IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Northern Division

FRANKLIN SAVAGE et al., Plaintiffs, v. POCOMOKE CITY, et al., Defendants.	Case No. 1:16-cv-00201-JFM

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS POCOMOKE CITY, RUSSELL BLAKE, ERNEST CROFOOT, AND BRUCE MORRISON'S PARTIAL MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO BIFURCATE

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INTRODUCTION

The Defendants Pocomoke City, Russell Blake, Ernest Crofoot, and Bruce Morrison (collectively, the "Municipal Defendants") and Plaintiffs agree on one thing: the factual allegations are "daunting." Brief of Pocomoke City, Russell Blake, Ernest Crofoot, and Bruce Morrison in Support of Motion to Dismiss ("Mun. Br.") at 1. But it is not the number of paragraphs that are daunting, as Municipal Defendants contend. Instead, the actual reason is because the facts in this case—pled with great specificity—are so disturbing. Taking everything alleged in the First Amended Complaint ("FAC") as true, and drawing every inference in favor of Plaintiffs, as the Court must, the FAC far surpasses the plausibility line drawn the Supreme Court in *Twombly* and *Iqbal*. The hostile work environment, the lower pay and differential treatment for African-American police officers, and the labeling of those who complained about it as "troublemakers" and the successful vendetta to blackball and then fire Chief Sewell and Officer Savage form a coherent, logical and entirely plausible chain of events. The City's attempt to minimize its role in the discrimination itself and avoid its role in the delegation of its policymaking authority to the Worcester County Criminal Enforcement Team ("CET") should be rejected. No doubt discovery in this case will reveal that the allegations of the FAC are only a whiff of the poisonous atmosphere of racial and retaliatory animus that drove the actions of the nearly all-white power structure in Pocomoke and the tip of a very troubling racial state of affairs in the Pocomoke City Police Department.

The Municipal Defendants' motion to dismiss simply ignores certain allegations of the complaint and improperly draws every inference in favor of the Municipal Defendants. For instance, its rejection of *Monell* liability includes empty citations to several cases (Mun. Br. at 31-32) but not a single reference to the Plaintiffs' factual allegations or the five different counts that relate to *Monell* liability. The City's defense to First Amendment retaliation claims is that

Plaintiffs complaints were primarily internal (*id.* at 28-30)—a fact that is demonstrably false on the pleadings now before this Court, but legally irrelevant even if true. And the opening to the Municipal Defendant's motion boldly seeks dismissal of six of the seven counts of the First Amended Complaint ("FAC") based entirely on the text of one sub-caption contained in those counts and without a single reference to the factual allegations or the required legal elements underlying those counts. *Id.* at 16-17.

Unfortunately for Defendants, they are not free to ignore the factual allegations that they find inconvenient. In February 2012, Pocomoke City officials detailed Officer Franklin Savage to the CET, where he was the first and only African American member of a seven-member task force. In doing so, Pocomoke City delegated its final policymaking authority over Officer Savage's duties and work environment to the CET and its two supervisors, who were themselves detailed from the Worcester County Sheriff's Office and the Department of Maryland State Police. Those supervisors communicated their evaluation of then-Detective Savage's performance to Chief Sewell. Pocomoke City joined the CET to attack drug-trafficking on a county-wide basis for the benefit of the citizens of Pocomoke City. At all times, then-Detective Savage was subject to the authority of the City Manager, who could still order Savage demoted or even fired. Although the City delegated its policymaking authority over Savage's work duties and environment to the CET, its delegation did not insulate it from liability for constitutional violations. Any other result would allow local jurisdictions to game the system and argue that *no one* employed a law enforcement task force member, thus allowing open season on the violation of federal civil rights.

As to the racial discrimination itself, for nearly 28 months, Officer Savage experienced routine and unremitting acts of racial harassment and discrimination from other members of the

CET. Most troubling of all, the supervisors and final policymakers on the CET—those officials who established its workplace policies and customs—were responsible for many of the most troubling of those acts. Under well-settled principles of municipal liability, Pocomoke City remained at all times liable for the unconstitutional actions of a third party task force to which it had delegated its final policymaking authority over Officer Savage.

The unceasing race-based hostility eventually led Officer Savage to resign from the CET in June 2014, at which point he returned to the Pocomoke City Police Department. In his resignation letter, he reported the pattern of race-based harassment and discrimination and expressed hope that his act of resignation might ensure that such discrimination would never again be seen in the CET. Soon after, he filed racial discrimination charges against the Worcester County Sheriff's Office and the State's Attorney for Worcester County with the Equal Employment Opportunity Commission ("EEOC").

One tragic aspect of the racial discrimination in this case is that Officer Savage's reporting of the racial discrimination only made it worse. Upon his return to the Pocomoke City Police Department, City Manager Russell Blake—fully aware of the racial discrimination and retaliation inside the CET and Worcester County law enforcement community—made it his mission to retaliate against Officer Savage for his decision to report it. Among other acts, Blake ordered investigations into patently false rumors spread about Officer Savage, ordered psychiatric evaluations, and pressured Pocomoke City Police Chief Kelvin Sewell to demote Savage, deny him any overtime, and reassign him to the midnight shift. When Chief Sewell refused to carry out Blake's edicts on the grounds that they were pretext for retaliation, Blake referred to Sewell as an "ungrateful-ass nigger." Despite Chief Sewell's resistance, however, Blake pressed on and enlisted support from Mayor Bruce Morrison; the two ordered Officer

Savage's demotion on February 9, 2015. Thus, a stellar undercover narcotics investigator, who had helped significantly reduce drug-trafficking and the associated street crime in Pocomoke City, was relegated to checking doors alone on the night shift.

Meanwhile, Chief Sewell and Lieutenant Lynell Green's decisions to support Officer Savage created irreversible repercussions for both of them. Chief Sewell testified about Blake's abuse of power and official misconduct at an October 2014 Pocomoke City Council meeting, and his testimony in support of Officer Savage's rights led Blake, Morrison, and others on the City Council to align against him. Chief Sewell repeatedly told the Municipal Defendants that Officer Savage had done nothing wrong, that he was the victim in the matter, and that firing him on that basis would, in the Chief's view, violate federal civil rights protections. On July 1, 2015, Chief Sewell was abruptly terminated at an unannounced and hastily concocted City Council Meeting. The vote was 4-1 to terminate Chief Sewell, with the only African-American member of the Council dissenting. The City has since floated multiple pretextual reasons for Chief Sewell's discharge, none of which bears even cursory scrutiny. Chief Sewell's firing inflamed a community where his leadership had reduced crime and improved relations between the African-American community and the police department. Similarly, Lieutenant Green had his overtime eliminated, had his duties adversely altered, and was ostracized by white officers for his support of Officer Savage.

At the end of the day, this case is about a police officer who excelled in undercover narcotics work on the CET, was promoted to detective, and who received consistently high performance reviews until he made the fateful decision to speak out against pervasive race-based harassment and discrimination. Far from seeking to redress this discrimination, the highest officials in the Pocomoke City government responded to Officer Savage's allegations by making

sure he could no longer perform his job and that anyone who supported him would also be punished. For too long, too many public officials entrusted by law with Officer Savage's welfare and development as a police officer, instead labeled him a "troublemaker" and attacked his credibility in a manner intended to disable his law enforcement career for the rest of his lifetime.

The First Amended Complaint contains seven sufficiently pled counts that relate to the hostile work environment inside the CET and within the Pocomoke City government, and the racial discrimination and retaliation experienced by the Plaintiffs at the hands of the Pocomoke City government and its primary policymakers, Defendants Blake, Morrison, and Crofoot. This discrimination and retaliation meant that African American police officers were paid less, harassed, and retaliated against for multiple years by the highest government officials. Ultimately, two of the three Plaintiffs were terminated and the third resigned due to the stress from the hostile work environment. The City's motion to dismiss suffers from the same attitude that epitomized its officials' conduct in this case—racial discrimination is business as usual and African Americans who complain about it will pay a dear price.

FACTS

Over a one-year span beginning in November 2010, Kelvin Sewell (November 2010), Franklin Savage (April 2011), and Lynell Green (November 2011) all joined the Pocomoke City Police Department. FAC ¶¶ 17-20. Each was quickly recognized for strong performance and promoted. Initially hired as one of two lieutenants, Sewell was promoted to captain on October 1, 2011 and chief of police by December 1, 2011. *Id.* ¶ 19. Green joined the department as an officer, but was promoted to first sergeant on December 6, 2011 and thereafter promoted to one of the two lieutenant positions and as operations manager on February 29, 2012. *Id.* ¶ 20. Savage was assigned as an officer on the CET in February 2012, where he was the first African American member of a combined narcotics unit jointly supervised by members of the

Department of Maryland State Police and Worcester County Sheriff's Office and subsequently promoted to detective around May 2012. *Id.* ¶¶ 18, 19, 53, 58.

1. February 2012 to June 2014: Racial Hostility in the CET

When Officer Savage was assigned to the CET, the assignment was approved by Chief Sewell, Pocomoke City Manager Russell Blake, and Pocomoke City Mayor Bruce Morrison. Pocomoke City delegated its policymaking authority over Officer Savage to the CET, including the authority to set his personnel policies, assign work duties, establish work environment and practices, and communicate evaluations of his performance back to Pocomoke City. *Id.* ¶¶ 58-59. Besides Officer Savage, the CET included two supervisors, Nathaniel Passwaters and Patricia Donaldson, and four other members. *Id.* ¶¶ 62-63. Officer Savage was the only Black member and the only member from the Pocomoke City Police Department.

Shortly after Officer Savage was assigned to the CET in February 2012, he began to experience racial hostility, racially charged comments, and other acts of racial discrimination within the CET. Supervisors and other members of the CET regularly referred to "niggers" or variations thereof, streamed and laughed at racially charged videos nearly weekly on workplace computers, and took Officer Savage to so-called "KKK Lane," where they talked to Officer Savage about Ku Klux Klan activity, nooses, and lynchings; one member even remarked that he kept a chest in his attic with "white sheets and nooses." *Id.* ¶ 66-77. Despite the repeated instances of racial discrimination, his supervisors failed to discipline other CET members and even participated in many of the most egregious acts of racial harassment. *Id.* ¶¶ 77, 80, 83, 84.

Unable to address this racial hostility through the policymakers inside the CET, Officer Savage began reporting some of the most troubling incidents of hostility outside the CET in April 2014. *Id.* ¶¶ 84-86. In April 2014, he reported to Chief Sewell that he found a fake food

stamp in his desk drawer that depicted President Obama and which he took to be ridiculing African Americans. *Id.* ¶ 86. In May 2014, one CET member, Brooks Phillips, referred to Officer Savage as "nigga" in a text message, which Savage immediately reported to Chief Sewell. *Id.* ¶ 88. Although Chief Sewell did not have authority to set policy within the CET, he attempted to help Officer Savage by writing a letter to the Department of Maryland State Police (one of the CET's policymakers, Donaldson, was detailed from the Department of Maryland State Police). *Id.* ¶ 89.[1]

The perpetrators of the racially hostile environment within the CET did not respond positively to word that Officer Savage had reported their behavior. *Id.* ¶ 90. Immediately after finding out about his reports, they began spreading false rumors, accusing Officer Savage of misconduct, and even drug use. *Id.* ¶¶ 90-95. Practically overnight, Officer Savage went from receiving consistently positive reviews on his performance (*id.* ¶¶ 101-103 & Ex. E) to being the target of rumors of malfeasance, with a direct temporal link from his outside reports about racial discrimination to the beginning of performance criticisms from other members of the CET (*id.* ¶ 90-95). Around the same time, in April 2014, the State's Attorney for Worcester County—who was responsible for prosecuting cases investigated by the CET—read a series of letters from a suspect and said aloud the word "nigga" more than ten times in a single meeting, "placing particular emphasis on" the word. *Id.* ¶¶ 105-112.

Facing an escalation in the hostility that he had already experienced for over two years, Officer Savage resigned from the CET on June 12, 2014 and thereafter returned to the Pocomoke City Police Department. His resignation letter was succinct, "citing the repeated use of the word 'nigger'" and the hostile work environment within the CET and expressing the hope that his

[1] After an investigation, the Maryland State Police later concluded that a CET member had violated the rules and regulations of the Maryland State Police with unbecoming conduct for the text message incident. *Id.* ¶ 117. There is no evidence that the MSP imposed any punishment on Defendant Phillips for his actions.

resignation might mean that such racial discrimination would never again occur in the CET. *Id.* ¶ 113. But his resignation did not stop the other members of the CET, who continued to spread false rumors targeting Officer Savage. *Id.* ¶ 114-15. Since they no longer controlled Officer Savage's conduct, the CET members spread the rumors to other members of the Worcester County law enforcement community, including members of the Pocomoke City government.

2. Officer Savage's Return to the Pocomoke City Police Department

By this time in mid-2014, members of the Pocomoke City government, including Blake, Morrison, and other members of the Pocomoke City Council, knew about the allegations of racial hostility within the CET and Officer Savage's acts of reporting it. *Id.* ¶ 120. Instead of investigating Officer Savage's allegations, however, the members of the Pocomoke City government penalized Officer Savage for his temerity in reporting the racial harassment. *Id.* ¶ 121. Blake was the earliest and most frequent to retaliate in the Pocomoke City government. Seizing on one of Passwater's false rumors that Officer Savage had used a false identity, Blake demanded that Chief Sewell initiate an disciplinary investigation of Savage. *Id.* ¶ 120. Around the same time, the Pocomoke City employee database was updated to demote Officer Savage from Detective to Officer, a database over which Blake exercised final control. *Id.* ¶ 122.

On July 21 and 22, 2014, Officer Savage filed complaints with the EEOC against the Worcester County Sheriff's Office and against the State's Attorney for Worcester County. *Id.* ¶¶ 123-24. Blake's acts of retaliation did not stop—but instead intensified—after the EEOC complaints. Blake told Chief Sewell that Officer Savage would no longer be called to testify in court (*id.* ¶ 137), and he instructed Chief Sewell to remove Officer Savage from narcotics work entirely and reassign him to the undesirable midnight shift as a patrol officer whose only role

would be to confirm that doors were locked (*id.* ¶ 142), all this despite the consistently positive past performance reports given to Officer Savage (*id.* Ex. E).

When Chief Sewell resisted these orders, Blake called him an "ungrateful ass nigger" and instigated heated arguments with Chief Sewell beginning around August 2014. *Id.* ¶ 143. Blake continued to pressure Chief Sewell to remove Officer Savage from narcotics work in September 2014, and the combination of repeated acts of retaliation from Blake, members of the CET, and the State's Attorney led Officer Savage to request sick leave on September 11, 2014. *Id.* ¶ 150. Blake, still seeking to penalize Officer Savage, ordered that Savage see a psychiatrist before being allowed to return to active duty. *Id.*

3. *EEOC Proceedings and Retaliation Against Lieutenant Green and Chief Sewell*

On October 1, 2014, Officer Savage attended an EEOC mediation related to his EEOC complaint against the Worcester County Sheriff's Office. *Id.* ¶ 151. Lieutenant Green also attended to support his colleague, and the Worcester County Sheriff's Office deputies attending the mediation expressed open hostility to both Officer Savage and Green, stating that they were the causes of Pocomoke City's problems. *Id.* ¶ 152. By this point, word had leaked to the entire Pocomoke City Council about the problems being confronted by the Plaintiffs, and the Council called a special meeting on October 14, 2014. Just hours before the meeting, Chief Sewell was ordered to testify to the mayor, city manager, and entire city council. *Id.* ¶ 156. Because it was a specially called meeting, there was no agenda or minutes for the meeting, but one of the primary topics was an investigation into Blake's conduct in taking adverse actions against Officer Savage. *Id.* ¶¶ 156-57. In his testimony, Chief Sewell raised concerns that Blake was retaliating against Officer Savage for protected acts of reporting racial discrimination. He testified that there was no performance-based rationale for the retaliation, which occurred on a near daily

basis. *Id.* ¶ 159. After being accused of abuse of the city manager position, Blake became very upset and verbally confronted Chief Sewell in front of the council. *Id.* ¶¶ 159-60.

Yet the public confrontation did nothing to alter Blake's retaliatory conduct. Instead, he continued to order adverse employment actions against Officer Savage after the City Council meeting. *Id.* ¶ 161. Beginning at this time, he enlisted others to help; Morrison also joined in Blake's campaign of retaliation, and they together worked with the four white members of the City Council to take adverse action against Officer Savage as well as Lieutenant Green, including capping their overtime in mid-January 2015 (while no white officers had their overtime similarly capped). *Id.* ¶¶ 161, 163. Concerned about the escalation of hostilities, Chief Sewell reported Blake's retaliation and race discrimination to other individual City Council members to try to prevent Blake's continued harassment of Officer Savage. *Id.* ¶ 162. After months of pressuring Chief Sewell to demote Officer Savage without success, finally, on February 9, 2015, Blake and Morrison together ordered Chief Sewell to demote him. *Id.* ¶ 164-65 & Ex. I. A junior officer who had been trained by Officer Savage, and who had less experience and qualifications, was promoted to replace Officer Savage. *Id.* On March 9, 2015, Chief Sewell filed his own EEOC charges against Pocomoke City and the Worcester County Sheriff's Office. *Id.* ¶ 166.

4. *Disparate Treatment of African Americans in Pocomoke City Police Department*

Among other charges, Chief Sewell's EEOC complaint alleged disparate treatment in employment terms by the Pocomoke City Police Department. Specifically, despite a significant improvement in crime statistics during his tenure as police chief, Chief Sewell did not receive annual raises, compensatory time, or paid health insurance, as similarly situated White police chiefs had in the past. *Id.* ¶ 46. Although Chief Sewell received a single pay raise when

promoted to chief in December 2011, he did not receive a raise thereafter, unlike his predecessor White police chief, who had received a raise annually or near annually. *Id.* ¶ 47. Nor did he receive an employment contract defining benefits, such as severance pay and health care, as past White Pocomoke City police chiefs had. *Id.* ¶ 48.

Moreover, Chief Sewell also had personal knowledge that other African Americans in the Pocomoke City Police Department were paid less than similarly situated White members. Annually, Chief Sewell submitted a budget to Blake, who had final authority for determining salaries. *Id.* ¶¶ 43-44. On more than one occasion, Chief Sewell recommended raises for Officer Savage and Lieutenant Green and White members of the police department in the same budget request, but Blake rejected the salary increases for the two African Americans while granting raises for other White members who had similar performance and qualifications. *Id.* ¶ 43. Instead of providing explanations for his decisions, Blake returned a single, handwritten response that singled out African American members by denying their raises. *Id.* ¶ 44.

5. *Events Leading to Termination*

After Chief Sewell's EEOC complaint, events occurred in quick succession that eventually resulted in Sewell's and Officer Savage's terminations. On March 12, 2015, Chief Sewell received a note on his windshield stating that Blake and other Councilmembers were seeking to get rid of him, and that Blake had called Chief Sewell a "smart nigger chief" and said he was "done [with] all nigger police." *Id.* ¶ 167 & Ex. J. When Chief Sewell complained to a member of the Pocomoke City Council on April 10, 2015 that Officer Savage was being penalized for exercising federal protected civil rights, the council member stated that Lieutenant Green was also becoming a problem, but that once Green and Officer Savage were gone, the police department would be okay. *Id.* ¶¶ 168-69. The councilmember also implied that Chief

Sewell would be ousted if he didn't start doing what Blake and other councilmembers wanted, such as by firing Green and Savage. *Id.* By May 3, 2014, Officer Savage began to hear that Blake and Morrison were circulating a petition to terminate both Savage and Lieutenant Green. *Id.* ¶ 170. Although Blake resigned as city manager on June 30, 2015—before completing Savage's termination—he was successful in convincing other council members to terminate Chief Sewell, which occurred on July 1, 2015. *Id.* ¶¶ 172-73. Morrison issued the official termination letter, and the city council voted 4 to 1 to approve Chief Sewell's firing (the only African American member of the city council dissented from the majority, repeatedly and publicly stated that the reasons given for Chief Sewell's termination were entirely pretextual). *Id.* ¶ 173-76. The firing of Chief Sewell was widely protested in Pocomoke City due to Chief Sewell's excellent reputation and law enforcement record. *Id.* ¶ 177. After Blake's departure, the final pieces for Officer Savage's termination that had been begun by Blake finally fell into place. By this time, Officer Savage had been demoted to foot patrol, was unable to perform arrests, was refused backup by Worcester County, and had been reduced in role to all but the most menial tasks due to the discrimination and retaliation of Blake and others in the Worcester County law enforcement community. *Id.* ¶ 186. Then, a nearby county began investigating Officer Savage in August 2015 simply because he had accurately described the April 2014 incident with the State's Attorney in a letter to the Attorney Grievance Commission. *Id.* ¶ 180. He was interrogated as part of that investigation in October 2015, and the State's Attorney told the new city manager, Ernie Crofoot, that Officer Savage was useless as a police officer, would never again testify in court, and that he should be terminated. On or about October 16, 2015, several days after his conversation with the State's Attorney about Savage, Crofoot fired Officer

Savage. *Id.* ¶¶ 183-84. None of the required procedures of the Law Enforcement Officer's Bill of Rights were followed in the firing of either Chief Sewell or Officer Savage. *Id.* ¶¶ 186-87.

STANDARD OF REVIEW

A party seeking dismissal under Fed. R. Civ. P. 12(b)(6) must show that, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). All complaints must meet the "simplified pleading standard" of Rule 8(a)(2), which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

To determine whether a complaint meets this standard, a court first must divide genuine factual allegations, which are entitled to deference, from "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *quoted in, e.g.*, *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013). Next, the court must "assume [the] veracity [of the genuine factual allegations] and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. A complaint will survive when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 678. A court must "draw on its judicial experience and common sense" to determine whether a reasonable inference can be made, and thus whether the pleader has stated a plausible claim for relief. *Id*. at 679.

In applying its experience and common sense, a court must accept all genuine factual allegations as true and construe all facts and derived reasonable inferences in the light most favorable to the plaintiff. *See Tobey*, 706 F.3d at 390. Finally, if "the motion to dismiss involves 'a civil rights complaint, [a court] must be especially solicitous of the wrongs alleged and must

not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged.'" *Hall v. Burney*, No. 11-6566, 2011 WL 5822176, at *1 (4th Cir. Nov. 18, 2011) (quoting *Edwards*, 178 F.3d at 244); *accord Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243, 248 (4th Cir. 2005); *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002). That context is highly salient in this case.[2]

ARGUMENT

I. FAR FROM CONFLATING DISCRIMINATION AND RETALIATION, THE AMENDED COMPLAINT PLAINLY PLEADS WELL-ESTABLISHED RIGHTS

The Municipal Defendants express confusion about whether they are being accused of racial discrimination or retaliation in six different counts, on the grounds that these claims are "subject to differing analytical frameworks." Mun. Br. at 16. But the root of their confusion is their strategic decision to pursue a broad and undifferentiated attack on all six counts simultaneously. By glossing over the separate wrongs alleged in each count, it is the Defendants that have conflated separate constitutional routes to recovery.

First, "the Equal Protection Clause of the Fourteenth Amendment confers upon public sector employees a right to be free from employment discrimination on the basis of race and violations of such rights are actionable under § 1983." *Maupin v. Howard Cty. Bd. of Educ.*, No. CIV.A. BPG-08-2203, 2010 WL 9460565, at *10 (D. Md. July 15, 2010), *aff'd sub nom. Maupin v. Howard Cty. Pub. Sch. Sys.*, 420 F. App'x 227 (4th Cir. 2011) (citing *Keller v. Prince George's Cnty.*, 827 F.2d 952 (4th Cir. 1987)); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("[The Equal Protection Clause's] central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race.").

[2] The Municipal Defendants have not challenged the sufficiency of Count VIII for a violation of the Fair Labor Standards Act, of which Pocomoke City, Blake, and Morrison are the only named defendants. The sufficiency of those allegations is therefore not in question.

The first three counts sufficiently alleged facts supporting racial discrimination by Pocomoke City, Blake, and Morrison, based on three different Equal Protection violations:

- Count I alleges that Pocomoke City unconstitutionally subjected Officer Savage to a hostile work environment within the CET. In assigning Officer Savage to the CET, Pocomoke City delegated its final policymaking authority with respect to Officer Savage's work environment to the CET, which was under the supervision of the Worcester County Sheriff's Office and the Department of Maryland State Police. FAC ¶ 58-59. As a result of the delegation, the CET's policies and customs related to Officer Savage's work duties and environment constituted the official policies and customs of Pocomoke City. Therefore, Pocomoke City is liable for the numerous acts of racial discrimination giving rise to a hostile work environment are alleged. *Id.* ¶¶ 66-104.

- Count II alleges that the terminations of Officer Savage and Chief Sewell were motivated by racially discriminatory intent. Count II names three municipal defendants: (1) Blake, whose racial animus led to the demotion and eventual termination of Officer Savage; (2) Morrison, as his racially discriminatory conduct led to the termination of Chief Sewell; and (3) Pocomoke City, because it has *Monell* liability for the actions of its final policymakers. Plaintiffs have offered direct evidence of Blake's racial animus (*Id.* ¶¶ 143, 167), and properly pled a causal nexus between that animus and Officer Savage's termination.

- Count III alleges that Savage, Green, and Chief Sewell received lesser pay and benefits than similarly situated white police department employees, in violation of their right to equal pay under the Fourteenth Amendment Equal Protection Clause. This count is supported by factual allegations showing that Officer Savage and Lieutenant Green were denied pay raises on multiple occasions that were granted to similarly situated white police department employees. *Id.* ¶¶ 48-52. In denying the raises, Blake singled out only black employees of the police force by summarily denying their proposed raises—with absolutely no explanation—while granting pay raises of similarly situated white officers. *Id.* ¶¶ 44, 50-51, 228. With regard to Chief Sewell, unlike prior white police chiefs, he did not receive yearly raises, did not receive an employment contract, and did not receive health and other benefits. *Id.* ¶¶ 45-47.

The Fourth Circuit also has recognized that retaliation claims are actionable under the Fourteenth Amendment if retaliatory conduct "maintain[s] and reinforce[s]" prior acts of racial discrimination. *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994). In *Beardsley*, a county sheriff had initially engaged in "overt sexual harassment" including "sexual innuendos and proposals" against a female employee. *Id.* at 529. After the employee reported the sheriff's

conduct, his overt acts of discrimination ended, but he began to retaliate instead. In these circumstances, the Court found that the Plaintiff's "sole reliance on the Fourteenth Amendment [for] her claim of retaliation" was properly submitted to the jury because the supervisor's conduct had been a "mixture of retaliation and continued sexual harassment." *Id.* at 530.

The Municipal Defendants' baseless assertion that Plaintiffs have not distinguished retaliation and discrimination claims ignores *Beardsley* and other cases reaching similar results: where the same individuals who are involved in racial discrimination also engage in retaliation, it is often the case that a particular action will have elements of both retaliation and continued racial discrimination. *Williams v. Virginia Dep't of Soc. Servs.*, No. CIV. A. 3:93CV688, 1995 WL 848699, at *24 (E.D. Va. Aug. 21, 1995), *aff'd*, 81 F.3d 153 (4th Cir. 1996) ("To survive the defendants' motion on this equal protection argument, Williams must show that after October 15, 1991, Perry's conduct towards her was a mixture of continued harassment and retaliation."); *Palisano v. City of Clearwater*, 219 F. Supp. 2d 1249, 1256 (M.D. Fla. 2002), *aff'd*, 62 F. App'x 320 (11th Cir. 2003) ("Viewed in the light most favorable to the Plaintiff, Count VI sets forth facts which implicate the narrow protection of retaliation under the equal protection clause.").

For example, in this case, eliminating the overtime of Officer Savage and Lieutenant Green, placing Officer Savage exclusively on night duty and foot patrol, and firing Officer Savage without cause were acts of racial discrimination and retaliation. Because only Black officers and no White officers were subject to these adverse actions, these were acts of racial discrimination in themselves. Because they occurred after Savage had filed his EEOC complaints and Green had supported Savage at an EEOC mediation, and were motivated in part by those complaints, they also qualify as acts of retaliation for previously asserted claims of

violations of federal civil rights. Defendants act as if the concept of actions with mixed-motivations were entirely novel in the law.

Plaintiffs studiously have followed the Fourth Circuit line of cases regarding mixed discrimination and retaliation in Counts I, II, and III. Indeed, Plaintiffs have alleged that the Municipal Defendants, who initially made derogatory remarks, subsequently engaged in conduct that should be classified as a mixture of retaliation and continued racial discrimination. The subsequent retaliation therefore "maintained and reinforced" the initial discrimination. *Beardsley*, 30 F.3d at 530 ("His conduct maintained and reinforced the hostile work environment that he had created.").[3] Under Count I, Pocomoke City delegated final policymaking authority with respect to Officer Savage's work environment to the CET. After the delegation, the policy or custom of the CET that caused the racial discrimination (FAC ¶¶ 66-104) became imputable to Pocomoke City, as did the subsequent acts of retaliation that perpetuated that racial discrimination. In fact, many of the retaliatory acts for the complaints of a hostile work environment in the CET were carried out by the Mayor, City Manager and City Council of Pocomoke, not the CET. Under Count II, Officer Savage has pled that Blake's racially derogatory remarks exhibited animus towards African Americans and were causally connected to adverse employment actions including demotion and eventually, termination. *Id.* ¶¶ 120-165. Count III first alleges that Blake discriminated on multiple occasions against Officer Savage and Lieutenant Green by paying them less than white officers. *Id.* ¶¶ 44, 228. He then abused his

[3] Municipal Defendants rely on *Clark v. Maryland Department of Public Safety* in seeking dismissal, but that case is entirely dissimilar and provides them no help. 247 F. Supp. 2d 773, 776 (D. Md. 2003). In *Clark*, the Plaintiffs failed to allege any provision of federal or state law that provided grounds for recovery, and the factual allegations were inconsistent within each count, leaving this Court without direction as to what right provided the remedy. *Id.* at 776. Here, by contrast, Plaintiffs have clearly stated the statutory or constitutional rights underlying each count, and Municipal Defendants' entire argument hinges on a sub-caption to the count, without any claim that the factual allegations themselves are inconsistent or confusing. Mun. Br. at 16. More troubling still, Municipal Defendants disingenuously ignore *Beardsley*, which allows race discrimination and retaliation to be alleged together under the Equal Protection Clause where the same employer is involved in both.

position of power and perpetuated that disparity by retaliating against Savage and Green as soon as they showed they would no longer stand idly by as discrimination occurred. *Id.* What's more, Blake demoted Officer Savage—further reducing his pay while promoting another officer with less experience and qualifications than Savage—while at the same time working with other council members to cap the overtime and benefits for Savage and Greene. *Id.* ¶¶ 163, 165.

Second, Counts IV and V allege unconstitutional retaliation in response to Officer Savage's and Chief Sewell's exercise of their protected First Amendment rights. Contrary to the Municipal Defendants' unsubstantiated assertion, there can be no confusion about what "analytical framework[]" applies to First Amendment retaliation claims in the Fourth Circuit. Mun. Br. at 16. Instead, the elements of such a claim have been well-established for over twenty years. *See, e.g.*, *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685-86 (4th Cir. 2000) (explaining that a Plaintiff need only "establish three elements in order to prove a First Amendment § 1983 retaliation claim"); *Collin v. Rector & Bd. of Visitors of Univ. of Virginia*, 873 F. Supp. 1008, 1016 (W.D. Va. 1995) ("[T]he court must first outline the well-established elements of a First Amendment retaliation claim."). The applicable analytical framework for Counts IV and V could not be more clear.

Third, Count VII alleges a hostile work environment based on racial discrimination and retaliation under 42 U.S.C. § 1981. As set forth more fully below, *see* Part II.B *infra*, hostile work environment claims based on race discrimination and retaliation are both actionable under § 1981, and they share the same framework. Officer Savage has adequately pled a hostile work environment based on severe and pervasive race-based harassment during his tenure with the CET, and a hostile work environment based on the severe and pervasive retaliatory pattern engaged in by Pocomoke City after he left the CET and returned to the Pocomoke City Police

Department. The basis for hostile work environment claims based on race discrimination and retaliation is well-established, and the frameworks for municipal liability are identical under the different theories.

Simply put, none of the counts require Defendants to "speculate" about the legal rights asserted (Mun. Br. at 17), but only to place the factual allegations into the context of the different well-settled legal rights invoked in each Count. There can be no doubt that the FAC gives the Municipal Defendants more than adequate notice of the time, place and content of specific acts of discrimination and retaliation alleged. That the Municipal Defendants decided to attack all counts in an undifferentiated fashion speaks not to any defect in the FAC, but to their inability to meet or deny the specific allegations of the FAC regarding their immoral and illegal discriminatory actions.

II. COUNTS I AND VII ADEQUATELY ALLEGE THAT POCOMOKE CITY AND INDIVIDUAL CITY EMPLOYEES UNCONSTITUTIONALLY CREATED A HOSTILE WORK ENVIRONMENT

A. Count I Properly Pleads that Pocomoke City is Liable for Unconstitutional Acts of CET Supervisors Who Were Delegated the City's Final Policymaking Authority Over Officer Savage's Work Environment

Defendant Pocomoke City misapprehends the law of municipal liability when it claims that the *Monell* claim in Count I "fails because none of the individual Defendants named in Count I are employed by the City." Mun. Br. at 18. On the contrary, it is well settled that a City retains responsibility for the unconstitutional conduct of a third party—such as the CET in this case—where the City has delegated its final policymaking authority to that entity. In fact, Pocomoke City's exact argument has been rejected by the Supreme Court: if "a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its intended purpose." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988).

The facts alleged in the First Amended Complaint present the common scenario in which a city retains liability for unconstitutional acts of a task force that has been delegated final authority to "develop and administer employment and personnel policies and practices for the City." *Edwards*, 178 F.3d at 245. *See Scott v. Clarke*, 64 F. Supp. 3d 813, 821 (W.D. Va. 2014) ("[W]here a State effectively cedes final decision-making authority with respect to the provision of or failure to provide medical care to a third-party contractor, the contractor's policies and decisions effectively become and constitute the policies and decisions of the State.").

The recent case of *Moody v. City of Newport News* is an informative example. There, the court found that plaintiffs had adequately alleged a delegation from the city on similar facts. 93 F. Supp. 3d 516, 532 (E.D. Va. 2015). In *Moody*, the issue was whether the City was liable for the police chief's delegation of "final policymaking authority with respect to reviewing the use of excessive force" to a Professional Standards Division. *Id.* at 532. Because the chief of police had created an official policy that delegated authority to the Professional Standards Division and required it "to report a summary of complaints to the chief of police" on an annual basis, the court found that the complaint had sufficiently pled that the police chief had delegated his policymaking authority to the Professional Standards Division. *Id.* at 534. Owing to this delegation, the official policies of the Professional Standards Division therefore became the policies of the City, and the City thus could be liable for unconstitutional policies or customs of the Professional Standards Division that related to the area of delegation. *Id.* at 534-35.

As in *Edwards* and *Moody*, Pocomoke City delegated its authority to establish "personnel and employment" policies with respect to Officer Savage to the CET. FAC ¶¶ 58-59; *Edwards*, 178 F.3d at 245. The CET thus became the final policymaker for Pocomoke City, such that the official policies or customs of the CET and its final policymakers are a proper basis to impose

liability on the city. *Id.* at 244-45; *see also King v. Kramer*, 680 F.3d 1013, 1020 (7th Cir. 2012) (finding that the county could not "shield itself from § 1983 liability by contracting out its duty to provide medical services" because the contractee's "policy becomes that of the County if the County delegates final decision-making authority to it" (citation omitted)). In Count I, Officer Savage has pled that racial hostility was an official policy and custom within the CET. The acts of racial discrimination were widespread and the highest policymakers in the Task Force themselves participated in and initiated some of the most egregious discriminatory acts. FAC ¶¶ 66-104. Even assuming Municipal Defendants are correct that "none of the individual Defendants named in Count I are employed by the City" (Mun. Br. at 18), that fact is irrelevant as a legal matter to *Monell* liability. Individual defendants in *King* or *Moody* were not employed by the municipal defendants in those cases either. Pocomoke City cannot shield itself from liability for unconstitutional acts of the CET merely by delegating its final policymaking authority with respect to Officer Savage.

B. Count VII Sufficiently Alleges that the Municipal Defendants' Pattern and Practice of Retaliation Created a Hostile Work Environment in Violation of 42 U.S.C. § 1981

Municipal Defendants relatedly contend that, because "Mr. Savage's time with the [CET] . . . provid[es] the factual underpinning" of his § 1981 claim, Morrison, Blake, and Crofoot, cannot be held liable. Mun. Br. at 19. But Municipal Defendants misread the allegations in the First Amended Complaint and misunderstand the elements of a claim under 42 U.S.C. § 1981.

As a factual matter, Municipal Defendants wholly ignore the factual allegations in Count VII. While the severe and pervasive pattern and practice of alleged race-based discrimination began while Officer Savage was detailed to the CET (FAC ¶ 279), the Pocomoke City Defendants contributed to the hostile work environment by engaging in retaliation against

Officer Savage after he left the CET and returned to the Pocomoke City Police Department (*id.* ¶ 276-278). This pattern and practice extended well after Officer Savage's departure from the CET in June 2014. *Id.* ¶ 277. Thus, Municipal Defendants' error is to strip paragraph 279 in Count VII entirely out of its context within Officer Savage's factual allegations, which show that Morrison (¶¶ 164, 170), Blake (¶¶ 142-43, 148-50, 158-62, 164, 170), and Crofoot (¶¶ 184, 186) each engaged in acts of retaliation against Officer Savage after he left the CET. It is well established that severe and pervasive retaliation is a separate basis for a hostile work environment claim. *See, e.g.*, *Wells v. Gates*, 336 F. App'x 378, 387 (4th Cir. 2009).[4]

Having incorrectly limited their factual analysis to the period of time when Officer Savage was with the CET, Municipal Defendants next conclude that Pocomoke City, Morrison, Blake, and Crofoot were not the "employer" of Officer Savage for purposes of Section 1981 liability and did not have knowledge of the hostile work environment within the CET. But the Municipal Defendants do not address their liability for the period after Officer Savage returned to the Pocomoke City Police Department.[5] In this later period, Municipal Defendants concede that the factual allegations state that all the Pocomoke Defendants were aware of the racial discrimination in the CET. And they do not dispute that Pocomoke City was the employer of Officer Savage during this time period and that Pocomoke City would therefore be liable for any unconstitutional policy or custom of retaliation during that period. Nor could they. *See Jett v.*

[4] A hostile work environment claim based on retaliatory conduct also shares the same elements of proof of a hostile work environment claim based on racial discrimination. *See, e.g.*, *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001).

[5] Discovery is especially likely to lead to relevant information in this case: the EEOC, the expert agency for these sorts of claims, already has found probable cause under Title VII that Savage had faced a hostile work environment and retaliation and that Sewell and Green had faced retaliation. *See* Exhibit A (EEOC Findings). Defendant Crofoot has publicly stated that Pocomoke City is not interested in conciliating the findings and waived any privilege as to these findings. Taya Graham, *Feds Find Probable Cause of Widespread Discrimination in Firing of Pocomoke's First Black Police Chief*, REALNEWSNETWORK, http://therealnews.com/t2/index.php?option=com_content&task=view&id=767&Itemid=74&jumival=16420. As such, the charges are now in the hands of the Department of Justice for review, and plaintiffs will amend their complaint to add these Title VII claims as soon as the Department of Justice concludes its review. FAC ¶ 11.

Dallas Indep. Sch. Dist., 491 U.S. 701, 735 (1989); *see also CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 451 (2008) ("[S]ince 1991, the lower courts have uniformly interpreted § 1981 as encompassing retaliation actions.").[6]

C. Plaintiffs Can Bring Claims Against Public Employers for Violations of 42 U.S.C. § 1981 Under the Remedial Scheme of 42 U.S.C. § 1983

In the alternative, Municipal Defendants also argue that § 1981 does not provide a private remedy and therefore "is an inappropriate vehicle to bring claims against the City." Mun. Br. at 21. That argument is a complete misreading of §1981, part of the Civil Rights Act of 1866 and which prohibits racial discrimination in the making and enforcement of contracts. Passed in the wake of the Thirteenth Amendment's ratification, it was intended as a declaration of equal rights for newly freed slaves. *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 713-14 (1989). The rights declared in §1981 were shortly "constitutionalized" in the Fourteenth Amendment. *Id.* at 721 (citing Cong. Globe, 39th Cong., 1st Sess., 2465 (1866) (Rep. Thayer). Section 1981 was amended through the 1991 Civil Rights Act to expand and clarify that the rights of § 1981 were "protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(b)-(c).

A few short years after § 1981 came into existence, Congress passed the Civil Rights Act of 1871 in order to combat the rising violence engaged in by the Ku Klux Klan and to provide an enforcement mechanism for the newly ratified Fourteenth Amendment. *Jett*, 491 U.S. at 722. Section 1 of that Act (codified at 42 U.S.C. § 1983) provided a civil damages remedy in Federal Court against state actors who had violated a person's federal rights.

[6] Municipal Defendants have not challenged the sufficiency of factual allegations that Pocomoke City had a custom or pattern of retaliation that would satisfy the *Monell* liability standard applicable to Section 1981 claims. Because the municipal liability analysis for Section 1981 and Section 1983 is the same, however, Officer Savage has sufficiently pled municipal liability for the policy or custom of retaliation for the same reasons as explained in Part VI, below. *See Carney v. City & Cty. of Denver*, 534 F.3d 1269, 1276 (10th Cir. 2008) ("The municipal liability analysis for Ms. Carney's retaliation claim is the same as that which was previously discussed in relation to her discrimination claim.").

In light of this legislative history, the Supreme Court declared that, unlike against private entities, Congress did not intend for § 1981 to create a private cause of action against state actors. *Jett*, 491 U.S. at 731-32. The Fourth Circuit has also held that the 1991 Civil Rights Act did not create a new cause of action or change the result of *Jett*. *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995).[7] However, the Fourth Circuit has not clarified whether its *Dennis* holding precludes § 1981 actions against municipal officials in their individual capacities, and courts within this District have reached inconsistent conclusions on the issue. *Compare Victors v. Kronmiller*, 553 F. Supp. 2d. 533, 543 (D. Md. 2008) (finding that § 1981 suits could not be brought against state actors whether sued in their individual or official capacities) *with Stout v. Reuschling*, No. TDC-14-1555, 2015 U.S. Dist. LEXIS 39997, at *14 (D. Md. Mar. 27, 2015) (finding that *Dennis* only applied to suits against municipal entities and not individuals).

Defendants' argument that *Dennis* requires a dismissal of Savage's § 1981 claims misreads the text and thrust of the law, however. Both *Jett* and *Dennis* limited a Plaintiff's ability to recover against municipal entities under § 1981 to cases where he can prove that the discriminatory act was a custom or policy of the city. *Dennis*, 151 F.3d at 156 (citing *Jett*, 491 U.S. at 735-36). But *Jett* and *Dennis* did not limit the rights created by § 1981: "We think the history of the 1866 Act and 1871 Act recounted above indicates that Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981." *Jett*, 491 U.S. at 731.

[7] The Ninth Circuit has taken the opposite position and held that the 1991 Civil Rights Act created an implied right of action against state actors. *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir.1996). Fourth Circuit cases also are not entirely consistent after *Dennis*, and Fourth Circuit caselaw is "somewhat murkier than that of other circuits" on whether § 1981 creates an implied right of action against state actors. *James v. Univ. of Maryland Univ. Coll.*, No. PJM 12-2830, 2013 WL 3863943, at *2 (D. Md. July 23, 2013).

Therefore, *Jett* explicitly states that *rights* created by §1981 still exist for public employees, it is only the *remedies* for those rights that must be enforced through 1983.[8]

That holding is supported by the text of § 1983, which creates a cause of action for violations of the "laws" of the United States. And the use of § 1983 as a remedial vehicle for § 1981 enforcement is consistent with the interpretation of other federal laws that do not include their own remedial scheme. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1 (1980) (allowing § 1983 remedies for deprivation of benefits under Social Security Act). Even if this court decides that § 1981 does not provide an implied right of action or authorize suits against officials in their individual capacities, failure to invoke § 1983 would not warrant dismissal where the Municipal Defendants have full notice of the claims against them. As the Supreme Court recently declared, "no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim." *Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 347 (2014); *see also Brown v. Sessoms*, 774 F.3d 1016 (D.C. Cir. 2014) (holding that *Johnson* also applies to § 1981 claims that do not invoke § 1983). In these circumstances, the federal pleading rules "do not countenance dismissal of a complaint for an imperfect statement of the legal theory supporting the claim asserted." *Johnson*, 135 S.Ct. at 346.

III. THE POCOMOKE CITY DEFENDANTS DISCRIMINATED AGAINST THE PLAINTIFFS BASED ON THEIR RACE.

Contrary to Municipal Defendants' contention, Plaintiffs have pled claims for racial discrimination against Pocomoke City and Blake for all counts in which racial discrimination is a required element. In contending otherwise, Defendants conflate the different claims and offer fatally imprecise analysis. First, in Count II, Plaintiffs have proffered credible and plausible

[8] Detective Savage also brings § 1983 claims for violations of his First and Fourteenth Amendment rights, but that should not foreclose his ability to plead § 1981 claims because those rights differ. For example, the right to be free from certain forms of retaliation is clearly established § 1981. *CBOCS W.*, 553 U.S. at 457.

factual allegations that race-based motivations triggered Officer Savage's termination. Second, both arguments that the Municipal Defendants raise for dismissal of Count III are at odds with binding Fourth Circuit law, and must be rejected for that reason. Finally, none of the other counts require either allegations or proof of racial discrimination; Municipal Defendants thus have no basis for seeking dismissal of these counts for failure to plead a non-required element.

A. Count II Sufficiently Alleges that Officer Savage and Chief Sewell Suffered Adverse Employment Actions Because of their Race

Count II of the First Amended Complaint names Pocomoke City and Blake as the defendants responsible for Officer Savage's termination and Pocomoke City and Morrison for Chief Sewell's termination. As one of the elements of a discriminatory termination claim, a Plaintiff must allege and ultimately show that the termination decision was motivated by discriminatory animus. A "[p]laintiff can satisfy his burden of proof for the discriminatory discharge claim by either direct proof of discriminatory intent or through the indirect, burden-shifting method of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–804 (1973)." *Eruanga v. Grafton Sch., Inc.*, 181 F. Supp. 2d 514, 520 (D. Md. 2002) (internal citations omitted) . Where a Plaintiff offers direct evidence of discriminatory intent, the burden-shifting framework of *McDonnell Douglas* is unnecessary. *Id.* Direct evidence may include derogatory remarks about race, and such remarks constitute direct evidence when a plaintiff can establish "a nexus between the offensive remark and Plaintiff's eventual termination for that remark." *Id.* at 521.

There is direct evidence of Blake's discriminatory intent. Around August 2014, Blake made a derogatory remark about Officer Savage's race to Chief Sewell. FAC ¶ 143. At the time of the remark, he was pressuring Chief Sewell to demote Officer Savage, but had not yet exercised his unilateral authority to order Savage's demotion. *Id.* ¶ 43. When Chief Sewell did

not accede to Blake's pressure, Blake referred to Chief Sewell as an "ungrateful ass nigger." Id. ¶ 143. As in *Eruanga*, the single use of the word "nigger" showed a discriminatory attitude toward members of Savage's and Sewell's race, and shows an intent to discipline any African Americans who do not show the proper gratitude for the opportunities that Blake—as the official responsible for personnel decisions—had provided them. *Eruanga*, 181 F. Supp. 2d at 521 ("[R]ather than merely an offensive remark, the precise wording of Lore's statement indicates an intent to remove people of Plaintiff's race from their jobs based on Lore's discriminatory attitude. . . . Lore not only referred to at least some of the black workers at Grafton as 'niggers,' he said he would 'get [them] out of here.'").

Less than a month after this remark, on September 9, 2014, Blake took significant retaliatory actions against Officer Savage, including instructing Chief Sewell to demote Savage and compel him to submit to a psychiatrist evaluation to prove that he was fit to return to active duty. FAC ¶ 148. Blake's efforts to demote Savage continued—slowed for only a few months by Chief Sewell's efforts to report Blake's abuse of power to the Pocomoke City Council—until Blake ultimately was successful in getting Officer Savage demoted on February 9, 2015. *Id.* ¶ 164. A six-month period between the derogatory remark and the demotion is well within the period in which the remark provides evidence of discriminatory intent behind the adverse action, particularly when there are intervening acts of retaliation. *See Eruanga*, 181 F. Supp. 2d at 521 (eighteen months). During the intervening period from his racially derogatory remark to the ultimate adverse employment action, Blake harassed Chief Sewell to take adverse action against Savage "on a near daily basis." FAC ¶ 159. Because Officer Savage had not showed the proper gratitude expected by Blake of Black officers, he was labeled a troublemaker, placed on night

duty, denied overtime, and ultimately demoted while a junior officer—who had been trained by Officer Savage—was promoted to his old position. *Id.* ¶ 165.

Not content with the demotion of Officer Savage, Blake next began plotting to terminate Officer Savage, beginning with a petition to remove him and Lieutenant Green, one of the few other Black members of the Pocomoke City Police Department, whose only "error" had been to support Savage in his EEOC proceedings. *Id.* ¶ 170. After Officer Savage's termination, Blake allegedly told others in or about March 2015 that "before he is done all nigger police in Pocomoke will be gone," only two months before he began circulating a petition on May 4, 2015 within the Pocomoke City Police Department to terminate Lieutenant Green and Officer Savage. *Id.* ¶¶ 167,170 & Ex. J.

While Blake was not successful in firing Officer Savage before his resignation, his successor as city manager completed the task. But the basis for the termination was of Blake's doing: Blake had made it impossible for Officer Savage to perform his job after a relentless campaign to demote Officer Savage and assign him to menial duties where he would no longer be able to contribute to the police force. By taking away all his responsibilities, the discriminatory actions of Blake provided the "basis for [Officer Savage's] termination," even if Blake was no longer there at the time of termination. *Eruanga*, 181 F. Supp. 2d 514. Count II thus properly sues Blake in his individual capacity for the termination and the intermediate adverse employment actions that were motivated by racial discrimination.

The Municipal Defendants also wrongly suggest that Blake is entitled to the *Proud* inference that Blake could not have acted with discriminatory intent because he also hired and promoted Sewell, Green, and Savage. Mun. Br. at 24 (citing *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991)). As a threshold matter, Municipal Defendants fail to recognize that the *Proud*

inference is inapplicable at the motion-to-dismiss stage, because all inferences must be drawn in favor of the Plaintiffs. *Cf. Morgan v. City of Rockville*, No. PWG-13-1394, 2013 WL 6898494, at *4 (D. Md. Dec. 30, 2013) ("[I]t is unclear whether the inference recognized in *Proud* is applicable at the motion to dismiss stage, where all inferences must be drawn in favor of the Plaintiff."). Even if this were not so, the inference would be inapplicable here for two reasons: (1) the employees were hired several years prior to later-in-time adverse employment actions; and (2) there exists a later "discrete event" that may have influenced the policymaker's opinion. *See Salami v. N. Carolina Agr. & Tech. State Univ.*, 394 F. Supp. 2d 696, 715 (M.D.N.C. 2005), *aff'd*, 191 F. App'x 193 (4th Cir. 2006) (finding that "18 months" between the hiring to firing rebutted any inference to be drawn from the hiring, and that "a discrete event . . . may have influenced [an employer]'s opinion of Plaintiff"). Because all the Plaintiffs were hired at least four years before the adverse employment actions—in November 2010 (Sewell), April 2011 (Savage), and November 2011 (Green)— the possible involvement of Blake in those hirings offers no defense for his later actions. Nor does the *Proud* inference apply where an intervening event offers a new reason for the racial animus; here, Plaintiffs have pled that Officer Savage's decision to speak out about a pattern of racial discrimination was just such an intervening event.

B. Count III Adequately Alleges that Blake Paid Black Officers Less On Account of their Race

Municipal Defendants offer only two arguments for dismissal of Count III: (1) Chief Sewell did not express dissatisfaction with his compensation package for five years, until he filed his EEOC Complaint in March 2015; and (2) the First Amended Complaint did not specifically name White officers who received raises while African American officers were denied raises, making the First Amended Complaint "sparse," "conclusory," and "non-specific." Mun. Br. at 25. Each of these criticisms misses the mark.

First, Municipal Defendants fail to explain why it is relevant whether Chief Sewell expressed dissatisfaction about being paid less than similarly situated previous past chiefs. This failure is telling; there is no requirement to express dissatisfaction before alleging disparate treatment. Instead, a plaintiff need only allege that he was (1) a member of a protected class; (2) performing his job satisfactorily; (3) paid less; (4) treated differently than similarly situated employees outside his protected class. *Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010), *aff'd sub nom. Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012). Chief Sewell has done so, and Municipal Defendants unsurprisingly offer no cases supporting their position that Chief Sewell also was required to publicly state his dissatisfaction.

Second, Fourth Circuit cases clearly establish that there is no pleading requirement to provide a list of similarly situated individuals. Contrary to Defendants' assertion that the disparate treatment allegations are "fatally anemic," Lieutenant Green and Officer Savage have provided specific factual allegations of disparate wages and benefits based on the actions of Pocomoke City, acting through Blake. Plaintiffs have pled that Chief Sewell recommended pay raises for Lieutenant Green and Officer Savage at the same time he recommended raises for White officers, and that this pattern occurred on multiple occasions between December 1, 2011 and July 1, 2015. FAC ¶ 50. They have also alleged that Blake had to approve any pay raises, and that he would respond to Chief Sewell's detailed salary requests with a simple "handwritten sheet of paper" with "Blake's own suggested compensation amounts." *Id.* ¶ 44. Over the span of four years, Blake singled out two Black officers by denying them raises—wholly without explanation—while at the same time approving raises to white officers similarly situated with regard to experience and performance. *Id.* ¶¶ 43-52, 227-28. Defendants' only challenge is that the First Amended Complaint did not provide the specific names of White employees who

received raises.[9] But there is no formalistic pleading requirement to list specific names. *See, e.g., Buchhagen v. ICF Int'l, Inc.*, 545 F. App'x 217, 220 (4th Cir. 2013) (finding sufficient, on an age discrimination claim, allegations that supervisors "played favorites with younger employees" and "mentored younger employees and sent them to management training courses"); *Veney v. Wyche*, 293 F.3d 726, 731 (4th Cir. 2002) ("We also assume, without deciding, that in all relevant respects, Veney is similarly situated to the other [heterosexual male and homosexual female] inmates at Riverside [and] Veney's complaint therefore sufficiently alleges that Riverside is intentionally discriminating against him by treating him differently from similarly situated heterosexual males and homosexual females."). Count III therefore adequately alleges that black members of the Police Department were paid less than similarly situated white members.[10] Nor are Plaintiffs obligated to plead every piece of evidence they possess at this stage of the proceedings. The standard is a plausible case under *Iqbal* and the clear logical progression of discrimination, complaints of discrimination, and then retaliatory adverse employment actions plays out for Sewell, Savage and Green. It strains credulity that the three Black police officers who complained about racial discrimination were all, by chance, fired or driven out of the Pocomoke City Police Department *after* their EEOC complaints were filed. That combined with the direct statements of discriminatory intent from Blake are more than enough to compel the conclusion that this case should move forward to the discovery phase.[11]

[9] Moreover, Municipal Defendants cannot dispute that Chief Sewell's disparate treatment claim does allege specific White police chiefs who received better pay and benefits. *See* FAC ¶ 47 ("the chief of police prior to Chief Sewell received a raise each year he served as chief.").

[10] Although Municipal Defendants also extend their bid for dismissal based on the premise that there is no proof of racial discrimination by any individual Pocomoke City Defendants to Counts I, IV, V, and VII, none of those counts requires proof of racial discrimination by individual Pocomoke City Defendants, so this argument is irrelevant, even accepting the premise as true (which Plaintiffs, of course, do not). Each of those other counts is adequately pled, as explained in other sections. *See* Part II.A, *supra* (Count I); Part V, *infra* (Counts IV and V); Part II.B, *supra* (Count VII).

[11] Plaintiffs will have additional testimony from African American police officers regarding acts of racial discrimination and retaliation. In addition, Plaintiffs believe that discovery of the Municipal Defendants' emails and

IV. PLAINTIFFS CAN SUSTAIN A CIVIL CONSPIRACY CLAIM UNDER 42 U.S.C. § 1985

Officer Savage adequately pled a civil conspiracy charge, and Defendants' arguments for dismissal of Count VI should be denied because Defendants misread both the law and Officer Savage's allegations. Section 2 of the Civil Rights Act of 1871 (codified at 42 U.S.C. § 1985), also known as the Ku Klux Klan Act, prohibits two or more people from conspiring to deprive a person or class of persons of the equal protection of the law. To establish a civil conspiracy claim, a plaintiff must show

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995) (internal citation omitted).

The Municipal Defendants do not dispute that the allegations of an injurious hostile work environment and Officer Savage's demotion and termination meet elements four and five. Instead, they wrongly argue that employment discrimination is not an actionable source of an equal protection violation under § 1985 (elements two and three) and that Officer Savage has not adequately pled a conspiracy (element one).

Although Congress stated that § 1985 was a mechanism to fight discrimination rather than a "general federal tort law," *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), the Supreme Court has not clarified which federal statutory rights are protected under § 1985. It has held that § 1985 cannot be used as a remedy for Title VII violations because Title VII provides an extensive remedial scheme of administrative exhaustion. Authorizing suits under § 1985 would bypass that exhaustion requirement, thus hurting the purpose of Title VII. *Great Am. Fed. Sav.*

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other communications among themselves will reveal additional evidence of a concerted effort to discriminate and retaliate against all three Plaintiffs and to "cook up" pretextual reasons for doing so.

& Loan Ass'n v. Novotny, 442 U.S. 366, 377-378 (1979). The "specific holding" in *Novotny* was narrow: "42 U.S.C. § 1985(3) may not be invoked to redress violations of Title VII." *Id*. at 379 (Powell, J., concurring). Therefore, the *Novotny* Court did not, as Defendants suggest, foreclose § 1985 remedies for victims of discrimination by public employers.

In distinguishing *Novotny*, several courts have held that the substantive rights created by 42 U.S.C. § 1981 can satisfy elements three and four of a § 1985 claim.[12] Courts are divided as to whether § 1981 implicates a right that can be enforced through § 1985, *compare Johnson v. Greater Se. Community Hosp. Corp.*, 903 F. Supp. 140, (D.D.C. 1995) ("a violation of federal rights secured by § 1981 may serve as the basis of § 1985 claim") *with Brown v. Philip Morris, Inc.*, 250 F. 3d 789, 806 (3d Cir. 2001) (recognizing differing views but not deciding whether § 1981 claims could be brought under § 1985). The Fourth Circuit has not addressed the issue.

But the District of Maryland has, and Judge Miller's thorough analysis concluded nearly two decades ago that *Novotny* did not preclude § 1985 as a remedial vehicle for § 1981 claims. *Whitten v. A.H. Smith & Co.*, 567 F. Supp. 1063 (D. Md. 1983). The *Whitten* opinion first explained that the *Novotny* Court based its ruling on the remedial scheme of Title VII, not on the substantive rights embodied in Title VII. *Id.* at 1067. Next, it noted that *Notovny*'s holding was limited to Title VII itself and not all federal statutes; the majority opinion did not join Justice Stevens' concurrence, which stated that § 1985 could not be used to enforce any statutory rights. *Id.* (citing *Novotny*, 442 U.S. at 385 (Stevens, J., concurring)). The *Whitten* opinion concluded that the 42nd Congress intentionally did not limit the rights that § 1985(3) could protect, but rather found that the overall purpose was in harmony with that of § 1981: the eradication of racism and the promotion of equal citizenship in the wake of the ratification of the Thirteenth

[12] Section 1981, contained in Section 1 of the Civil Rights Act of 1866, was enacted in a precursor to the 1871 Act. *Jett*, 491 U.S. at713-14 (1989).

and Fourteenth Amendments. *Id.* at 1071-72. The opinion ultimately concluded that § 1981 was a bedrock part of the statutory scheme created along with and under the Constitutional authority of Reconstruction Amendments and thus it is a "proper substantive basis for a claim of redress under § 1985(3)." *Id.* at 1072. *Cf. Hodgin v. Jefferson*, 447 F. Supp. 804, 808 (D. Md. 1978) (equal pay act a substantive basis for a § 1985 claim).

Whitten is persuasive because it focuses on the clear legislative history reflecting that § 1985 is tool for the enforcement of the rights that were created and declared in § 1981. It is also similar to legislative analysis used by the Supreme Court in *Jett*, \which held that § 1983—enacted in the same 1877 Civil Rights Act—is a remedial tool for use by public employees to vindicate the rights created by § 1981. Therefore, this Court should find that because Congress enacted § 1985 to redress the discrimination that § 1981 prohibits, and that the violation of § 1981 by persons acting in concert may be pled as a conspiracy under § 1985.

Constitutional rights such as the Fourteenth Amendment also are enforceable under § 1985. One such denial of Fourteenth Amendment equal protection occurs when a public employer denies equal terms and conditions of employment on the basis of race. The Fourth Circuit has made very clear that—in spite of the *Novotny* decision—Title VII does not pre-empt government employees from bringing employment discrimination claims under the Fourteenth Amendment and the statutory vehicle of 42 U.S.C. § 1983. *Keller*, 827 F.3d at 963.

As described above, § 1983 is part of the same 1871 Civil Rights Act that created § 1985. Like § 1985, § 1983 is a statutory vehicle through which victims of discrimination can seek redress for violations for the Constitution. Accordingly, as an individual claim alleging discrimination in violation of the Fourteenth Amendment is actionable under § 1983, the same form of claim against defendants who allegedly acted in concert is actionable under § 1985.

Here, Detective Savage has made out conspiracy claims for violations of both § 1981 and the Fourteenth Amendment; thus he has alleged elements three and four of a viable § 1985 claim.

Defendants' arguments that Detective Savage has not adequately alleged a conspiracy are faltering indeed. In order to make out the first element of a § 1985 claim, a plaintiff must allege a "meeting of the minds" among defendants to violate the plaintiffs' rights. *Poe*, 47 F.3d at 1377 (citing *Caldeira v. County of Kauai*, 866 F.2d 1175, 1181 (9th Cir. 1989)). There is no heightened pleading standard for § 1985 claims beyond that prescribed by Rule 8 of the Federal Rules of Civil Procedure. *Poe*, 47 F.3d at 1376. Even when the plaintiff's burden is higher at the summary-judgment phase, a plaintiff may defeat summary judgment on a § 1985 conspiracy claim with either direct or circumstantial evidence as long as the evidence "reasonably lead[s] to the inference that [Defendants] positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan." *Hinkle v. City of Clarksburg*, 81 F.3d 416, 421 (4th Cir. 1996) (citing *Hafner v. Brown*, 983 F.2d, 570, 576-77 (4th Cir. 1992)). If such circumstantial evidence can be used to prove a claim, a plaintiff should not be required to plead with absolute certainty the nature of every detail of the conspiracy. Therefore Officer Savage has alleged sufficient, non-conclusory allegations that Defendants plausibly had a meeting of the minds to deprive him of equal employment:

- Oglesby spoke with Crofoot by phone, urging him to terminate Savage. ¶ 184.
- Smack and Blake act on rumors created by Passwaters about Savage. ¶¶ 134-38, 245-47.

Although Officer Savage cannot know the exact details of communications among Defendants without discovery, he has alleged specific times in which they worked in together to violate his rights to equal employment.

Further, the First Amended Complaint is replete with allegation of racial animus, *Facey v. Dae Sung Corp.*, 992 F. Supp. 2d 536, 541-42 (D. Md. 2014), including on the part of Oglesby, Blake, and Passwaters, who were all central to the alleged conspiracy. *E.g.* FAC ¶¶ 66-104 (Passwaters); *id.* ¶¶ 106-112 (Ogleby); *id.* ¶¶ 143-167 (Blake).

Accordingly Detective Savage respectfully requests that this Court deny Defendants' motions to dismiss Count VI of his First Amended Complaint.[13]

V. AS A RESULT OF ENGAGING IN SPEECH OF PUBLIC CONCERN, OFFICER SAVAGE AND CHIEF SEWELL EXPERIENCED UNCONSTITUTIONAL RETALIATION

Although the Municipal Defendants contend that "the First Amendment is not implicated" by the speech of Officer Savage and Chief Sewell, the Municipal Defendants' Motion to Dismiss fails to cite a single case dismissing a First Amendment retaliation claim on this basis. Indeed, the only case cited by the Municipal Defendants, *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004), supports the Plaintiffs and reversed a lower-court dismissal of First Amendment retaliation claims.

To survive a motion to dismiss a First Amendment retaliation claim brought under Section 1983, a plaintiff must plead that (1) he or she spoke as (i) a citizen (ii) on a matter of public concern; (2) his or her and the public's interests in the First Amendment expression outweighs the employer's legitimate interest in the efficient operation of the workplace, if that interest was infringed by the communication, and (3) the protected speech is a substantial factor in the decision to take adverse employment action. *Smith v. Gilchrist*, 749 F.3d 302, 308 (4th Cir. 2014); *Love–Lane v. Martin*, 355 F.3d at 776. Officer Savage and Chief Sewell adequately pled each of the required elements. But Municipal Defendants challenge only the first and third

[13] In the alternative, if this Court finds that Detective Savage has not adequately pled sufficient facts to make out a claim under 42 U.S.C. § 1985(3), he respectfully requests that this Court allows him leave to amend just as this Court did for the § 1985 count in *Hejrika v. Maryland Div. of Correction*, 264 F. Supp. 2d 341, 343 (D. Md. 2003).

elements: whether Plaintiffs' speech was a matter of public concern, and whether it was a substantial factor in the decision to take adverse employment action. Mun. Br. at 28-29.

A. Officer Savage's and Chief Sewell's Speech Raised Matters of Tremendous Public Concern

Speech raises matters of public concern if it "involves an issue of social, political, or other interest to the community." *Campbell v. Galloway*, 483 F.3d 258, 267 (4th Cir. 2007). Underlying this First Amendment protection is the "considerable value of encouraging, rather than inhibiting, speech by public employees [who] are often in the best position to know what ails the agencies for which they work." *Hunter v. Town of Mocksville, N.C.*, 789 F.3d 389, 396 (4th Cir. 2015) (internal citations and quotations omitted).

1. *Officer Savage's Speech Raised Matters of Public Concern*

Municipal Defendants make only a half-hearted suggestion that Officer Savage engaged in private speech, consisting of only one sentence: "[u]p until [his] EEOC complaints, Mr. Savage complained internally." Mun. Br. at 29. But even if his speech had been solely internal—which it was not—that fact is legally irrelevant.

Defendants ignore that even internal complaints can constitute matters of public concern based on the subject matter of the complaint: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Campbell*, 483 F.3d at 267 (quoting *Connick v. Myers*, 461 U.S. 138,147-48 (1983)). Defendants make the same argument that was rejected in *Campbell*. But, as in *Campbell*, "[t]o conclude, as the defendants would have us do, that a personal complaint about discrimination affecting only the complaining employee can *never* amount to an issue of public concern could improperly limit the range of speech that is protected by the First Amendment." *Id.* at 269 (emphasis in original). In *Campbell*, a police officer complained about

multiple instances of sexual harassment and discrimination in a single thirteen-page letter to the chief of police. Although much of the letter consisted of personal grievances, the Court found that it also spoke in broad terms about "sexual harassment within [the] police department" and therefore was not merely intended to "resolve [the officer's] personal problems." *Id.* at 270.

Considering his allegations in the light most favorable to Officer Savage, there is no question his speech similarly raises questions of public concern. After Officer Savage's supervisors on the CET directly participated in racial discrimination and harassment and failed to take any action after known acts of racial hostility, Officer Savage wrote a letter describing the hostile work environment. Before that letter, Officer Savage first took advantage of internal grievance protocols, but he got nowhere with supervisors that were intimately involved in the creation of the hostile work environment. In fact, one supervisor regularly used the word "nigger" and its variants in Officer Savage's presence (FAC ¶¶ 67, 70, 71), failed to take any action after other Task Force members took Officer Savage to "KKK Lane" (*id.* ¶ 77) and failed to discipline another Task Force member who placed a bloody deer's tail on Officer Savage's windshield (*id.* ¶¶ 80-81). Subsequently, Officer Savage *on two separate occasions* reported outside the CET to Chief Sewell and the Maryland State Police Criminal Enforcement Division acts of discrimination that were reflective of the pattern of discrimination within the CET. *Id.* ¶ 236.[14] Any of these earlier reports would satisfy the First Amendment public concern threshold: where a police officer reports "improper treatment" of officers based on race, such reports "would be of genuine interest and concern to the public." *Campbell*, 483 F.3d at 271. *See also Durham v. Jones*, 737 F.3d 291, 303 (4th Cir. 2013) (finding that a police officer's conduct in sending materials to the State's Attorney and the Governor of Maryland was "no ordinary

[14] Indeed, the State Police validated one of the instances of racial discrimination, and decided to penalize Corporal Phillips for the use of a racial epithet in a text message. FAC Ex. G.

workplace dispute," and that "where public employees are speaking out on government misconduct, their speech warrants protection") (internal citations and quotations omitted).

If doubt remains about whether the first three acts of speech raised matters of public concern, Officer Savage's resignation letter sweeps it aside. Unlike the "rambling thirteen-page memo" in *Campbell*—which, despite its lack of focus and inclusion of many personal grievances, was nonetheless found to raise matters of public concern—Officer Savage wrote a concise, one-page resignation letter discussing the "repeated use of the word 'nigger' and variations thereof . . . and a hostile work environment" and concluded with the hope that his resignation might ensure that no other officer would have to experience the same pattern of discrimination in serving on the CET that Officer Savage had faced. *Campbell*, 483 F.3d at 271; FAC ¶ 113, 236. Because Officer Savage's resignation letter spoke in "broader terms" about the racial "harassment within [the] police department," it raised a matter of genuine public concern. *Campbell*, 483 F.3d at 270.

2. *Chief Sewell's Testimony Before the City Council was a Matter of Public Concern*

The Municipal Defendants, in a similar one-sentence argument, contend that Chief Sewell's speech did not raise matters of public concern because he only "complained internally, through Mr. Blake and his meetings with the Mayor and City Council." Mun. Br. at 29. Yet that conclusion is at odds with every precedent in this circuit. Chief Sewell's speech protested race discrimination within Pocomoke City and Worcester County, as well as government misconduct in the form of subsequent acts of official retaliation in response to protected speech. Under binding precedent, both of these subjects are matters of public concern under binding precedent.

The Supreme Court has instructed courts to examine the "content, form, and context of the speech" to determine if its "can be fairly considered as relating to any matter of political,

social, or other concern to the community, or when it is a subject of legitimate news interest." *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014) (internal quotations omitted).

Here, the *content* of Sewell's speech—protesting racial discrimination, retaliation within the law enforcement community in Pocomoke City and Worcester County, and abuse of power by Defendant Blake—is indisputably a matter of public concern, irrespective of whether the speech is internal or external. *See Connick v. Myers*, 461 U.S. 138, 148 (1983) ("Mrs. Givhan's right to protest racial discrimination—a matter inherently of public concern—is not forfeited by her choice of a private forum."); *Love-Lane v. Martin*, 355 F.3d 766, 784 (4th Cir. 2004) ("[B]y 1997 it was clearly established that Love–Lane's speech about race discrimination at Lewisville involved a matter of public concern."); *Wyckoff v. Maryland*, 522 F. Supp. 2d 730, 738 (D. Md. 2007) ("Viewing Wyckoff's allegations as true, her complaints about sex discrimination are matters of public concern."); *Myers v. Town of Landis*, 957 F. Supp. 762, 767 (M.D.N.C. 1996), *aff'd in relevant part*, 107 F.3d 867 (4th Cir. 1997) ("An allegation that a public official has tried to cover up wrongdoing by retaliating against a whistleblower is itself an accusation of significant wrongdoing and a matter of public concern."). In short, when Chief Sewell testified before the City Council that "there was no performance based-rationale for penalizing Officer Savage" and that Blake was abusing "his position of authority to harass and retailiate against Officer Savage for his EEOC charges" (FAC ¶ 159), these allegations of an abuse of power at the highest levels of city government and retaliation to cover up prior discrimination raised matters of enormous public concern. The public concern for the racial discrimination within the CET and the race-based discrimination and retaliation against all the Plaintiffs cannot be in doubt in light of the extensive media coverage and public outcry in the local press.[15] In fact, Defendant

[15] *See, e.g., Pocomoke City Officer Claims Harassment*, WBOC16, (Aug. 14, 2014), http://www.wboc.com/story/26285681/pocomoke-city-officer-claims-harassment; Scott Broom and Vanessa

Crofoot has himself commented on the case and the EEOC findings against the City and for the Plaintiffs on local television. After Chief Sewell was terminated there was a public outcry for and demonstrations calling for his reinstatement. One of the key demands of those supporting Chief Sewell was to know what exactly were the reasons for his termination. Morrison and Crofoot held a City Council meeting to tell their side of the story. The sole African-American member of the City Council, who dissented from the decision to fire Chief Sewell, publically commented on the pretextual grounds given for the Chief's termination. It is difficult to think of an issue of greater public concern in Pocomoke City than the racial discrimination and retaliation alleged in the FAC.

Defendants' focus upon the forum within which the speech occurred goes only to the *form* and *context*, but makes little sense in light of the facts alleged in the First Amended Complaint. As in *Lane*, "the form and context" of Chief Sewell's speech "fortif[ies]" the conclusion that his speech was a matter of public concern. *Lane*, 134 S. Ct. at 2380. The Amended Complaint alleges that Chief Sewell testified at a special meeting of nearly all the elected officials in Pocomoke City to investigate Blake's treatment of Officer Savage and whether he had abused the public trust of his office.[16] FAC ¶ 156-160. Chief Sewell's testimony before the City Council—because it took place in a special government meeting seeking to investigate government actions or actors—is a matter of public concern precisely because such testimony is "the basis for official governmental action, action that often affects the rights and liberties of others." *Lane*, 134 S. Ct. at 2380; *see also Perry v. Sindermann*, 408 U.S. 593, 598

Judkins, *Federal Investigators to Probe Racism Claims in Pocomoke City*, WUSA9 and DelmarvaNow (July 21, 2015), http://phxux.wusa9.com/story/news/local/maryland/2015/07/20/pocomoke-city-investigation-over-police-chief-firing/30433099/; Randall Chase, *Firing of Pocomoke City's First Black Police Chief Leads to Turmoil*, THE ASSOCIATED PRESS (Aug. 4, 2015), http://www.baltimoresun.com/news/maryland/eastern-shore/bs-md-es-police-chief-fired-20150803-story.html.

[16] Municipal Defendants have not questioned the adequacy of the allegations that Chief Sewell's testimony about Blake's misconduct constituted speech as a citizen rather than an employee, nor could they in light of the recent Fourth Circuit decision in *Hunter*.

(1972) (finding that plaintiff's "testimony before legislative committees and his other public statements critical of [government] policies" were matters of public concern). The context of the speech also supports its public importance. Testimony that is given in a meeting with public representatives from the community "called for the very purpose" of investigating potential misconduct of the Pocomoke City Manager is unquestionably a matter of significant "public importance." *Love-Lane*, 355 F.3d at 766 ("[A]t [school] meetings when Love–Lane talked about race discrimination in discipline, she was raising exactly the sort of issue that was meant to be discussed at such meetings—meetings that were attended by parent representatives from the community."). For the same reasons, Chief Sewell's subsequent conversations with public representatives of Pocomoke City about Blake's abuse of power were also speech on matters of public concern. FAC ¶¶ 161-64, 168-69.

B. Officer Savage and Chief Sewell Have Adequately Pled a Causal Link Between Their Protected Activity and Defendants' Retaliatory Conduct

Municipal Defendants also dispute the causal relationship between the protected speech and the retaliatory employment action, although they do concede that "only in those instances when there are no causal facts in dispute" can a motion "be decided on summary judgment"—let alone on a motion to dismiss. Mun. Br. at 29 (quoting *Love-Lane*, 355 F.3d at 775-76).

First and foremost, in this case there is direct evidence from Blake's own mouth that his motives were retaliatory. There are also public statements from the only African-American City Councilwoman that the stated reasons for the firing of Chief Sewell were thin pretexts for racial discrimination. This is the rare case where the causal connection is made out by both direct and circumstantial evidence.

The circumstantial evidence is also overwhelming on the issue of causal connection. The facts alleged show a close and direct causal link between Officer Savage's protected activity and

adverse actions—including Officer Savage's demotion and eventual termination—by Blake, Morrison, and other members of the Pocomoke City government. To establish a causal connection, "[t]here must also be some degree of temporal proximity" between the protected activity and the adverse action. *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 501 (4th Cir. 2005). Time intervals of up to nine months—with no retaliatory conduct in the interim—present a "very close question" with respect to causation but have been held to be sufficient to survive a motion to dismiss. *Id.* at 501. And even where there is an even longer time lapse, "courts may look to the intervening period for other evidence of retaliatory animus." *Murphy-Taylor v. Hofmann*, 968 F. Supp. 2d 693, 720 (D. Md. 2013) (quoting *Lettieri v. Equant, Inc.*, 478 F.3d 640, 650 (4th Cir. 2007)). In *Murphy-Taylor*, the court rejected a motion to dismiss after an employee was constructively demoted fifteen months after protected activity and then terminated ten months later, finding that the Plaintiff had "allege[d] a host of retaliatory actions taken against her throughout this time period." *Id.* at 721.

Officer Savage has alleged at least two acts of protected conduct for which he experienced retaliation and of which Blake was aware: (1) on June 12, 2014, Savage wrote a resignation letter from the CET alleging a pattern of discrimination and racial harassment within the Task Force (FAC ¶¶ 113-14); and (2) he filed EEOC petitions against Worcester County Sheriff's Office and the State's Attorney for Worcester County on July 21 and July 22, 2014 (*id.* ¶¶ 123,124). Immediately after becoming aware of these protected acts, Blake began to retaliate against Officer Savage. *Id.* ¶¶ 120, 130. Less than a month after Savage's resignation letter, Blake ordered Chief Sewell to investigate rumors regarding Savage that were patently false. *Id.* ¶ 120). Less than a week after Officer Savage's EEOC complaint, Blake informed Chief Sewell that Savage would no longer be called to testify in regard to investigations that he had conducted

(*id.* ¶ 137). By August 17, 2014, Blake began to pressure Chief Sewell to reassign Officer Savage from narcotics work to menial patrols and checking for locked doors during an "undesirable midnight shift," a request he renewed on September 9, 2014. *Id.* ¶¶ 142, 148. When Chief Sewell refused to take this action, Blake expanded his retaliatory campaign by enlisting other members of the City Council, and as a result, other councilmembers directed Chief Sewell to cap the overtime of Officer Savage (*id.* ¶ 163), and ultimately ordered Chief Sewell to officially demote Savage on February 9, 2015 (*id.* ¶ 164-65 & Ex. I), six to seven months after Savage's protected acts of reporting a pattern of discrimination within the CET. And over that entire period, Blake had exercised minor acts of retaliation, including ordering Sewell to demote Savage "on a near daily basis" until he was finally successful in enlisting the support of Morrison and achieving the desired demotion. *Id.* ¶ 159. Not satisfied with demoting Officer Savage, Blake and Morrison then sought to get Officer Savage terminated by circulating a petition on May 4, 2015. *Id.* ¶ 170. Although Blake resigned on June 30, 2015, by the time of his resignation, he had stripped Officer Savage of all opportunities to perform his job by demoting him to foot patrol, ensuring he was unable to perform arrests or obtain backup from Worcester County, and reduced his role to all but the most menial administrative tasks. *See id.* ¶ 186; *Lettieri*, 478 F.3d at 651 ("These steps made it easier for Taylor to take the position later that Lettieri was not needed and should be terminated."). After these successive small acts of retaliation, demotion, and attempted firing of Officer Savage, the process begun by Blake finally achieved his intended result on October 26, 2015, when Savage was officially terminated. FAC ¶ 186-87.

Even less time elapsed between Chief Sewell's protected acts and his termination. Chief Sewell's protected speech occurred in testimony about Blake's official misconduct in an October

14, 2014 meeting, in follow-up with conversations with individual council members, in an EEOC complaint on March 9, 2015, and in an April 10, 2015 meeting with Councilmember Tasker. *Id.* ¶¶ 156-62, 166, 168. In response to these protected acts, Chief Sewell was warned in April 2015 that he better follow Blake's orders to get rid of Officer Savage and Green or he likely would be ousted as chief of police. *Id.* ¶ 169. Indeed, he was fired only a few months later. On July 1, 2015, Chief Sewell was terminated, for reasons which the lone dissenter claimed were a pretext for retribution in response to his acts of reporting Blake's misconduct. *Id.* ¶ 173-74. His termination occurred less than four months after his protected activity of filing an EEOC complaint and three to nine months after his protected activities of reporting Blake's retaliatory conduct to the council members.

VI. BECAUSE CUSTOMS AND POLICIES OF POCOMOKE CITY LED TO RACIAL DISCRIMINATION AGAINST THE PLAINTIFFS, POCOMOKE CITY IS LIABLE TO EACH OF THE PLAINTIFFS.

Municipal Defendants argue that the First Amended Complaint fails to adequately state a *Monell* claim under § 1983 against Pocomoke City for two reasons: (1) the Complaint fails to allege that the City had a custom or policy of racial discrimination; (2) there is no causal link between the constitutional violations and Pocomoke City's deliberate actions. *See* Mun. Br. at 31. Both of these arguments ignore the allegations in the Amended Complaint.

To establish a *Monell* claim, a plaintiff must show that "a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent the official policy," inflicted a constitutional injury. *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987) (quoting *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 649 (1978)). Policies are "discrete, consciously adopted courses of government action" made directly by lawmakers, a municipal agency, or a municipal official "having final authority to establish and implement the relevant policy." *See id.* at 1387. These policies may include "formal and informal decisions

made by municipal officials authorized to make final decisions." *Ensko v. Howard Cty., Md.*, 423 F. Supp. 2d 502, 510 (D. Md. 2006) (citing *Castle v. Wolford*, 165 F.3d 17 (4th Cir.1998)). Beyond affirmative acts by municipal officials, official policy may also be established by omissions that manifest deliberate indifference to constitutional rights. *Jones v. Chapman*, No. ELH-14-2627, 2015 WL 4509871, at *14 (D. Md. July 24, 2015) ("In sum, a plaintiff may demonstrate the existence of an official policy in three ways: (1) a written ordinance or regulation; (2) certain affirmative decisions of policymaking officials; or (3) in certain omissions made by policymaking officials that manifest deliberate indifference to the rights of citizens.") (internal citations and quotations omitted).

Alternatively, "the hallmark of an impermissible custom or usage" is a "persistent and widespread pattern of practice" of unconstitutional conduct. *Owens v. Baltimore City State's Attorney's Office*, 767 F.3d 379, 403 (4th Cir. 2014), *cert. denied*, 135 S.Ct. 1893 (2015) (internal quotations and citations omitted); *Spell*, 824 F.2d at 1386 ("[C]ustom or usage may be found in persistent and widespread practices of municipal officials which although not authorized by written law, are so permanent and well-settled as to have the force of law.") (citing *Monell*, 436 U.S. at 691 (internal quotations omitted)).

A plaintiff seeking to impose municipal liability need "satisfy only the usual requirements of notice pleading." *Jordan by Jordan v. Jackson*, 15 F.3d 333, 339 (4th Cir. 1994). Under this simple pleading standard, "[t]here is no requirement . . . that he plead the multiple incidents of constitutional violations that may be necessary at later stages to establish the existence of an official policy or custom and causation." *Id.* at 339.

Two recent cases illustrate the low bar for pleading a municipal policy or custom. In *Owens*, the plaintiff pled only that "'[r]eported and unreported cases . . . during the events

complained of' establish that the [Defendant] had a custom, policy, or practice of knowingly and repeatedly suppressing exculpatory evidence in criminal prosecutions [and] that 'a number of motions were filed and granted during this time period that demonstrate that [the Defendant] maintained a custom, policy, or practice to allow this type of behavior either directly or ... by condoning it, and/or knowingly turning a blind eye to it.'" *Owens*, 767 F.3d at 403. Based only on these two factual allegations, the court found that the Plaintiff had met the simple notice pleading standard: "The assertions as to 'reported and unreported cases' and numerous 'successful motions' are factual allegations, the veracity of which could plausibly support a *Monell* claim." *Id.* In the second case, a plaintiff had offered evidence that she was repeatedly harassed over "her 17 year career and that she repeatedly complained of this harassment to her supervisors." *Ensko v. Howard Cnty.*, 423 F. Supp. 2d 502, 511. Because the alleged municipal policy or custom had factual support, the court easily concluded that the plaintiff had pled a theory of municipal liability. *Id.* at 502, 511 (D. Md. 2006) ("As Ensko has offered evidence of harassment over an extended period, by multiple HCPD officers and, as she and other female officers have repeatedly complained to their supervisors of the harassment, there is a genuine issue whether such harassment was so widespread as to be a policy or custom of the HCPD.").

The First Amended Complaint here contains far more factual allegations than in *Owens* or *Ensko* establishing that Pocomoke City had a policy and custom of unconstitutional and unlawful race discrimination and retaliation, and that such policies and customs were attributable to Pocomoke City. *First*, Plaintiffs adequately alleged that Blake was a final policymaker for Pocomoke City whose actions represent the official policy of Pocomoke City, and that his actions as final policymaker directly caused racial discrimination in pay and benefits against the Plaintiffs in violation of the Equal Protection Clause. Blake was delegated in the city charter

final authority to set police department salaries. FAC ¶¶ 43-44. On more than one occasion, at the same time as Blake provided or approved pay raises to White police officers of similar rank and performance to Lieutenant Green and Officer Savage, he denied raises to Green and Savage. *Id.* ¶¶ 48-52. When making these salary decisions, Blake was aware of Chief Sewell's recommendations for raises for Lieutenant Green and Officer Savage based on his review of Chief Sewell's annual budget. *See id.* ¶ 44. But Blake ignored the recommendations for African American officers who deserved salary increases based on their performance while granting those increases to similarly situated White officers. *See id.* ¶¶ 44-52. Similarly, Defendant Blake declined to enter into an employment agreement with Chief Sewell, despite doing so with prior White Pocomoke City police chiefs. *See id.* ¶ 47. These factual allegations are more than sufficient to defeat dismissal of the disparate pay and benefits claim. *Jordan*, 15 F.3d at 339.

Second, Officer Savage alleges that the policies or customs of Pocomoke City led to an unconstitutionally hostile work environment, as challenged in Counts I and VII. During the period which Officer Savage served on the CET, Pocomoke City had delegated its final policymaking authority to the CET to establish Officer Savage's job duties, work assignments, and personnel policies. FAC ¶¶ 53, 59. Because of the delegation of final policymaking authority to the CET, the CET's "policy becomes that of" Pocomoke City. *King*, 680 F.3d at 1020. And the First Amended Complaint includes a litany of allegations evidencing routine harassment in the CET over a multi-year span that is sufficient to establish a policy or custom for purposes of municipal liability. FAC ¶¶ 66-104; *Ensko*, 423 F. Supp. 2d at 511 (finding that "evidence of harassment over an extended period, by multiple . . . officers" created "a genuine issue whether such harassment was so widespread as to be a policy or custom of the HCPD"). Count VII additionally alleges a policy or custom of retaliation by final policymakers in the

Pocomoke City government, including Blake, Crofoot, and Morrison. The elements of the hostile work environment claim and the municipal liability analysis are same where the hostility is based on retaliation as where it is based on racial discrimination. *See Carney*, 534 F.3d at 1276 ("The municipal liability analysis for . . . retaliation claim[s] is the same as that [for] discrimination claim[s]."). For engaging in protected speech about race discrimination and filing EEOC complaints against local government, Officer Savage was demoted, removed from narcotics work, ordered to take psychiatric evaluations, reduced to menial roles within the Pocomoke City Police Department, and eventually terminated. FAC ¶¶ 137-54, 163, 170, 186. This pattern of retaliation for engaging in protected activity did not only harm Officer Savage but swept in Lieteunant Green and Chief Sewell for their support of Officer Savage, which provides factual support that retaliation was the custom in Pocomoke City. FAC ¶¶ 166-173; *see also Owens*, 767 F.3d at 404 (affirming that "other cases . . . lent credence to the claim that policymakers" encouraged "an impermissible practice").

Third, with respect to Plaintiffs' Equal Protection claims for unconstitutional termination (Count II) and First Amendment retaliation claims (Counts IV and V), Plaintiffs have more than adequately pled that Blake and Morrison were final policymakers for Pocomoke City, and that their unconstitutional acts thus were the official policy of Pocomoke City, beginning with adverse employment actions in retaliation for Officer Savage's and Chief Sewell's protected First Amendment speech and continuing through the eventual terminations of Officer Savage and Chief Sewell by Pocomoke City. *See* FAC ¶¶ 123-188, 256-66. The Amended Complaint also alleges that the retaliation and racial discrimination became widespread and persistent, and thus was a custom of Pocomoke City.

Fourth, Officer Savage's and Chief Sewell's First Amendment claims also adequately allege a policy or custom of retaliation leading to *Monell* liability. Both claims rely on the retaliatory actions by final policymakers and a pattern of retaliation by Blake that was sufficiently widespread to constitute a custom. *See Edwards*, 178 F.3d at 244-49.

In sum, Pocomoke City's official policies and customs are alleged to have caused the constitutional violations in Counts I to V and in Count VII, subjecting it to *Monell* liability. As such, the Defendants' requests to dismiss claims of *Monell* liability against Pocomoke City should be denied.[17] While Pocomoke City may elect to dispute how widespread its acts of discrimination and retaliatory practices were, the proper time for that dispute is following discovery. *See Jordan*, 15 F.3d at 340 ("[U]nder the Federal Rules of Civil Procedure, primary reliance must be placed on discovery controls and summary judgment"—rather than motions to dismiss—"to ferret out before trial unmeritorious suits against municipalities.").[18]

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court deny the Municipal Defendants' Motion to Dismiss and grant such other relief as this Court deems necessary and proper.

[17] Municipal Defendants also argue that it is redundant to name Morrison in his official capacity as a Defendant when Pocomoke City is a Defendant. Mun. Br. at 30. Plaintiffs do not object to dismissal of Morrison in his *official capacity* only but note that dismissal would not be applicable for state and county defendants on those grounds. To the extent that those defendants are held to be performing state functions, certain forms of relief would only be available from the official in his official capacity but not from the government unit. *See Hayat v. Fairely*, No. WMN-08-3029, 2009 WL 2426011, at *10 (D. Md. Aug. 5, 2009) ("Under the *Ex Parte Young* doctrine, prospective relief against a state official in his official capacity to prevent future federal constitutional or federal statutory violations is not barred by the Eleventh Amendment.").

[18] In the alternative, Municipal Defendants requested bifurcation of claims. *See* Mun. Br. at 32. For simplicity, and because multiple briefs included this request, this argument was addressed separately in Plaintiffs' Consolidated Response to Defendants' Motions to Bifurcate.

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