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

JEFFREY WIGGINGTON **PLAINTIFF**

V. **CIVIL ACTION NO. 4:12CV51-SA-JMV**

WASHINGTON COUNTY, MISSISSIPPI; SHERIFF MILTON GASTON, in his official and individual capacities; and WASHINGTON COUNTY SHERIFF'S DEPARTMENT **DEFENDANTS**

DEFENDANTS' REBUTTAL MEMORANDUM OF AUTHORITIES IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COME NOW, Defendants, by and through counsel, and submit this Rebuttal Memorandum of Authorities in Further Support of their Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56.

INTRODUCTION

While Plaintiff would have this Court believe he was a victim of racial discrimination in his employment, suffering from such behavior in silence, the undisputed facts and evidence show Plaintiff was only a victim of his own decision-making, as well as a liability for the Department in the eyes of the public. Rather than take responsibility for his own inappropriate behavior and the disrepute he brought upon the Department, Plaintiff and his counsel have attempted to further damage and discredit the Department and tarnish the record of an elected official who has spent his entire career in public service for Washington County through the use of groundless statements and accusations, hearsay, innuendo, mis-characterization of facts, inadmissible evidence, and rhetoric. However, as discussed more fully below, Plaintiff and his counsel's rhetoric does not preclude summary judgment in this matter.

ARGUMENT AND AUTHORITIES

I. Race Discrimination

A. *McDonnell Douglas Framework*

The *McDonnell Douglas* test is appropriately applied where a plaintiff wishes to prove race discrimination under Title VII through circumstantial evidence. *Morris v. Monotech of Miss., Inc.*, 2006 WL 3690741 (N.D. Miss. 2006). Thus, a plaintiff must show (1) he is a qualified member of a protected group; (2) he was qualified for the position held; (3) he was discharged from the position; and (4) he was replaced by someone outside the protected group." *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000). If a plaintiff satisfactorily proves these factors, the burden then shifts to the employer to offer a legitimate nondiscriminatory reason for terminating the plaintiff. *Id.* After such a proffer, the plaintiff must then "persuad[e] the trier of fact by a preponderance of the evidence that the employer intentionally discriminated against h[im] because of h[is] protected status. *Id.*

The fourth prong of the *McDonnell Douglas* test has been interpreted to allow a plaintiff to demonstrate either replacement from someone outside the protected class or that other similarly situated employees outside the protected class were treated more favorably. *House v. Huntington Ingalls, Inc.*, 482 Fed. Appx. 937 (5th Cir. 2012).

Plaintiff contends he has fully satisfied the above enumerated four prong, establishing his prima facie case of race discrimination under Title VII. While Plaintiff has demonstrated he was a qualified member of a protected group, was qualified for the position held, and suffered an adverse employment action, Plaintiff has not satisfied the fourth prong and demonstrated he was either replaced by someone outside the protected group or that similarly situated employees were

treated differently. Plaintiff was replaced by Todd Weeks, a Caucasian male. **Exhibit F to Motion**, Response to Interrogatory No. 20. Deputy Weeks was even assigned Plaintiff's SO#, which is the only number the Department uses to identify its deputies. *Id.* Thus Plaintiff cannot satisfy this fourth prong by proving replacement outside the protected class.

Plaintiff acknowledges he cannot satisfy the fourth prong by demonstrating replacement by someone outside the protected class. Rather, Plaintiff attempts to satisfy the prong by showing similarly situated persons outside the protected class were treated more favorably than he was, or that he was otherwise discharged because of his race. He claims to make such a demonstration through a string of anecdotes which he contends show a pattern of racial discrimination.

Plaintiff contends he has begun making a *prima facie* case, thereby taking the first steps towards proving the fourth prong, by claiming he, before termination, made complaints about the racial atmosphere in the Department. This, however, is wholly untrue. In his deposition, Plaintiff testified he did not make any formal complaints concerning his treatment in the Department, and, when he did talk to someone with any authority, he testified he did not want his complaints taken up the chain of command or expect them to become formal complaints. **Exhibit A to Motion for Summary Judgment [Doc. # 41]**, Wigginton Depo. at 64. Further, the complaint Plaintiff supposedly made to his "black supervisor," Mack White, was not meant to be a formal complaint. It was merely Plaintiff complaining about how he, personally, was being treated and not how whites in general were being treated, as well as Plaintiff's bemoaning about getting in trouble in a clear attempt to gain leniency from his supervisor. *Id.* at 120-21; *see also* **Exhibit C to Motion for Summary Judgment [Doc. # 41]**, Depo. of Mack White at 10 ("When

he got in the car, he started to cry"). This was in no way a race based complaint by any stretch of the imagination.

Under the guise of some logical inference, Plaintiff attempts to satisfy the fourth prong by arguing Plaintiff was fired because Sheriff Gaston knew his place in the Department as a black man, whereas Plaintiff did not know his place as a white man in the Department under a black Sheriff. How this argument in any way satisfies the fourth prong of the *McDonnell Douglas* framework is a mystery, especially when one considers what it means for one to know his or her place in today's society and because several white deputies received promotions from the Sheriff, as well as the fact that the Sheriff has hired other white deputies, just like he hired Plaintiff. **Exhibit F to Motion for Summary Judgment [Doc. # 41],** Response to Plaintiff's Interrogatories, No. 13. Further, Plaintiff has only surmised that whites who were being promoted knew their place; he was offered no proof whatsoever substantiating such a shameless and bare allegation.

However, Plaintiff continues with his line of reasoning, arguing the statistical data in the Department, i.e. the number of whites in the Department, has decreased over the years and attributes this diminution to the Sheriff's employment practices. This constitutes his attempt to make a disparate impact argument in order to prove his prima facie case under the fourth prong of the *Mcdonnell Douglas* framework. However, his argument fails. What Plaintiff's *cum hoc ergo propter hoc* argument refuses to consider is the fact that the racial makeup of the entire Delta, let alone the Department, has drastically changed over the past years. Plaintiff fails to even consider the changing Delta population and its effect on the decrease of white deputies in the Department. Also, Plaintiff contends the Sheriff's agenda to remove whites from the

Department is bolstered by the fact that he allegedly fired five white individuals the moment he entered office. However, Plaintiff hasn't offered any evidence demonstrating who these individuals were, whether they were all truly white, or whether they were a part of the Sheriff's personal staff, which he would be entitled to replace by statute. As such, his assertions are simply empty and contain no probative value to aid his survival of summary judgment whatsoever.

Plaintiff also attempts to demonstrate he was otherwise discharged due to his race by pointing to several instances where he verbally applied for transfers but did not receive them. As argued by Defendants' in the original Memorandum Brief **[Doc. #42]** a transfer is in no way a promotion. Further, Plaintiff has offered no proof via commendations or other conduct on his behalf which would warrant a promotion or transfer. Instead, Plaintiff believes the heads of the Department are racist against whites because he spent several years there and never received a merit based promotion. The fault of that failure lies on Plaintiff himself, not the Department. The same argument goes for Plaintiff's failure to receive stripes. Plaintiff claims the Sheriff never "gave" him his stripes; realistically, except time spent on the force, what proof has Plaintiff offered that he earned any stripes. The requirement that deputies earn their stripes, even if the earning of these stripes is subject to subjective criteria, is important because a deputy with stripes is in charge of other deputies. If Plaintiff had proven himself, he would have earned his stripes. Of course this is moot, as Plaintiff admitted he never formally applied for any promotion in the first place. **Exhibit A to Motion for Summary Judgment [Doc. # 41]**, Wigginton Depo., pgs. 27-37.

Plaintiff makes all sorts of other inflammatory remarks which he claims clearly

demonstrates a racial motive behind Plaintiff's firing. Many of the statements referred to by Plaintiff in his Response were objected to as irrelevant and inadmissible in Defendants' Motion to Strike [Doc. #47]. However, the insinuation that Sheriff Gaston only kept whites who knew their place and "supported a culture of racial animosity" are wholly unfounded. Plaintiff has offered no proof whatsoever that Sheriff Gaston ever partook in or approved of these allegedly hostile comments made by subordinates. Nor has Plaintiff demonstrated the Sheriff was even aware of such actions within the Department; Plaintiff has already admitted to not making a formal complaint and he cannot point to any other complaint which would have brought such actions to the Sheriff's attention. Plaintiff's contention that Sheriff Gaston saw the world through a "racial lens" simply because he lived with racism in the Department before his election is completely unfounded. Plaintiff construes comments by the Sheriff concerning the disrespect certain white deputies had for him as proof the Sheriff had an agenda against them. If anything, Sheriff Gaston was simply being a realist and demonstrating that he understands many poor, ignorant whites in this area refuse to let go of their racial animosity toward black people, especially those they see in charge. Further, Sheriff Gaston's actions, especially those in promoting other white deputies, demonstrates he has risen above such pettiness.

B. Non-Discriminatory Reason for Firing Plaintiff

A plaintiff attempting to show a non-discriminatory reason for termination is a pretext for discrimination must produce "substantial evidence of pretext." *Cash Dist. Co., Inc., v. Neely*, 947 So.2d 286, 294 (Miss. 2007)(citing *Auguster v. Vermillion Parish Sch. Bd.*, 249 F.3d 400, 402 (5th Cir. 2001). It bears repeating that Plaintiff was fired for one reason, and one reason only: conduct unbecoming of an officer. Plaintiff argues the Defendants' reason for terminating the

Plaintiff is merely pretextual because he believes he was fired for speeding. However, Plaintiff was terminated for conduct unbecoming of an officer because he led a Greenville Police Officer and a Greenville citizen on a high speed chase down Highway one. **See Exhibit D to Motion for Summary Judgment [Doc. # 41]**, Affidavit of David Harmon. Whether Plaintiff wishes to admit it or not, David Harmon saw the officer get behind Plaintiff, and then saw the Plaintiff, who made a series of turns, come barreling down a side street and onto another. *Id.* The implication here is that Plaintiff knew he was being chased by the officer and was desperately trying to evade capture. Plaintiff, in his brief, also claims he fully complied with the officer when confronted by him. However, the officer's notes show otherwise. When the Greenville Police Officer asked Plaintiff what kind of car he was driving, Plaintiff stated "a white truck," knowing full well he was driving the yellow mustang in the parking lot. . **Exhibit B to Motion for Summary Judgment [Doc. # 41]**, Attachments to Gaston Affidavit; **Exhibit A to Motion for Summary Judgment [Doc. # 41]**, Wigginton Depo., pg. 106. Telling a lie such as this can in no way be construed as "fully cooperat[ing] with the officer" as Plaintiff would have this Court believe. Further, Plaintiff admitted to traveling at a high rate of speed on one of the most trafficked roads in town, substantiating the fact that a citizen such as Mr. Harmon may have been concerned by this and chose, by his own volition, to make a complaint concerning Plaintiff's behavior. Once the concerned citizen and the police officer's report found their way to the Department, action had to be taken. According to Sheriff Gaston, Plaintiff's termination for conduct unbecoming to an officer was recommended by Chief Deputy Billy Barber, approved by a three-person Review Board of Plaintiff's co-workers, and ultimately approved by Sheriff Gaston. **Exhibit E to Motion for Summary Judgment [Doc. # 41]**, Gaston Depo., pgs. 42-43.

Plaintiff had shamed the Department in the eyes of the public, necessitating termination under the policies manual. **Exhibit B to Motion for Summary Judgment [Doc. #41]**, Attachments to Gaston Affidavit.

C. Disparate Impact

Plaintiff attempts to use racial percentages in the Department in an attempt to discredit the Department's reasoning for firing Plaintiff. Plaintiff contends there is context for these new percentages; he believed these change in statistics were due solely to Sheriff Gaston's election and to the "black leadership" the Sheriff put in place after his election (interestingly he forgets that former white Sheriff Victor Smith was temporarily a part of Sheriff Gaston's leadership before retirement). Plaintiff also attempts to misconstrue the testimony of Sheriff Gaston, who testified that whites in the area did not want to work for a black sheriff. **Exhibit E to Motion for Summary Judgment [Doc. # 41]**, Depo. of Milton Gaston,17-18. The Sheriff obviously was implying a lot of the whites don't apply because they don't want to work for him because he is black. This does not make him a racist as Plaintiff would have this Court believe. This also is in no way a concession as to how poorly he treated his white deputies. Rather, it's merely a true statement made by a Sheriff who recognizes that some whites have yet to understand or accept racial equality. Further, Plaintiff has still not accounted for the overall change in the racial percentages of Washington County as a whole, which undoubtedly had an affect on the racial percentages of the Department. Yet, despite such an obvious factor on racial percentages, Plaintiff would have this Court believe that the racial disparity in the Department is not due to any uncontrollable, outside factors, but to the Sheriff alone. Such is simply not the case. As such, summary judgment is appropriate on Plaintiff's claim of race discrimination.

Plaintiff attempts to support many of his propositions concerning the alleged racial atmosphere in the Department with anecdotal evidence, hearsay, and other inadmissible or irrelevant forms of testimony. Defendants have filed a motion to strike which addresses each faulty piece of evidence separately and would incorporate those arguments as if fully set forth herein.

D. Mixed Motive

Plaintiff's claim of racial discrimination cannot survive on his alleged mixed-motive alternative argument. As argued above, most of the evidence he relies on to prove such motive is inadmissible as anecdotal or hearsay evidence, or is simply irrelevant in time. Plaintiff again contends the statistics also bolster his point, yet Plaintiff has still not reconciled the change in population statistics in this area with those in the Department. Without more competent evidence, Plaintiff has not demonstrated a mixed-motive alternative to survive summary judgment.

II. Hostile Work Environment

A plaintiff asserting a hostile work environment claim under Title VII must demonstrate "(1) they belong to a protected group; (2) they were subjected to unwelcome harassment; (3) the harassment complained of was based on race; and (4) the harassment affected a term, condition, or privilege of employment." *Frank v. Xerox Corp.*, 347 F.3d 130, 138 (5th Cir. 2003).

It is admitted that Plaintiff belongs to a protected group. However, all other allegations contained within Plaintiff's claim of a hostile work environment are denied. Plaintiff attributes a policy of "white out" to Sheriff Gaston. However, this phrase was first uncovered in an affidavit from Dondi Gibbs and addressed in the Defendant's Motion to Strike [Doc. #47]. Gibbs doesn't even attribute this "policy" to the Sheriff or allege that the Sheriff was aware of it, so it is

remarkable Plaintiff wishes to misconstrue this statement as a policy of Gaston's. He also claims Gaston "oversaw" a Department where whites were openly mocked, but, again, Plaintiff has offered no proof of awareness on the part of Gaston, nor has he offered this assertion in any admissible form of testimony, as argued above and in the Defendants' Motion to Strike [Doc. # 47]. Further, Plaintiff claims Gaston would "torment" whites with merit-less remands. Aside from the fact Plaintiff has offered no proof of the tormenting of whites by Gaston, all that is relevant to this proceeding is how the Plaintiff was treated.

Looking at each of Plaintiff's reprimands within his personnel file, it is obvious the Department had ample grounds to reprimand the Plaintiff for his continual wrong doing. **Exhibit B to Motion for Summary Judgment [Doc. # 41]**. These reprimands were not meritless, but were necessary to obtain and maintain order from Plaintiff, who had been playing loose and fast with the Departmental policies. However, being reprimanded when one is clearly in violation of policies or procedures is not harassment, it is discipline necessary to keep an employee in line.

Plaintiff also seeks to bring up the movie incident again. However, Plaintiff's assertions concerning the Sheriff's reaction to his request to partake in the movie are wholly unsubstantiated. In fact, Sheriff Gaston testified he had nothing to do with any of his deputies playing a part in a movie while off duty and would not have made the comment Plaintiff attributes to him. **Exhibit E to Motion Summary Judgment [Doc. # 41]**, Gaston Depo. at 51.

Plaintiff claims the environment was hostile because he never received a transfer when Mack White would. However, Plaintiff, again, has failed to demonstrate that he was ever entitled to a transfer due to meritorious work. Plaintiff can also not compare himself with Mack White without further comparing their accomplishments; to do so would be similar to comparing

apples and oranges. As such, summary judgment is appropriate on Plaintiff's claim of a hostile work environment.

III. Retaliation

A plaintiff alleging retaliation under Title VII must demonstrate a *prima facie* case by establishing "(1) he engaged in activity protected by Title VII; (2) that he suffered an adverse employment action; and (3) that a causal connection exists between the protected activity and the adverse employment action." *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000)(citing *Webb v. Cardiothoracic Surgery Assoc.*, 139 F.3d 532, 540 (5th Cir. 1998)). Protected activity is defined by courts as "(1) 'oppos[ing] any practice made an unlawful employment practice by this subchapter,' or (2) 'ma[king] a charge, testif[ying], assist[ing], or participat[ing] in any manner in an investigation, proceeding, or hearing under this subchapter.'" *Id.* (citing 42 U.S.C. § 2000e-3(a)).

By Plaintiff's own admission, he never once made a formal complaint concerning the perceived racial atmosphere he now claims was so pervasive at the Department. However, the Fifth Circuit has decided an informal complaint could constitute protected activity for purposes of a Title VII retaliation claim. *Amanduron v. American Airlines*, 416 Fed. Appx. 421, 424 (5th Cir. 2011). Plaintiff would have this Court believe he complained about "the way whites were treated" to his supervisor, Mack White. It is important to note that, despite Plaintiff's mis-characterization of his own deposition testimony, Plaintiff never complained to Mack White about whites being "treated like crap;" rather, he testified he spoke to Mack about how he was personally tired of being treated poorly, making it a personal and not racial issue. **Exhibit A to Motion for Summary Judgment [Doc. # 41]**, Depo. of Jeffrey Wigginton at 120. However,

Mack only remembers Plaintiff "g[etting] in[to] the car... [and] start[ing] to cry," as well as begging to not be written up. **Exhibit C to Motion for Summary Judgment [Doc. # 41]**, Depo. of Mack White at 10. Further, Plaintiff admitted in his own deposition to only actually complaining in one instance to Evan Smith, who was one of his superiors. **Exhibit A to Motion for Summary Judgment [Doc. # 41],** Depo. of Jeffrey Wigginton at 64. But, Plaintiff could not specifically remember what he was even complaining to Smith about. *Id.* Furthermore, Plaintiff admitted he did not want or expect any action to be taken by Smith. *Id.* He simply characterized his conversation with Smith as two white guys talking about how they were treated by blacks, even though he also admitted Smith never contributed to this conversation or ascribed to the Plaintiff's viewpoint. *Id.* In reality, this appears more to be Plaintiff complaining about what he perceived as racism to another white person who did not agree with him, speaking volumes as to Plaintiff's own character. As such, since Plaintiff did not make a formal complaint or make a complaint which he expected to make it up the chain of command, summary judgment is appropriate on his retaliation claim.

IV. Malicious Interference with Employment

A plaintiff asserting a claim for malicious interference with employment must prove the acts of an individual "(1) were intentional and willful; (2) were calculated to cause damage to the plaintiff engaged in a lawful business; (3) were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant; and (4) resulted in actual damage and loss." *Perkins v. Wal-Mart Stores, Inc.*, 46 So.3d 839, 846 (Miss. Ct. App. 2010)(citing *Hammons v. Fleetwood Homes of Miss., Inc.*, 907 So.2d 357, 361 (Miss. Ct. App. 2004)). A malicious interference with employment claim necessarily requires a plaintiff to prove

"the contract would have been performed but for the alleged interference." *Id.*

As argued above and in the initial Memorandum in Support [Doc. #] Sheriff Gaston did not discriminate or intentionally interfere with Plaintiff's job in any manner. Plaintiff was terminated solely due to his own conduct, conduct which brought disrepute upon the Department in the eyes of the public. His termination had nothing whatsoever to do with his race. As such, Plaintiff's claims for malicious interference of employment against Sheriff Gaston concerning his job at the Department should be dismissed.

With respect to Plaintiff's alleged job opportunities at the Leland Police Department, Greenville Police Department, and Indianola Police Department, Plaintiff has offered no evidence other than his unsubstantiated assertions and rank hearsay with respect to these claims. Plaintiff has offered the testimony of no one in the Leland Police Department with first hand knowledge that could testify Sheriff Gaston personally intervened in Plaintiff's hire. With respect to the Greenville Police Department job, Plaintiff has also offered no firsthand proof. In fact, he could've been denied this job simply due to the fact that a Greenville Police Department officer was involved in a high speed chase with him months before and the Greenville Police Department didn't want the types of problems that came with Wigginton. Finally, and again, Plaintiff has failed to substantiate any involvement by Sheriff Gaston with respect to his failure to obtain employment with the Indianola Police Department and has, again, only offered rank hearsay in support of his position. Without more evidence, Plaintiff's claims for malicious interference with employment are appropriately dismissed on summary judgment.

V. Motion to Strike

The Defendants would like to fully incorporate all arguments made in their Motion to

Strike [Doc. #47] as if set forth fully herein.

CONCLUSION

For the reasons set forth above, this Court should grant summary judgment in favor of the Defendants on all claims.

Date: June 5, 2013

Respectfully Submitted,

WASHINGTON COUNTY, MISSISSIPPI, SHERIFF MILTON GASTON, in his official and individual capacities, and WASHINGTON COUNTY SHERIFF'S DEPARTMENT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **June 6, 2013**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document was served this day on all counsel of record listed below via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized matter for those counsel or parties who are not

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