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in this issue:

Termination

Former officer could not show that County's reasons for his termination were pretextual

Citation: *Johnson v. Miami-Dade County, 948 F.3d 1318, 2020 Fair Empl. Prac. Cas. (BNA) 32700 (11th Cir. 2020)*

The Eleventh U.S. Circuit has jurisdiction over Alabama, Florida, and Georgia.

Harrius Johnson, a black male, was terminated from the Miami-Dade County Police Department ("MDPD") for insubordination and disrespecting his superior officers. Johnson sued Miami-Dade County alleging that the real reasons for his termination were racial discrimination and unlawful retaliation in violation of 42 U.S.C.A. § 1983, Title VII of the Civil Rights Act of 1964 and the Florida Civil Rights Act ("FCRA"). Specifically, Johnson asserted that the MDPD terminated him in retaliation for filing various complaints with the Equal Employment Opportunity Commission. The district court awarded the County summary judgment, concluding that Johnson could not show that the County's nondiscriminatory, nonretaliatory reasons for terminating him were pretextual. Johnson appealed.

Relevant to this appeal were three sets of facts: (A) those related to Johnson and his supervisor, Lieutenant Ricelli, in 2013; (B) those related to discipline imposed on Johnson by Captain White in June of 2015; and (C) those related to Director Patterson's decision to terminate Johnson in August of 2015.

Johnson claimed Ricelli retaliated against him for reporting Ricelli's and other officers' misconduct in 2013. Specifically, Johnson claimed that, as a result of his reports, (1) Ricelli began giving Johnson low monthly evaluations; (2) Ricelli denied Johnson three days of personal leave; and (3) Ricelli formally disciplined Johnson with a Record of Counseling ("ROC") and a Disciplinary Action Report ("DAR").

Turning to Johnson's "reports," in July of 2013, Johnson sent an e-mail to Ricelli and other supervisors that complained that Ricelli had directed Johnson to alter the evaluation of another officer. In that evaluation, Johnson claimed that the other officer used racial slurs and profanity towards black citizens while performing her duties.

The ROC stated that his e-mail inappropriately expressed personal concerns and opinions about various officers outside of the proper chain of command.

The next month (August of 2013), Johnson received an ROC because of the July e-mail. The ROC stated that his e-mail inappropriately expressed personal concerns and opinions

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about various officers outside of the proper chain of command. Johnson sent similar e-mails several more times, which the ROC deemed purposeful disregard for direct orders, and it warned Johnson that further disciplinary action was possible if his conduct continued.

Then, in September of 2013, Johnson used a transfer evaluation for a black officer under his command to express concerns that Ricelli falsified a document that resulted in the revocation of personal vehicle privileges for that officer. Roughly a week later, the County issued Johnson a DAR that suspended him for five days. Johnson was issued the DAR because he was warned that it was improper to use the transfer evaluation to complain about Ricelli, but Johnson refused to alter his evaluation. Such conduct was found to be disrespectful and defamatory. Johnson appealed the DAR, but the hearing examiner agreed that Johnson's conduct was insubordinate, disrespectful, uncooperative, and improper. However, some of Johnson's complaints about other officers and Ricelli were ultimately sustained when he properly filed his grievances with the Internal Affairs department.

Jumping forward to 2015, on April 30, Johnson filed two Charges of Discrimination with the EEOC, alleging retaliation, race discrimination, and sex discrimination.

Roughly two months later, on June 27, Johnson drafted a DAR against a subordinate officer who he believed had violated several MDPD policies. In a meeting regarding the DAR, Captain White asked Johnson to alter the report, but Johnson refused because he believed doing so would amount to unlawfully falsifying an official document. According to Johnson, White threatened that he would keep Johnson in his office all night until Johnson changed the DAR.

During the meeting, Johnson repeatedly stood up to leave the room, claimed he had "better things to do," and otherwise was deemed to have been insubordinate and disrespectful. Therefore, on June 29, the County issued Johnson a DAR that suspended him for five days. According to Johnson, the DAR was, in reality, issued in retaliation for his April EEOC complaints, not because of his conduct at the meeting.

Approximately six weeks later, on August 14, Johnson sought to issue another DAR against the same subordinate officer for additional policy violations. The next day, on August 15, White summoned Johnson to the office, where White presented Johnson with the June 29 DAR. White claimed that Johnson left the room without permission or explanation to make copies of the DAR, walked out of the room multiple times without being excused, and finally stated that he did not "have time for this," before walking out and slamming the door so hard that it jammed, stranding White in the room. Johnson claimed none of this happened, and that he calmly left the room. The court here assumed Johnson's version was true for the purposes of summary judgment.

As a result of this meeting, on August 19, White drafted a DAR against Johnson based on White's allegedly falsified version of the August 15 events. White recommended that Johnson receive a 20-day suspension for his conduct. However, on August 25, Police Director JD Patterson overruled this recommendation and decided to terminate Johnson's employment. Roughly five months later, on January 28, 2016, a final appeal meeting was held where Johnson, represented by a member of the Professional Law Enforcement Association, was permitted to provide his version of the August 15 events. Patterson upheld the termination.

Johnson sued the County, alleging that the County engaged in various illegal conduct. As relevant to this appeal, Johnson alleged racial discrimination and unlawful retaliation in violation of Title VII, § 1983, and the FCRA. In the district court, both parties moved for summary judgment on these claims. The court found that, even assuming Johnson

could make a prima facie showing of discrimination or retaliation, the County was entitled to summary judgment. The County was entitled to summary judgment because, under the *McDonnell Douglas* framework, Johnson had not demonstrated a genuine issue of material fact regarding whether the County's nondiscriminatory reasons for the adverse employment actions against Johnson were pretextual. Specifically, the court found that Johnson had not presented evidence that similarly situated employees were treated dissimilarly (i.e., Johnson had not presented any "valid comparators"), and it rejected Johnson's argument that his evidence showed that the County inadequately investigated his claims of discrimination.

DECISION: Affirmed in part, vacated in part, and remanded.

When a Title VII retaliation claim (such as Johnson's) is based on circumstantial evidence, the courts often utilize the three-part *McDonnell Douglas* burden-shifting framework.

First, the plaintiff must establish a prima facie case, which raises a presumption that the employer's decision was more likely than not based upon an impermissible factor. To establish a prima facie case of retaliation, a plaintiff must show: (1) that he engaged in statutorily protected expression; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship between the two events.

Second, once the plaintiff establishes a prima facie case, the burden shifts to the defendant to offer a legitimate, nondiscriminatory reason for its employment decision.

Third, if the defendant offers a legitimate, nondiscriminatory reason for its employment decision, the burden shifts back to the plaintiff to establish that the reason offered by the defendant was not the real basis for the decision, but a pretext for discrimination.

Additionally, when, as here, a plaintiff attempts to use Title VII and 42 U.S.C.A. § 1983 as parallel remedies for the same allegedly unlawful employment discrimination, the elements of the two causes of action are identical, and identical methods of proof, such as the *McDonnell Douglas* framework, are used for both causes of action. And because the FCRA is based on Title VII, decisions construing Title VII apply to the analysis of FCRA claims. Therefore, all of Johnson's claims were governed by the *McDonnell Douglas* framework.

In a Title VII retaliation case, a plaintiff can attempt to establish that his employer's proffered reason for its employment decision was a pretext for unlawful activity by showing that the employer treated similarly situated employees differently—i.e., by showing that valid "comparators" were treated differently than the plaintiff.

The district court had evaluated Johnson's comparators before circuit court had changed the standard for considering such evidence. The circuit had concluded that the traditional "nearly-identical test is too strict," and held that the new standard is "show[ing] that [the plaintiff] and [his] comparators are 'similarly situated in all material respects.' " Therefore the appellate court vacated the district court's ruling on Johnson's comparators evidence and remanded for reconsideration of the evidence.

The circuit court next determined whether Johnson can carry his burden under *McDonnell Douglas* on any of his retaliation claims in the absence of valid comparators evidence.

Johnson alleged various retaliatory acts that concerned the three sets of facts mentioned above.

Johnson claimed that Ricelli unlawfully retaliated against him because he reported Ricelli's and other officers' misbehavior.

First, the negative monthly evaluations were not material adverse employment actions based on the facts of this case, and therefore could serve as the basis for a Title VII retaliation suit. A material adverse employment action is one that might have dissuaded a reasonable worker from making or supporting a charge of discrimination. Here, Johnson generally alleged that the negative evaluations "affected the terms and conditions of [his] employment, including [his] annual performance evaluation, disciplines issued, and other rights provided for under the Collective Bargaining agreement." However, at no point did Johnson provide any support for his assertions or allege why a reasonable worker in his shoes would have been dissuaded from reporting allegedly retaliatory conduct because of these negative evaluations. In fact, his claims about the changes in the terms and conditions of his employment were affirmatively negated by his own brief, in which he said that "[a]t the time of his termination, Plaintiff was a supervisor who held the rank of Police Sergeant, with a successful three years of above satisfactory and outstanding employee evaluations." Accordingly, Johnson failed to establish that the negative monthly evaluations were material adverse employment actions.

Second, Johnson could not recover based on Ricelli's alleged denial of Johnson's request for personal leave because Johnson raised this argument for the first time in his reply brief.

Third and finally, Johnson could not recover for the formal discipline he suffered from Ricelli—namely, the ROC and the DAR—because Ricelli had legitimate, nonretaliatory reasons for disciplining Johnson, and Johnson has not offered evidence that these reasons were pretextual.

Johnson was issued the ROC because he did not file his complaints against Ricelli and other officers in the proper channels, which was deemed an inappropriate attempt to circumvent the proper chain of command. When Johnson continued this conduct, he was warned that further discipline was possible. Then, when Johnson did not cease, he was issued a DAR.

Promoting the chain of command and punishing insubordination are legitimate, important concerns for a

police force, and Johnson has not offered proof that these legitimate reasons were pretextual. In fact, when Johnson filed his complaints in the proper channels, some of his most serious complaints were sustained. This suggested that the County was not attempting to sweep Johnson's complaints under the rug, but rather that Johnson's inappropriate methods of complaining were the reason he was disciplined. Because Johnson offered no reason that this discipline was illegitimate or pretextual, he had not satisfied his burden under *McDonnell Douglas*.

Johnson claimed that White filed a DAR against him because Johnson filed two Charges of Discrimination with the EEOC in April of 2015. However, because the County offered a legitimate, nondiscriminatory reason for its decision to discipline Johnson in June of 2015—namely, insubordination—the burden was on Johnson to establish that this proffered reason is pretextual.

Mere temporal proximity, without more, must be very close to suggest causation in a Title VII retaliation case.

Johnson argued that he could establish pretext because his discipline occurred 58 days after his EEOC complaint. But mere temporal proximity, without more, must be very close to suggest causation in a Title VII retaliation case. Here, Johnson claimed that the temporal proximity (nearly two months) between his protected conduct (filing complaints with the EEOC) and his adverse employment action (suspension) established that the County's reason for suspending him (insubordination) was a pretext for retaliation. However, the circuit's case law suggested that much shorter disparities were insufficient, standing alone, to establish pretext. Therefore, because Johnson did not provide any other evidence of pretext, he failed to satisfy his burden under *McDonnell Douglas* to prove that the legitimate reason proffered by the County was pretextual as related to the June 2015 DAR.

Finally, the court addressed Johnson's complaints about the August 2015 events that ultimately resulted in his termination from the MDPD. The only possible claim that Johnson could have had regarding those events was that the termination was retaliation for the April 2015 EEOC complaints.

As discussed above, Johnson could not establish pretext solely based on the temporal proximity between protected conduct (his April EEOC complaints) and an adverse employment action (termination of employment) when such a large gap existed between the two events. However, unlike the June discipline, Johnson alleged that the August discipline was based, at least in part, on a falsified report of insubordination written by White. This fact, in addition to temporal proximity, might preclude summary judgment if it was White who terminated Johnson because a reasonable jury could infer that the reason White falsified the disciplinary report against Johnson was retaliation for the EEOC complaints, at least when no other reason for such a falsified report was readily apparent.

But that was not the case here because it was *Patterson* who ultimately decided to terminate Johnson in August of 2015, not White, and there was no evidence that Johnson's EEOC complaints inspired Patterson to terminate Johnson (other than insufficient temporal proximity). And even if the court could construe Johnson as alleging a "cat's paw" argument, whereby White's retaliatory motives could be imputed to Patterson, Johnson's argument would fail because Patterson considered both Johnson's and White's versions of the events before finalizing Johnson's termination in January of 2016.

As a result, the court here could not conclude that Patterson merely "rubber-stamped" White's allegedly retaliatory motive. Patterson chose to believe White's version of the events—a decision that was well within his discretion—and it was not the proper function of the court to second guess Patterson's decision

Accordingly, the County was entitled to summary judgment regarding Johnson's termination.

See also: *Jefferson v. Sewon America, Inc., 891 F.3d 911, 926, 130 Fair Empl. Prac. Cas. (BNA) 1567, 102 Empl. Prac. Dec. (CCH) P 46041 (11th Cir. 2018).*

See also: *Crawford v. Carroll, 529 F.3d 961, 974, 103 Fair Empl. Prac. Cas. (BNA) 717 (11th Cir. 2008).*

Editor's Note:

An employer may be liable for the discriminatory intent of an employee who manipulates decisionmakers into terminating another employee by providing false information to the decisionmakers that leads to termination. See Wright v. Southland Corp., 187 F.3d 1287, 1304 n.20, 80 Fair Empl. Prac. Cas. (BNA) 1280, 4 Empl. Prac. Dec. (CCH) P 46292 (11th Cir. 1999).

Retaliation

Officer who spoke out against proposed potentially illegal policy stated claim for retaliation

Citation: *Frazier v. City of Philadelphia, 2020 WL 897698 (E.D. Pa. 2020)*

The dispute underlying this lawsuit began at a department-wide meeting of the Narcotics Bureau. The parties had very different recollections of the meeting. Chief Inspector Anthony Boyle and Raymond Evers say they held the meeting shortly after they were assigned as the new leaders of the Narcotics Bureau to introduce themselves, review the expectations for their divisions, and receive input from members of the Bureau. They recalled discussing various issues

pertaining to the integrity and effectiveness of investigations, the ability to get violent criminals off the street, and the arrest and prosecution of higher-level drug dealers. They also recollected raising flipping, but contended it was simply a discussion about a common, legal method of developing information about criminal activity from arrested individuals whereby the arrestee becomes an informant. "Flipping" in this context refers to an arrangement between law enforcement and an arrested person whereby the arrestee provides law enforcement with useful investigative information in return for which the arrestee hopes to escape charges for the crime for which he or she was arrested. Following the meeting, Boyle and Evers worked with lawyers within the Bureau and within the District Attorney's office to draft a formal policy on flipping.

Debra Frazier remembered the flipping discussion very differently. She recalled that during the meeting, Boyle and Evers ordered aggressive and illegal tactics—namely, that if someone was found with a small quantity of drugs, instead of arresting them, the officers were to simply record the drugs as an "investigation of objects" not attached to a specific person, then force the suspect to become an "informal informant" through unofficial channels. She also understood Boyle and Evers to be instructing officers to falsify property receipts tied to potential informal informants. Specifically, when officers questioned Evers as to what to say on the property receipt and whether they were supposed to lie about the origin of the drugs on the receipt, Evers responded that "we will take care of it." Further, she said that Boyle told officers to engage in aggressive policing tactics, such as forcefully clearing people off street corners and running over the feet of "toads and scumbags" if they would not move.

After the meeting, Frazier reported her concerns up the chain of command to First Deputy Commissioner Myron Patterson as well as to Evers. She both described how, following their reports, Boyle and Evers as well as others retaliated against her.

She contended that Boyle and Evers attempted to eliminate her position.

Frazier said she was excluded from meetings at which she should have been present; her office door locks were changed without prior notification to her and she was not given a key to the new lock; someone broke into her office (as evidenced by "jimmy" marks on the door and an askew light panel); Boyle nitpicked and made unnecessary corrections to her memos (for example to her use of parentheses); and he took his time forwarding her memos to Wilson which made it look like she was late in completing them. Further, when she requested a day off to make the arrangements for a relative's funeral service, Boyle denied her request on the grounds that funeral days could only be used on the date of the actual service. She contended that Boyle and Evers attempted to eliminate her position at a meeting where Boyle claimed that her job duplicated another officer's job when, in fact, it was "quite clear" that the two jobs were distinct. Ultimately, Frazier was transferred to a different department, the Audits and Inspections Unit, which is housed in an office roughly four miles further away from her home than her old office. And, according to Frazier, the office was makeshift, cramped, and barely habitable, without heat or air conditioning, equipment, and female bathrooms. She said she was also denied an individual office, which was required for her rank.

In the midst of all of this, an anonymous letter dated July 30, 2017 and addressed "To Whom It May Concern, From Stressed Black Personnel of The Narcotics Bureau" circulated through the Narcotics Bureau. The memorandum raised many of the above-described complaints about the May bureau-wide meeting. It also alleged that African American supervisors and officers were held to different standards than white ones and cited perceived instances of discrimination against African American officers (including Frazier and Vann). According to the letter, the Narcotics Bureau, at the hands of Boyle and Evers, was a hostile work environment for African American employees. Frazier denied involvement with the letter. In response to the letter, the Police Department opened two parallel Internal Affairs Division (IAD) investigations. After extensive interviews with officers in the Narcotics Bureau, the IAD concluded that there was no support for the letters' allegations. The investigation did, however, find that Evers implemented the new flipping program despite expressed discomfort from officers and that the policy directive which was cited as support for its use was too vague and insufficient to support it.

Frazier sued Boyle, Evers and the City of Philadelphia asserting that Defendants retaliated against her for challenging comments made by Boyle and Evers. She alleged violations of 42 U.S.C.A. § 1983. All Defendants moved for summary judgment in their favor.

DECISION: Motion denied in relevant part.

To evaluate the First Amendment retaliation claim under 42 U.S.C.A. § 1983, a three step analysis, known as the "*Pickering* balancing test," was required.

The first step is whether the speech in question is protected speech? The primary inquiry is whether it involves a "matter of public concern," meaning it is fairly considered as relating to any matter of political, social or other concern to the community. For example, the speech is protected if it attempts to bring to light actual or potential wrongdoings on behalf of a public official or demonstrates a breach of public trust on behalf of the official.

But there are some limitations as to what is considered protected speech. Specifically, airing of "merely personal grievances" is not

of public concern. Further, an employee of a public entity is not protected when they make statements pursuant to their official duties. Only if they speak as a private citizen is their speech protected by the First Amendment. So, for example, an employee whose "primary purpose is to bring about systemic reform" is more likely speaking as a citizen. Whether a particular statement was made as part of a public plaintiff's duties (and thus not protected) or as a private citizen (and thus protected), is a mixed question of fact and law; the scope of job duties is fact-based, but the ultimate constitutional significance of those facts is a question of law.

Determining on which side of the line speech falls involves a practical inquiry into whether an employee is speaking within their job duties, looking at, among other things, whether the employee's speech relates to special knowledge acquired on the job; whether the employee raises complaints about issues related to her job up the chain of command; whether the speech was within the employee's designated responsibilities; and whether the speech is in furtherance of designated duties, even if the speech is not formally part of them. That the views were expressed inside the workplace or touch on the subject matter of the employee's job is not dispositive.

The second question in the analysis is whether plaintiff's interest in the speech outweighs the state's countervailing interest as an employer in promoting the efficiency of the public services it provides through its employees. A balance is struck between the employee's interest in free speech, and the state's countervailing interest as an employer to promote efficiency in its service. Thus, if an employee engages in speech that is highly disruptive to the workplace, making it difficult for the public entity to run an efficient office, then this weighs against protecting the speech. The significance of the speech's impact on the entity's interest in running an efficient workplace turns on the relationship between the employer and employee. The interest is particularly strong when the employee's position requires a high degree of trust between herself and the supervisor, and the speech at issue erodes that trust—and therefore erodes the working relationship. Nonetheless, the presumption in favor of free speech is strong. A mere showing of a disruption is not, standing alone, enough to determine that the employee's speech is not protected.

The third step of the analysis is a determination of whether the protected activity was a substantial or motivating factor in the alleged retaliatory action. The key question is whether the retaliatory act would deter a person of ordinary firmness from exercising his or her First Amendment rights. Generally, making the causal connection between the protected speech and the alleged retaliation requires showing either an "unusually suggestive" temporal proximity between the two, or a "pattern of antagonism" combined with timing. Actual or constructive discharge is not required: The constitutional violation is not in the harshness of the sanction applied, but in the imposition of any disciplinary action for the exercise of permissible free speech. On the other hand, not all negative actions rise to the level of actionable retaliation. For example, mere criticism, false accusations, or verbal reprimands are unlikely to qualify. The cumulative effects, however, of what might otherwise seem trivial, could become actionable even if the actions in isolation would not be.

Whether Frazier spoke as a private citizen, and not just an employee, was a closer question.

Frazier asserted that Evers and Boyle instructed officers to perform the common police tactic of flipping suspects in an illegal manner—namely, that they encouraged officers to falsify property records and not go through the proper channels to turn the suspects into confidential informants. Defendants vehemently denied Frazier's recounting of the meeting. There was no audio recording or official notes in the record from the meeting. But the extensive interviews taken during the IAD Investigation indicated that flipping was discussed and that numerous officers expressed discomfort with Defendants' proposals. It followed from the conflicting accounts that there was an issue of fact as to whether members of the Philadelphia Police Department were proposing using illegal investigative tactics. If such illegal tactics were found to have been proposed, then reporting the behavior could be said to bring to light actual or potential wrongdoing or breach of public trust on the part of government officials.

Whether Frazier spoke as a private citizen, and not just an employee, was a closer question. Frazier was the Integrity Control officer of the Narcotics Bureau. She, as well as Boyle and Evers, described her primary job as being in charge of the integrity of paperwork (such as reports and memos filed by officers) and reviewing paperwork for accuracy. Accordingly, her duties were unlikely to involve flipping an arrestee. She did, however, view herself as responsible for reporting any policy violation and believed that the flipping discussion at the meeting involved such a violation in that she understood it to mean other officers were being required to engage in illegal activity and subvert official channels for informants.

That did not, however, end the inquiry. She asserted, in an affidavit attached to the motion for summary judgment, that she reported her concerns up the chain of command, but that she also raised them with the Vice President of the Fraternal Order of Police and the President of the Guardian Civil League, which is the Philadelphia chapter of the National Black Police Association—neither of whom were in her chain of command.

There was no record evidence that Frazier's job duties required her to report to a fraternal organization or

her union. Such reporting did not fall within her job duties and, thus, in raising her concerns with them, she was speaking as a private citizen and her speech was protected.

Whether Frazier's interest in her speech outweighed her employer's countervailing interest in promoting efficiency was not addressed by any party in their briefs. The record reflected that, at most, a few officers reported in their IAD interviews that the allegations of racism and misconduct created some general feelings of tension within the Bureau—but most cited specifically the Anonymous Letter as the cause of tension, not Frazier's protests against the flipping policy. Balanced against potential tension within the Bureau is the high level of importance of speech that may bring police misconduct to the attention of the public and to other officers in the Bureau. The weight of the balance is in Frazier's favor.

Frazier finally had to show specific retaliatory actions taken by each Defendant separately.

Frazier was not in Evers' chain of command; she reported directly to Boyle. And the evidence specific to Evers was spare. Frazier claimed that Evers was at a meeting with her, Boyle, and Wilson a month after she first reported her complaints, during which Boyle attempted to have her position cut. But Frazier did not claim Evers played any role in that effort. And while Frazier made other general assertions of wrongdoing, including that she was transferred and improperly excluded from meetings, she again did not present evidence to tie this conduct to Evers. Because Frazier did not present any evidence showing that Evers retaliated against her, summary judgment was granted on this claim.

The evidence that Boyle retaliated against Frazier, when taken in its entirety, raised genuine issues of material fact, in that the jury, when viewing the evidence as a whole, could reasonably find that Boyle engaged in a "pattern of antagonism" against Frazier. Frazier asserted that Boyle: became enraged when she reported that her office was broken into; transferred her to a ramshackle office four miles further away from her home than her old office resulting in an increase in her commute time; nitpicked her reports; delayed sending her reports to Wilson; and improperly denied her a funeral day.

While evidence conclusively tying Boyle to the break-in was lacking, as the investigation of her office did not turn up any fingerprints, a jury could find Boyle's alleged angered response telling. Transfers to another office that increase commute time too can be construed as retaliation. Although there was no direct evidence that Boyle ordered the transfer and he denied that he had authority to initiate a transfer, he did acknowledge that he had the "power to request transfer." While close timing is generally more indicative of causation, the 10 months gap between the report and the transfer was not dispositive. And, although criticism and verbal reprimands such as nitpicking and delaying sending reports, are generally not sufficient to qualify as retaliatory, what in isolation may seem trivial can rise to the level of retaliation when viewed in the context of all other events. Finally, Boyle contended the funeral day denial was proper because a funeral day can only be used for the day of the service itself. Neither side introduced any written policy regarding funeral days. Thus, it was Frazier's word against Boyle's word—and who is to be believed is a matter for the jury.

Taking all inferences in Frazier's favor, together the evidence she has presented could paint an image of repeated harassing behavior from Boyle after she reported his alleged misdoing. With fact issues and credibility concerns remaining, summary judgment on this claim was not appropriate.

See also: *Evancho v. Fisher, 423 F.3d 347, 23 I.E.R. Cas. (BNA) 754 (3d Cir. 2005).*

See also: *Flora v. County of Luzerne, 776 F.3d 169, 39 I.E.R. Cas. (BNA) 1122 (3d Cir. 2015).*

On the Beat

Phoenix council approves civilian oversight committee

Phoenix City Council approved a plan to provide civilian police oversight, including investigative powers, after months of contentious debate.

By a 5-4 vote, the council approved the "Office of Accountability and Transparency" proposal championed by Councilmember Carlos Garcia. OAT will become a new city department, separate from the police department, which will include both a community review board and a unit dedicated to monitoring and investigating police complaints.

The vote came after a heated public comment period. Many community members spoke out against "Model A," which was a proposal by Mayor Kate Gallego that was more moderate when compared to Garcia's model. After her plan was lambasted for hours, and it appeared neither plan would pass, Gallego made the decision to support Garcia's proposal but said, "I do have concerns with the implementation of Model B."

"I'm really excited that the community came out and their testimony definitely made a difference. People were telling their stories and those of us on the council listened," said Councilman Carlos Garcia. "I'm grateful for the mayor and that she made this shift. And the big thing now is going to be implementation and [to] make sure that we get this done right."

Phoenix police unions spoke out against the concept of the Civilian Oversight Board over the past year and said they are still skeptical about the board's power and potential agenda. "You never buy the first model of a car, right? Something always goes wrong and there's always something to work out," said Britt London, President of the Phoenix Law Enforcement Association.

Other conservative-leaning members of the council also expressed their vote to reject both boards and

framed the debate as being pro or anti law enforcement. "To the officers, I know you got an extremely tough job. I, personally, don't want to add to your burdens, which I think this will today," said Councilman Jim Waring.

OAT will intake complaints about police and will have a role in investigating those complaints. When the Phoenix Police Department opens a professional standards investigation for alleged misconduct, OAT will conduct a parallel investigation, including questioning officers and witnesses. Both the internal and OAT investigators will provide reports with disciplinary recommendations directly to the police chief.

"It's a big deal to have investigative powers," Garcia said. "We need the ability to make sure that an independent investigator is in the room and through the process and does their own reporting of each individual case along with advising policy."

The community review board will review and recommend police policy changes, hold community forums for feedback, and review some completed professional standards investigations and officer discipline.

Discussions for civilian oversight ramped up last summer after officers investigating a shoplifting case were accused of excessive force against a young, black family. The police department was already dealing with backlash after a sharp increase in officer-involved shootings.

A second option, dubbed an ombudsman model, was proposed by Phoenix Mayor Kate Gallego. That plan was criticized by dozens of community members at the meeting. They say it fell short because it lacked independence and full investigatory authority.

Gallego had said her ombudsman plan had "multiple voices incorporated," but when she could not muster enough council votes, she shifted her support to the OAT model.

"I think our duty is to implement good, sound policy that will help bring positive change for all residents we serve and last beyond our own tenure on the council," Gallego said to kick off the meeting.

In addition to Garcia and Gallego, Vice Mayor Betty Guardado and Councilmembers Michael Nowakowski and Laura Pastor voted for civilian oversight. Councilmembers Jim Waring, Thelda Williams, Sal DiCiccio, and Debra Stark voted against the plan.

DiCicco said police officers aren't bad, they just had "one bad year." He was referring to 2018 when Phoenix had more officer-involved shootings than any city in the country.

Both Phoenix police unions opposed both options.

"I can say right now that the Phoenix Law Enforcement Association cannot support any model that does not show how the entire Phoenix community, which includes police officers, benefits," said PLEA president Michael "Britt" London.

"This plan is actually designed to create conflicts between the department's investigations and a parallel investigation conducted by investigators that will not have the experience and training the members of the department have," said Ben Leuschner of the Phoenix Police Sergeants and Lieutenants Association.

Source: *abc15.com*