubstantiated allegation of wrong-doing is enough to defeat a Title VII plaintiff's *prima facie* case. Such a standard would cause *McDonnell Douglas* to implode.

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[112] *de la Cruz v. New York City Human Resources Admin. DSS*, 82 F.3d 16, 20 (2d Cir.1996) (*quoting Powell*, 580 F.2d at 1155).
[113] *MacDonald v. Eastern Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1119-20 (10th Cir. 1991). *See also* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1192-93 (10th Cir. 2000) and *Kenworthy v. Conoco*, 979 F.2d 1462, 1469-70 (10th Cir. 1992)
[114] *MacDonald*, 941 F.2d at 1121 (citations omitted).
[115] *See* Wigginton Depo., pp. 74-79 (2007 reprimand), 83-93 (January 2011 reprimand), 94-101 (August 2011 reprimand), 103-12 (termination).
[116] *MacDonald*, 941 F.2d at 1121 (citations omitted).

In addition, if all it takes is one citizen to make a complaint to demonstrate an employee is not qualified for his job, then it is clear that at least two EEOC complaints of race discrimination and sexual harassment filed against Gaston demonstrate he is not qualified to hold the position of sheriff. He should, therefore, step down so a more qualified candidate can assume the position.

Finally, plaintiff had prior law enforcement training prior to joining the WCSD and had the appropriate qualifications to fill the position.[117]

b. Fourth Prong – Evidence of Discriminatory Intent.

Traditionally, the fourth prong of the *McDonnell Douglas* test requires a Plaintiff in a Title VII discrimination case to show either (i) other similarly situated employees outside the protected class were treated more favorably than him under "nearly identical circumstances" or (ii) he was replaced by someone outside the protected class.[118] This prong, however, is flexible and was never meant to be interpreted in a rigid fashion.[119] In addition, proof of disparate treatment can establish the fourth element of a plaintiff's *prima facie* case.[120]

"[I]t is common in discriminatory discharge cases for the last element of the *prima facie* case to be characterized as requiring that the plaintiff show that the position was filled by a person not of the protected class … or that similarly situated non-protected persons were treated more favorably".[121] The showing that a similarly situated employee outside the protected class was treated differently than the current Plaintiff or that the Plaintiff was replaced by someone in the same protected class **is not the only way to satisfy the fourth prong of the *McDonnell Douglass***

[117] *See* Wigginton Depo., p. 13-14. *See also* Road Deputy Job Description, Exhibit "B."
[118] *Okoye v. Univ. Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 512-514 (5th Cir. 2001).
[119] *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (holding "[t]he McDonnell Douglas framework was never intended to be rigid, mechanized, or ritualistic.").
[120] *See Bryant v. Compass Group USA Inc.*, 413 F.3d 471, 478 (5th Cir. 2005).
[121] *Bullock v. Children's Hosp. of Philadelphia*, 71 F.Supp.2d 482, 487-88 (E.D.Pa. 1999).

test.[122] "Although a plaintiff may make out a *prima facie* case with such evidence … neither of these is required."[123]

This Circuit has recognized that the purpose of the fourth prong is to identify "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'"[124] Hence, "**no single formulation of the *prima facie* evidence test may fairly be expected to capture the many guises in which discrimination may appear**."[125] "Any demonstration strong enough to support a judgment in the plaintiff's favor if the employer remains silent will do, even if the proof does not fit into a set of pigeonholes."[126]

"The central focus of the inquiry ... is always whether the employer is treating some people less favorably than others…."[127] The Third Circuit Court of Appeals, relying on U.S. Supreme Court precedent, ruled a plaintiff claiming a discriminatory firing need not prove that he was replaced by someone outside of the relevant class or others similarly situated were treated differently.[128] The *prima facie* case "clearly require[s] only 'evidence adequate **to create an inference that an employment decision was based on an illegal discriminatory criterion**' and is not limited to showing that the position was filled by a person not of the protected class or even that other similarly situated employees outside of the relevant class were treated more favorably.[129]

The Fifth Circuit accepted this logic and reasoned "the fourth element required the plaintiff to show that he was replaced by someone outside of the protected class **or that he was otherwise**

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[122] *Id.* (*citing Pivirotto v. Innovative Systems Inc.*, 191 F.3d 344, 356-57 (3rd Cir., 1999)).
[123] *Pivirotto*, 191 F.3d 344. *See also McDonnell Douglas*, 411 U.S. at 802 n. 1 (holding "[T]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations.").
[124] *Byrd v. Roadway Exp., Inc.*, 687 F.2d 85, 86 (5th Cir. 1982) (*quoting Furnco*, 438 U.S. at 576).
[125] *Id*, 687 F.2d at 86 (**emphasis added**).
[126] *Carson v. Bethlehem Steel Corp.*, 82 F.3d 159 (7th Cir. 1996)
[127] *Furnco*,483 U.S. at 577.
[128] *Pivirotto*, 191 F.3d at 357-59.
[129] *Id.* (*quoting O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996)) (omitting internal quotation, brackets and emphasis).

discharged because of his race."[130] The reason the fourth prong is not ritualistically applied is simple – it would permit an employer to easily dodge liability under Title VII and cover up discriminatory actions.

The Tenth Circuit in *Perry v. Woodward*, provided further examples of allegations of wrongfully motivated discharges that would be dismissed if a court applied the fourth prong in the manner being advocated by Defendants in this case.[131] The court hypothesized that an employer may "hire and fire minority employees in an attempt to prevent them from vesting in employment benefits or developing a track record to qualify for promotion."[132] In addition, an employer may prefer demure women to those it perceives as "feminist" or it may hire a black employee whom it perceives "know[s] his place" to replace another black employee who is less willing to cooperate with the employer's stereotypical ideals.[133]

The fourth prong, therefore, merely requires proof that points to illegal discrimination. In this case, Plaintiff's theory is concise and supported by the facts and was already deemed acceptable by the *Perry* court. Plaintiff is claiming that he became frustrated with the racially-charged atmosphere prevalent at the WCSD. In his own words, Plaintiff was tired of the "whites getting treated like s***."[134] In response to such treatment, Plaintiff became more vocal. He complained to

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[130] *Fields v. J.C. Penney Co., Inc.*, 968 F.2d 533, 535 n. 2 (5th Cir.1992) (**emphasis added**). As explained by the Fifth Circuit: "The Supreme Court 'has not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material....' *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 527 n. 1, 113 S.Ct. 2742, 2758 n. 1, 125 L.Ed.2d 407 (1993) (Souter, J., dissenting). Cf. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, ----, 116 S.Ct. 1307, 1310, 134 L.Ed.2d 433 (1996) . Recent cases in our circuit support the district court's view that a plaintiff's replacement by a member of the same protected class precludes the establishment of a prima facie case. (*citations omitted*). **These recent cases ignore earlier precedent in this circuit, however, which explicitly recognized 'that the single fact that a plaintiff is replaced by someone within the protected class does not negate the possibility that the discharge was motivated [by] discriminatory reasons**. *Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246-47 (5th Cir.1985) (citing *Byrd v. Roadway Express, Inc.*, 687 F.2d 85, 86 (5th Cir.1982)). It bears noting that our earlier precedent on this point continues to be controlling law in this circuit. *United States v. Gray*, 751 F.2d 733, 735 (5th Cir.1985). **While the fact that one's replacement is of another national origin 'may help to raise an inference of discrimination, it is neither a sufficient nor a necessary condition**. *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir.1996)."

[131] 199 F.3d 1126, 1137 (10th Cir. 1999).

[132] *Id.*

[133] *Id.*

[134] *See* Wigginton Depo., p. 48.

his black supervisor and repeatedly requested transfers.[135] In other words, he did not follow the party line.

Even more telling, unlike Gaston who stated he knew his place when the whites were treating him unfair, Plaintiff did not know his place as a white man under a black sheriff. The evidence, *detailed infra*., supports this theory and satisfies the fourth prong.

Plaintiff has proven that whites were treated differently than blacks. First, the statistical data showing the systematic removal of whites from the WCSD demonstrates that a discriminatory motive is in play. Such an argument is further developed in the pretext section of this memorandum.

Second, both Plaintiff and former deputy Stillman repeatedly requested transfers to broaden their law enforcement prospects and skills.[136] They were denied. Five out of seven of thetransfers Plaintiff requested were given to a black deputy.[137] Again, the *Perry* court viewed such a fact as proof of discrimination because an employer could "**hire and fire [protected] employees in an attempt to prevent them from vesting in employment benefits or developing a track record to qualify for promotion**."[138] This argument is further supported by the fact that Mack White, a black deputy that started around the same time of Plaintiff, was given numerous transfers and quickly ascended to the position of shift supervisor at the time Plaintiff was terminated.[139] Plaintiff, as well as Stillman, never left the entry level position of road deputy in the many years they worked at the WCSD.

Moreover, the fact that two transfers were given to whites is not dispositive because, as articulated by the Tenth Circuit in *Perry*, the white deputies that received promotions may have received such promotions because they knew their place in a black hierarchical system.

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[135] *Id.*, pp. 23-34, 120.
[136] *See* Wigginton Depo., p. 24-34. *See also* Stillman Declaration, ¶¶ 5-7.
[137] *See* Wigginton Depo., pp. 31-34.
[138] 199 F.3d 1126, 1137 (10th Cir. 1999).
[139] *See* White Depo., pp. 6-7.

Third, Gaston never gave Plaintiff any stripes. Unlike other law enforcement agencies, the WCSD awarded stripes, i.e. promotions in rank, based upon subjective criteria.[140] Plaintiff, a white, was never given a stripe in the five years he worked at the WCSD.[141] Mack White, a black who started as a road deputy in proximity with Plaintiff, was awarded stripes and promotions.[142]

Fourth, the fact that Gaston only kept whites that knew their place is further supported by the fact he was concerned and surmised that some white deputies did not respect him as the first black sheriff.[143] Gaston, as well as those at the top of the WCSD food chain, also viewed their rise to power as an opportunity to seek racial retribution.

Gaston testified that he was treated unfairly as a deputy when he joined the WCSD 27 years ago under white leadership.[144] He stated the deputies were largely white and he did not complain because he knew his place as a black man in Mississippi.[145] After 27 years of knowing his place and not complaining, Gaston became the first black sheriff elected in Washington County.

According to Ann White, a former dispatcher that Gaston viewed as trustworthy, Gaston instantaneously began to change the demographics of the WCSD. He immediately fired five employees – **all white**.[146] He demoted Ann White and replaced her with a black.[147] Gaston was not concerned about such terminations because, in his words, Washington County is 75% black and its police force never reflected such demographics.[148]

Over the course of five years – 2006 to 2011 – the WCSD went from 18 white deputies/16 black deputies to 10 white deputies/29 black deputies.[149] Ann White, as well as the black deputy

[140] *See* Wigginton Depo., pp. 23.
[141] *Id.*
[142] *See* White Depo., pp. 6-7.
[143] *See* Gaston Depo., p. 10.
[144] *Id.*, pp. 7-9, 17-19, 22.
[145] *Id.*, p. 8.
[146] *See* White Declaration, ¶ 5.
[147] *Id.*, ¶ 4.
[148] *See* Gaston Depo., p. 22.
[149] *See*, Defendants' EEOC position Statement, Exhibit "6."

Marquita Redfield, stated this change was due to the fact the blacks were in power for the first time.[150] Both women, **who Gaston admitted were trustworthy**, stated that the black leadership viewed their new-found power as an opportunity to right the wrongs of the white sheriffs of the past. In this respect, Plaintiff demonstrated that whites who, unlike Gaston, failed to know their place were targeted. Ann White witnessed Gaston target such employees.[151]

Fifth, Gaston, in concert with his black leadership, supported a culture of racial animosity at the WCSD. Chief Deputy Jerry Redman, second in command, routinely harassed white employees by making crude jokes. He told them their families were slave owners and told whites that need to go back to Arkansas because they were not welcomed in the black Delta.[152] Redman also described the systematic removal of white employees by the WCSD, which had to be approved by Gaston by virtue of his position as sheriff, as "white out."[153] Ann White, Gibbs, and Redfield stated such comments were normal for Redman and widely known.[154] Gibbs stated that, after the filing of this lawsuit, Gaston was told to hire more white people.[155]

Sixth, Plaintiff began to complain that whites were being treated poorly and reprimanded disproportionately.[156] He made this complaint to Mack White. Mack White said he was just following Gaston's orders.[157] Ann White stated she personally witnessed Gaston target those employees he wanted out.[158] He would do so by harassing them to the point that they were

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[150] *See* White Declaration, ¶ 10. *See also* Redfield Declaration, ¶¶ 4-6.
[151] *See* White Declaration, ¶ 16.
[152] *Id.*, ¶¶ 12-14.
[153] *See* Gibbs Declaration, ¶ 3. *See also* Gaston Depo., pp. 11, 25 45-46. Gaston testified that he had the final say on terminations. It is, therefore, a reasonable inference to conclude that Gaston's decisions to terminate were connected with the policy of "white out."
[154] *Id.*, ¶ 15. *See also* Redfield Declaration ¶ 8 and Gibbs Declaration, ¶ 3.
[155] *See* Gibbs Declaration, ¶ 5.
[156] *See* Wigginton Depo., p. 120.
[157] *Id.*
[158] *See* White Declaration, ¶ 16.

compelled to leave. Stillman also said that Gaston would fail to transfer whites to make them want to leave.[159]

Finally, Gaston only saw his world through racial lens. He stated that whites did not apply to the WCSD because they are inherently racist.[160] He specifically stated whites do not want to work for a black sheriff.[161]

All of this evidence – **which is not conclusory and based upon the personal knowledge of Plaintiff and current and former employees Gaston described as trustworthy** – is what the courts describe as "proof that points toward illegal discrimination."[162] In other words, it provides a window into how racial attributes influenced Gaston's decision making process.

2. Defendants' Non-Discriminatory Reason for Termination.

Once a plaintiff has made their *prima facie* case, the burden of production shifts to the defendant to produce a legitimate, non-discriminatory reason for the adverse employment decision made against the employee.[163] Gaston always stated that Wigginton was terminated for one reason – conduct unbecoming an officer in relation to an alleged speeding incident.[164] This, not the other red herring disciplinary actions referenced by Defendants, is the **only** reason Plaintiff was fired.[165]

3. Pretext

After an employment plaintiff has met his *prima facie* case and the employer has proffered a non-discriminatory reason for the termination, "the plaintiff must then offer sufficient evidence to create a genuine issue of material fact 'either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff's protected

[159] *See* Stillman Declaration, ¶ 10.
[160] *See* Gaston Depo., p. 17.
[161] *Id.*
[162] *Holmes v. Bevilacqua*, 794 F.2d 142, 147 (4th Cir. 1986) (en banc)
[163] *Nowlin v. Resolution Trust Corporation*, 33 F.3d 498, 507 (5th Cir. 1994).
[164] *See* Gaston Depo., p. 26. *See also* Law Enforcement Termination/Reassignment Report, Exhibit "11."
[165] *Id.*

characteristic (mixed-motive[s] alternative).'"[166] Because pretext involves the intent and motivation of the employer, it is for the jury, not the judge, to determine pretext.[167]

As this Court has held, pretext is established "either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or 'unworthy of credence.'"[168]

Rather than placing the burden on a plaintiff, the appropriate inquiry is whether there is a question of fact as to a defendant's articulated reason for firing a plaintiff.[169] When the parties reach the pretext stage, "the plaintiff [who has established a prima facie case] need produce very little evidence of discriminatory motive to raise a genuine issue of fact" as to pretext.[170] In fact, "**any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a factfinder**."[171] Instances where a plaintiff cannot satisfy pretext are defined by the Fifth Circuit as being "rare."[172]

To demonstrate pretext, Plaintiff must "identify such weaknesses, implausibilities, inconsistencies, or contradictions" in Defendants' asserted reason "that a reasonable person could find [it] unworthy of credence."[173] More importantly, "[I]f the stated reason, even if actually present to the mind of the employer, wasn't what induced him to take the challenged employment action, it was a pretext."[174]

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166 *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).
167 *Thornbrough*, 760 F.2d at 640-41. *See also Johnson v. Minnesota Historical Soc.*, 931 F.2d 1239 (8th Cir. 1991).
168 *See Finnie v. Lee County Jail, et al.,* No.: 1:10cv64-A-S (N.D. Miss. 2012)(*quoting Laxton v. Gap*, Inc., 333 F.3d 572, 578 (5th Cir. 2003)(internal citations omitted)).
169 *See, e.g., Rossy v. Roche Prods.*, 880 F.2d 621, 626 (1st Cir. 1990) ("All of Roche's explanations may in fact be accurate, but they must be decided after trial, especially in cases such as this where Roche's intent is the central issue."); Russo v. *Trifari, Krussman & Fishel*, 837 F.2d 40, 43 (2d Cir. 1988) ("While Russo's case is hardly a powerful one, we believe that a trier of fact might find that Trifari's avowed reasons . . . were pretextual."); *Jackson v. Univ. of Pittsburgh*, 826 F.2d 230, 233 (3d Cir. 1987) ("At the summary judgment stage ... all that is required [for the non-moving party to survive the motion] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth [at trial]").
170 *Lindahl v. Air France*, 930 F.2d 1434, 1437 (9th Cir. 1991).
171 *Id.* at 1438 (*quoting Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1986)) (**emphasis added**).
172 *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222, 223 (5th Cir. 2000).
173 *Boumehdi v. Plasttag Holdings, LLC.*, 489 F.3d 781, 792 (7th Cir. 2007).
174 *Forrester v. Raulant–Borg Corp.*, 453 F.3d 416, 418 (7th Cir.2006).

Defendants' stated reason for Plaintiff's termination, i.e. speeding, is susceptible to an inference of discrimination. Plaintiff **was never ticketed** for any offense connected with the alleged "high speed chase."[175] Gaston also admitted there was no proof that Plaintiff had engaged in a "high speed chase" or that Plaintiff was trying to evade the officer.[176] Though Plaintiff admitted he was going over the speed limit, he repeatedly stated that he never saw the Greenville officer.[177] Plaintiff fully cooperated with the officer when he was stopped.[178]

This is not to say that Defendant's reason is inherently untrue, which it is. It is to merely say that there is enough evidence for a jury to conclude that the reason for termination does not pass the smell test. This is especially true because Plaintiff, Charles Stillman, and Ann White have all testified that Gaston had a history using harassment i.e. bogus reprimands, to further discriminatory goals. Plaintiff, Stillman, and White, as well as Redfield and Gibbs, also provide evidence that employment actions are racially motivated. In that regard, the jury can infer discriminatory intent.

Moreover, Plaintiff's evidence clearly demonstrates that Gaston operated with discriminatory intent. Gaston was a former black deputy with a chip on his block who became sheriff. Constantly worried about how he was viewed by whites, Gaston let remnants of the racism he suffered create an irrational inferiority complex that led to him, and his black leadership, putting whites in their place or running them out of his department. This is the pretext that Defendants cannot overcome.

a. Whites Purged, Plaintiff a Casualty.

It is understood that "the time to consider comparative evidence in a disparate treatment case is at the third step of the burden-shifting ritual, when the need arises to test the pretextuality vel

[175] *See* Report of Officer Keith Jackson, attached to Plaintiff's Response to Defendant's Motion as Exhibit "K."
[176] *See* Gaston Depo., p. 30.
[177] *See* Wigginton Depo., pp. 103, 107.
[178] *Id.*, 103-12. Defendants insinuate that Plaintiff lied to Officer Jackson when Officer Jackson asked what car he drives. Plaintiff initially responding a "truck," the vehicle he usually drives, but then quickly told the officer he was in a yellow car today. *Id.*, p. 106. Though Plaintiff's literal response to Officer Jackson's question was a attempt at humor, it was not a lie.

non of the employer's articulated reason for having acted adversely to the plaintiff's interests."[179] In doing so, case law clearly states that statistical data is relevant in a Title VII employment discrimination lawsuit, specifically at the pretext stage.[180]

A plaintiff may rely on statistical evidence to establish a *prima facie* case or to show that a defendant's articulated nondiscriminatory reason for the employment decision in question is pretextual.[181] Such statistical data is dispositive in showing pretext because the data "may be helpful to a determination of whether petitioner's [adverse employment action against plaintiff] in this case conforms to a general pattern of discrimination."[182] Thus, "[I]t **unmistakably** clear that statistical analysis has served and will continue to serve an important roles in cases in which the existence of discrimination is a dispute issue.[183]

In this case, the statistical data speaks for itself. Shortly after his first election, Gaston canned five employees – **all white**.[184] From 2006 until 2011, the WCSD, under Gaston's control, lost 8 white deputies and gained 13 black deputies.[185] Standing alone, these statistics are staggering, as they show that whites not only left the department, but they were not hired back. There is, however, context for these statistics.

There is no doubt whites were being purged from the WCSD. Chief deputy Redman referred to the purge as "white out" and Gaston, after the filing of this lawsuit, was told to hire more white people.[186] Moreover, even when former deputy Gibbs, a black man, complained about the racial comments, he was told by Redman to "shut up."[187] Thus, a new, racially charged black

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[179] *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 19 (1st Cir.1999)
[180] *See McDonnell-Douglas Corp.*, 411 U.S. at 804-05 (stating, "other evidence that may be relevant to any showing of pretext includes … petitioner's general policy and practice with respect to minority employment.)
[181] *Lowe v. City of Montrovia*, 775 F.2d 998, 1008 (9thCir. 1986).
[182] *Id.*
[183] *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1977).
[184] *See* White Declaration, ¶ 5.
[185] *See* Defendants' position statement to the EEOC, Exh. "6."
[186] *See* Gibbs Declaration, ¶¶ 3, 5.
[187] *See* Gibbs declaration, ¶ 4.

leadership was in command and even opposition from fellow blacks would not be tolerated. The question became why?

Gaston joined the WCSD 27 years ago when, by his own testimony, there were few black deputies.[188] He testified that he was not treated fairly by his white supervisors, but he did not complain.[189] He did not complain because he knew his place, i.e. he knew he was a black man in the Mississippi Delta.[190] In other words, he was a subservient black deputy who opted to take the discrimination in lieu of fighting it.

Gaston waited in the wings and after two decades was elected as Washington County's first black sheriff. At this point, the demographics of the department changed with a dramatic reduction of white employees.[191] Gaston was not concerned because he worked for a county in which 75% of the people are black.[192]

In addition, Gaston eventually appointed black men to the top three spots under him.[193] One of those men, Billy Barber, made it a point to tell folks how bad black deputies had it before Gaston.[194] Another, Jerry Redman, openly mocked whites by referring to them as slave owners, etc.[195] This behavior caused Marquita Redfield, a black deputy, to state the black leaders in the department viewed their ascension to power as an opportunity to treat whites poorly.[196] Redfield based this on a conversation she had with Barber.[197] It also caused Gibbs to personally complain about the racial animosity directed towards his fellow white deputies.[198]

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188 *See* Gaston Depo., pp. 6, 19
189 *Id.*, pp. 7-8
190 *Id.*, p. 8.
191 *See* Exh. "6."
192 *See* Gaston Depo., p. 22.
193 *Id.*
194 *See* Redfield Declaration, ¶¶ 5-6.
195 *See* White Declaration, ¶¶ 12-14.
196 *See* Redfield Declaration, ¶¶ 4.
197 *Id*, ¶¶ 5-6.
198 *See* Gibbs Declaration, ¶ 4.

In a concession to how poorly whites were treated, Gaston testified that whites did not want to work for a black sheriff.[199] He stated that working for a black sheriff would be the last thing a white deputy would do.[200] Such a fact was evident because Gaston said his department, which was at one time predominantly white, "does not receive many applications from the white race."[201] This is hogwash, as all the evidence supports the WCSD's policy of "white out" – the systematic removal of whites from positions with the department.[202]

All the while, white deputies, like Plaintiff and Stillman, were denied promotions.[203] Whites like Ann White were harassed so severely they left.[204] And, as Ann White personally witnessed, if Gaston wanted an employee out and refusing to transfer them was not working, then he would make their work life miserable.[205] He did so by issuing baseless reprimands on stupid matters. For example, Plaintiff's decision to call a tow truck to tend to his broken down car was grounds for a reprimand because Plaintiff did not seek permission from his black supervisor. Plaintiff complained to his supervisor, Mack White, but White said he was just following Gaston's orders.[206]

All of this supports the inference that Gaston, a black man who suffered years of mistreatment in silence, used his newfound power to purge his department of the whites who once persecuted him. If they did not leave voluntarily, he would hound them with reprimands and refuse the transfers that would better their career.

The question before this Court is "if the stated reason, even if actually present to the mind of the employer, wasn't what induced him to take the challenged employment action, it was a

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[199] *See* Gaston Depo., pp. 17-18.
[200] *Id.*
[201] *Id.*
[202] *See* Gibbs Declaration, ¶ 3.
[203] *See* Wigginton Depo. pp. 23-34. *See also* Stillman Declaration, ¶ 5-9.
[204] *See* White Declaration, ¶ 16.
[205] *Id.*
[206] *See* Wigginton Depo. p. 120.

pretext."[207] Plaintiff's evidence coupled with his corroborating witnesses, show a Gaston who purged white employees and targeted white employees with baseless reprimands until they left or were fired. Plaintiff's case fits this *modus operandi*, demonstrates that speeding "wasn't what induced [Gaston] to take the challenged employment action,"[208] and defeats summary judgment.

b. Mixed-Motive Alternative.

As stated by the Northern District Court:

> A plaintiff's failure to prove the falsity of a defendant's stated nondiscriminatory reason has doomed many a discrimination case in this circuit, and the mixed-motive alternative set forth in *Rachid* will thus likely prove to be a lifeline for many discrimination cases which would otherwise not have survived summary judgment. Clearly, it will be easier for many plaintiffs to circumstantially prove that discrimination was one factor motivating an adverse employment decision than it would be to prove that the nondiscriminatory reason offered by the defendant is false.[209]

Plaintiff can make such a showing.

Assuming arguendo Defendant fired Plaintiff because he engaged in an act of speeding, the evidence demonstrated Gaston was purging his department of white employees. The statistics alone prove this point, but when you add in Gaston's racial rhetoric, i.e. that whites would not work for a black sheriff, it is clear race that **cannot** be removed from the decision making process. Furthermore, Plaintiff has corroborating evidence showing the department was infused with a belief that the blacks could treat the whites they way they, i.e. the blacks, were treated years ago. Such an atmosphere tolerated raunchy racist jokes. It further led to Gaston targeting people he wanted out by using baseless reprimands and refusing to allow them to further their career. There is evidence to

[207] *Forrester*, 453 F.3d at 418.
[208] *Id.*
[209] *Warren v. Terex Corp.*, 328 F.Supp.2d 641, 644 (N.D.Miss. 2004).

demonstrate that such actions were the result of a "**white out" policy** to purge the department of whites.[210]

Gaston, the same man who said he had to know his place 27 years ago, cannot separate his race-based animosity from his decision-making process. **His chief deputy brags of the department's "white out" policy and even black deputies state the reverse racism was so strong it was sickening**. The fact the whites were purged from his department and overwhelmingly replaced with blacks proves this point.

B. Hostile Work Environment.

Defendants erroneously claim Plaintiff does not have a hostile work environment claim. This argument is specious. It is long established that "although the complaint did not refer specifically to 'hostile work environment harassment,' it did describe the harassment … experienced in enough detail to put the claim before the court."[211] Plaintiff's complaint clearly put such facts before this Court. Such facts included: (i) Defendant's use of meritless reprimands to harass Plaintiff[212] and (ii) Gaston's racially charged reaction to Plaintiff's request to be in a movie.[213]

In order to establish a hostile work environment claim pursuant to Title VII, Plaintiff must establish: (1) he is a member of a protected class, (2) he suffered unwelcome harassment, (3) the harassment was based on race/gender, (4) the harassment affected his job, and (5) the employer was responsible.[214] Hostile work environment harassment occurs when "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[215]

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[210] *See* Gibbs Declaration, ¶ 3.
[211] *See Cruz v. Coach Stores, Inc.*, 202 F.3d 560 (2nd Cir. 1999).
[212] (Complaint ¶¶ 19-31).
[213] (Complaint ¶ 24).
[214] *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002).
[215] *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 991 (8th Cir.2003) (internal quotations omitted).

"In determining whether a workplace constitutes a hostile work environment, courts must consider the following circumstances: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[216]

Gaston's department had a "white out" policy to purge the WCSD of whites.[217] Gaston, as well as those working on his orders, had a history of tormenting whites with meritless reprimands.[218] Plaintiff complained to his black supervisor, Mack White, but White merely responded he was following Gaston's orders.[219]

In addition, Gaston also viewed whites as the enemies. When Plaintiff asked about portraying a deputy in a movie production, Gaston lost his cool.[220] He claimed the producer was racist for not asking a black deputy.[221] He claimed it was his county and a black would play the role.[222] He then hung up on Plaintiff. Plaintiff did not fill the role as it went to a black deputy.[223]

Gaston also refused to transfer white deputies so they could further their career. Though they stated roughly around the same time, the black Mack White was transferred to many different posts with the department and was a shift supervisor at the time Plaintiff was fired.[224] Plaintiff, of course, was a road deputy, the same position he held in 2006, when he was fired. Former deputy Stillman also stated he was barred from trying to expand his career in the department.[225]

In addition, Gaston oversaw a department in which whites were regularly mocked. Chief Deputy Redman referred to whites as slave owners and told whites they were not welcomed at the

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[216] *Id.*
[217] *See* Gibbs Declaration, ¶ 3.
[218] *See* White Declaration, ¶ 16.
[219] *See* Wigginton Depo. p. 120.
[220] *Id.*, 131-32, 134, 137-38.
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*, pp. 23-34. *See also* White Depo., pp. 6-7.
[225] *See* Stillman Depo., ¶¶ 5-9.

WCSD. This stemmed from a belief that whites treated blacks poorly in the department some years ago. It led to a "white out" policy to remove whites from the department.

C. Retaliation

Retaliation claims based on circumstantial evidence are developed through a burden-shifting construct.[226] To establish a *prima facie* case for retaliation, an employee must show "1) that she engaged in a protected activity[227]; 2) that an adverse employment action occurred; and 3) that a causal link existed between the protected activity and the adverse action."[228] If the plaintiff sets out a *prima facie* case, the burden shifts to the employer to "state a legitimate non-retaliatory reason for its action."[229] After the employer states the reason, "any presumption of retaliation drops from the case" and the burden shifts back to the employee to show that the "stated reason is actually a pretext for retaliation."[230]

Plaintiff engaged in protected activity when he complained about the way whites were treated to his black supervisor, Mack White.[231] After that complaint, Plaintiff was issued two baseless reprimands and ultimately fired, all within a period of seven months.

"[A] plaintiff need not prove that his protected activity was the sole factor motivating the employer's challenged decision in order to establish the 'causal link' element of a *prima facie* case."[232] Plaintiff has demonstrated that within a close proximity of complaining to Mack White, he was

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[226] *Septimus v. Univ. of Houston*, 399 F.3d 601, 610 (5th Cir. 2005).

[227] An employee has engaged in a "protected activity" when she "opposed any . . . unlawful employment practice" within the definition of 42 U.S.C. § 2000e, or "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" involving 42 U.S.C. § 2000e. 42 U.S.C. § 2000e-3. See also Byers v. Dallas Morning News, Inc., 209 F.3d 419, 427-28 (5th Cir. 2000).

[228] *Id.* (*citing Pineda v. United Parcel Service, Inc.*, 360 F.3d 483, 487 (5th Cir. 2004)). *See also Hockman v. Westward Comm 'ns, LLC*, 407 F.3d 317, 330 (5th Cir. 2004).

[229] *Id.* at 610.

[230] *Id.* at 610-11 (*citing Pineda*, 360 F.3d at 487).

[231] 42 U.S.C. § 2000e-3. *See also Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427-28 (5th Cir. 2000). *See also* Wigginton Depo. p. 120.

[232] *Yerby v. University of Houston,* 230 F.Supp.2d 753, 768 (S.D. Tex. 2002)(*citing Long v. Eastfield Coll.,* 88 F.3d 300, 305 n.4 (5th Cir. 1996)).

issued baseless reprimands and then terminated. A jury can infer the decision to demote Plaintiff was due to, or partially motivated by, his protected activities.

D. Same-Actor Inference

Due to the overwhelming weight of evidence to support reverse-racism, it is anticipated that Defendant, in their rebuttal, will argue the same-actor inference. This is a fool's errand.

"While evidence of such circumstances is relevant in determining whether discrimination occurred, we decline to establish a rule that no inference of discrimination could arise under such circumstances. Instead, we prefer to look at the evidence as a whole, keeping in mind the ultimate issue…"[233] Moreover, that same actor inference is not itself evidence and does not apply to situations where the employee acts differently than the employer expected or where the employer's opinion undergoes a change.[234]

Plaintiff argues that Gaston had issues with whites that did not know their place in the WCSD. Just like Gaston had to take the unfair treatment of his white superiors, Gaston expected the whites under his watch to take his unfair treatment in silence. Plaintiff, however, didn't fit the mold. Plaintiff vocally applied for transfers, questioned his reprimands, and told his black supervisors that "whites were treated like s***." This, of course, did not fit into the mold of a white deputy in the black-controlled WCSD. A jury, therefore, can infer that Plaintiff's refusal to assume the role of a subservient white deputy caused Gaston to change his opinion of Plaintiff.

II. MALICIOUS INTERFERENCE WITH EMPLOYMENT.

Mississippi law recognizes a cause of action against an individual who, for reasons unrelated to being a legitimate work requirement, maliciously interferes in the employment rights of another.[235] *Levens* simply follows general Mississippi law, holding one liable if he maliciously interferes with a

[233] *Id.* (*citations omitted*). *See also Russell v. McKinney Hosp. Venture,* 235 F.3d 219, 228 n. 16 (5th Cir. 2000) (noting same actor inference does not necessarily rule out discrimination)
[234] *Johnson v. Zema Sys. Corp.,* 170 F.3d 734 (7th Cir. 1999).
[235] *Levens v. Campbell*, 733 So.2d 753, 760 (Miss. 1999).

contract.[236] According to *Levens*, supra, the elements of such a claim are (1) that the acts were intentional and willful; (2) that the acts were calculated to cause damages to plaintiff in his lawful business; (3) that the acts were done with the unlawful purpose for causing damage and loss, without right or justifiable cause on defendant's part; or (4) that actual loss occurred.[237]

In this case, Gaston interfered with Plaintiff's rights in two ways: (i) he forced Plaintiff out of the WCSD and (ii) sabotaged Plaintiff's efforts to find another job in law enforcement. First, as stated *supra*., Plaintiff has put forth facts demonstrating that Gaston purged him from the WCSD because he was white. Plaintiff, thus, incorporates his factual argument detailed in his Title VII analysis into this section of his brief.

Second, Plaintiff can show that Gaston went out of his way to prevent Plaintiff from finding another job in law enforcement. Plaintiff applied for a job with the Leland Police Department, but that job was denied.[238] The police chief hiring him told Plaintiff that the WCSD was fighting his hire.[239] Plaintiff applied for a position with the Greenville Police Department, but the police chief there stated, "I don't want any problems with anybody."[240] Plaintiff also applied for a job with the Indianola Police Department and had taken a drug test, but was told by the department that his hire was canceled after Gaston personally intervened.[241]

In addition to Plaintiff, former deputy Stillman stated that Gaston harassed him after he resigned. Stillman stated that he had firsthand knowledge that Gaston personally interfered with his

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[236] *See Collins v. Collins*, 625 So.2d 786, 690 (Miss. 1993); *Shaw v. Burchfield*, 481 So.2d 247, 254-55 (Miss. 1985); *Morrison v. Mississippi Enterprise for Technology, Inc.*, 798 So.2d 567, 574-75 (Miss. App. 2001); *Hollywood Cemetery Ass'n v. Board of Mayor and Selectmen of City of McComb City*, 760 So.2d 715, 719 (Miss. 2000).
[237] *Wong v. Stripling,* 700 So.2d 296, 303 (Miss. 1997).
[238] *See* Wigginton Depo., pp. 151, 153.
[239] *Id.*
[240] *Id.*, p. 154.
[241] *Id.*, p. 155.

post-WCSD job search with the levee board.[242] Stillman also stated that, after he posted a criticism of Gaston performance as sheriff on Facebook, Gaston attempted to have him terminated.[243]

CONCLUSION

For all the reasons stated herein, Plaintiff requests that Defendant's Motion for Summary Judgment be denied.

Respectfully Submitted,

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[242] *See* Stillman Declaration, ¶¶ 12-13.
[243] *Id.*, ¶¶ 14-18.

CERTIFICATE OF SERVICE

I, Joseph R. Murray, II, attorney for Plaintiff, do hereby certify that I have filed the forgoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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Respectfully submitted this the 4th day of April, 2013,

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