UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

HISPANIC NATIONAL LAW ENFORCEMENT ASSOCIATION NCR, *et al.*, Plaintiffs, v. PRINCE GEORGE'S COUNTY, *et al.*, Defendants.	Civil Action No. 8:18-cv-03821 Hon. Theodore D. Chuang

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This is an action brought to remedy egregious racial discrimination and retaliation in employment by the Prince George's County Police Department ("PGPD" or the "Department") and Individual Defendants[1] in violation of the First and Fourteenth Amendments to the U.S. Constitution, as well as other violations of law.

Defendants' motion to dismiss asserts a variety of arguments, but not one provides a basis for dismissal of any Plaintiff or claim. Indeed, Defendants do not dispute the sufficiency of the overwhelming majority of allegations in the Complaint.

First, with regard to their motion under Rule 12(b)(1) as to standing, Defendants concede that each of the 12 Individual Plaintiffs has standing, and that the organizational plaintiffs (HNLEA and UBPOA) have standing to seek injunctive and declaratory relief. Because Fourth Circuit (and Supreme Court) precedent are clear that only one plaintiff need have standing to deny the motion, that should be the end of the matter. Defendants' limited challenge to HNLEA and UBPOA's standing to assert other remedies is wrong on the law and based on a distorted view of the facts pled in the Complaint.

Second, with regard to their Rule 12(b)(6) challenge as to the timeliness and substance of the claims, Defendants do not dispute ***18 of the 29 claims***[2] asserted in the Complaint. Defendants dispute in full just ***six*** claims and partially dispute another ***five,*** as summarized in the table below.

[1] "Individual Defendants" refers to Chief Henry Stawinski, Deputy Chief Administrative Officer Mark Magaw, Deputy Chief of Police Christopher Murtha, and Major Kathleen Mills.

[2] This includes each of the 14 Plaintiffs' discrimination and retaliation claims (Counts I and II), and a disability discrimination claim brought by Plaintiff Zollicoffer (Count III).

Defendants' Motion to Dismiss Does Not Dispute Validity of Nearly All Counts		
Plaintiff	**Validity of Count I Discrimination**	**Validity of Count II Retaliation**
HNLEA	Undisputed	Undisputed
UBPOA	Undisputed	Undisputed
Capt. Joseph Perez	Undisputed	Undisputed
Sgt. Thomas Boone	Undisputed	Undisputed
Sgt. Paul Mack	Disputed	Undisputed
Cpl. Danita Ingram	Disputed (partially)*	Undisputed
Lt. Sonya Zollicoffer	Undisputed	Undisputed
Cpl. Richard Torres	Undisputed	Undisputed
Officer Thomas Wall	Undisputed	Disputed
Cpl. Michael Anis	Disputed (partially)	Disputed
Cpl. Chris Smith	Disputed (partially)	Disputed
Cpl. Michael Brown	Undisputed	Disputed
Officer Tasha Oatis	Undisputed	Disputed
Officer Clarence Rucker	Disputed (partially)	Disputed (partially)

* Partially disputed refer to a claim in which Defendants:
- challenge one theory of discrimination but not others;
- challenge as time barred a subset of allegations but not others; and/or
- challenge sufficiency of a subset of allegations but not others

Defendants largely focus on stray allegations as time barred or insufficient, but fail to address other allegations in the Complaint that are both timely and sufficient to state a claim. For example, as to Sgt. Boone, the President of UBPOA, the motion disputes the viability of his allegation of "non-promotion," *see* Mot. 14-16, but nowhere addresses that following Sgt. Boone's participation in the filing of the Complaint to the Department of Justice and his meetings with Defendant Stawinski regarding the same, he was involuntarily transferred to the Patrol Division—which is considered a demotion within PGPD—where he has been assigned to work the midnight shift. Similarly, the

Defendants assert that Corporal Anis's claim as to Investigator School is time barred, but fail to address that 13 separate applications for reassignment to a specialized unit have been denied within the limitations period. Mot. 19-20. As discussed below, when viewed against the full and complete allegations in the Complaint, each claim is timely and satisfies Rule 8(a).

Third, Defendants do not dispute that the Complaint states claims against each of the Individual Defendants, with one exception: Deputy Chief Murtha. With regard to Deputy Chief Murtha, Defendants misconstrue the nature of Plaintiffs' claim. Plaintiffs assert claims against Deputy Chief Murtha in his ***individual*** capacity, based on his ***direct*** involvement in the discrimination and retaliation alleged in the Complaint. *See, e.g.*, Compl. ¶¶ 4, 5, 48, 66, 98, 99, 101, 102, 103. Defendants' argument that the Complaint fails to allege facts sufficient to show that Deputy Chief Murtha is liable in a ***supervisory*** capacity is wrong, and does not provide a basis for dismissing Deputy Chief Murtha from the case.

At bottom, Defendants' arguments—concerning statute of limitations, an affirmative defense on which Defendants bear the burden of proof, and challenging the merits of Plaintiffs' claims—raise issues to be addressed on a complete factual record following discovery.[3]

OVERVIEW OF COMPLAINT

The Department and Individual Defendants have created and continue to maintain a hostile environment where White officers, in the presence of Plaintiffs and other Officers of Color, engage in overtly racist conduct, including, among others:

- referring to People of Color within the community as "nxxxxs," "coons," "African mother f-ers," and "whores";

[3] Defendants also argue that Plaintiffs' claims against Individual Defendants Stawinski, Magaw, Murtha, and Mills in their official capacity are duplicative of their claims against Prince George's County. Plaintiffs respectfully request that the Court deem those official capacity withdrawn without prejudice.

- referring to PGPD officers and employees as "nxxxxxs and spics," "baboon," "ape," and "African Queen";
- circulating pictures of a Hispanic commander dressed up as a voodoo doll with derogatory comments;
- giving a training dummy a black face and Afro wig;
- sending an African-American officer a package with racist emails;
- circulating text messages expressing the desire to reinstitute lynching; and
- circulating racist images and racially insensitive pictures.

See Compl. ¶¶ 50-51; *see also id.* ¶¶ 3, 52, 58. The organizational plaintiffs and many of the Individual Plaintiffs have filed a series of complaints about such matters with the U.S. Department of Justice. *See id.* ¶¶ 16, 26, 33, 39, 99, 109, 117, 199. The Department and the Individual Defendants have engaged—and continue to engage—in patterns of retaliation against Officers of Color who file complaints against White officers or cooperate in efforts to investigate White officers who engage in misconduct, as well as the leaders and active members of the organizational plaintiffs involved in filing the Department of Justice complaints. *See, e.g., id.* ¶¶ 59-66, 3, 198, 221-224. The Individual Defendants' efforts include institution of investigative proceedings against complaining officers, imposition of transfers to unfavorable assignments, denial of promotions and favorable transfers, and other adverse changes in work conditions. *See id.* ¶ 4. For example, Plaintiffs Ingram, Perez, Wall, and others were all subjected to investigation in retaliation for their complaints about White officers. *See id.* ¶ 66. And, Officers Ingram, Zollicoffer, Perez, Smith, Torres, Wall, Boone, and others were all transferred following their complaints about White officers. *See id.*

The Department and Individual Defendants also administer employee discipline in a grossly discriminatory manner. *See, e.g., id.* ¶¶ 67-87. Officers of Color—especially those who will not keep silent about race discrimination at the Department—are subjected to discipline for

trivial infractions and alleged infractions, whereas White officers are permitted to breach the rules with near impunity. *See id.* ¶ 67. Frequently the Department and Individual Defendants refuse even to investigate complaints—especially race discrimination complaints—brought by Officers of Color against White officers. *See id.* On the other hand, disciplinary charges brought by White officers against Officers employees of Color are pursued vigorously by the Department even when the charges are unfounded. *See id.*

LEGAL STANDARDS

Rule 12(b)(1): "A defendant may challenge standing at the motion-to-dismiss stage in one of two ways: facially or factually." *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017) (citing *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (internal quotation marks omitted)). "In a facial challenge, the defendant contends that the complaint fails to allege facts upon which standing can be based, and the plaintiff is afforded the same procedural protection that exists on a motion to dismiss." *Id.* (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (internal quotation marks omitted)). In a factual challenge, the defendant contends "that the jurisdictional allegations of the complaint are not true." *Id.* In that event, a trial court may look beyond the complaint allegations. *Id.*

In raising a factual challenge, the defendant "has the initial burden of production." *See GBForefront, L.P. v. Forefront Mgmt. Grp., LLC*, 888 F.3d 29, 35 (3d Cir. 2018) (citing *Washington v. Hovensa LLC*, 652 F.3d 340, 345 & n.2 (3d Cir. 2011)). Accordingly, the defendant "must first present evidence sufficient to raise a given issue as pertinent." *Washington*, 652 F.3d at 345 n.2.

Rule 12(b)(6): In deciding a Rule 12(b)(6) motion, a court must assess whether the complaint contains sufficient factual matter, accepted as true, "to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible when the

plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable." *Id.* The Court's review is limited to "'well-pled facts in the complaint[, which it must view] in the light most favorable to the plaintiff.'" *Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 508 (4th Cir. 2015).

"[D]etailed factual allegations" are not required in order to overcome a motion to dismiss under Rule 12(b)(6). *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (requiring only "enough factual matter (taken as true) to suggest" the conduct occurred). The complaint must provide "plausible grounds to infer" the alleged conduct, but the standard "does not impose a probability requirement at the pleading stage." *Id*. at 556. A claim has facial plausibility when the pleaded enough facts to "raise a reasonable expectation" that discovery may lead to evidence of the misconduct alleged. *Id*. at 556. The Fourth Circuit "accept[s] as true all well-pled facts in the complaint and construe[s] them in the light most favorable to [the non-movant]." *SD3, LLC v. Black & Decker*, 801 F.3d 412, 422 (4th Cir. 2015) (citing *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 632 n.1 (4th Cir. 2015)).

The Fourth Circuit recognizes that pleading requirements must be "tempered by the recognition that a plaintiff may only have so much information at his disposal at the outset." *Robertson v. Sea Pines Real Estate Companies, Inc.*, 679 F.3d 278, 291 (4th Cir. 2012) ("A complaint need not 'make a case' against a defendant or '*forecast evidence* sufficient to *prove* an element' of the claim. It need only '*allege facts* sufficient to *state* elements' of the claim.") (citing *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 349 (4th Cir. 2005)). Indeed, plaintiffs' "prospects for success are largely irrelevant" at the motion to dismiss stage, *SD3*, 801 F.3d at 434, and complaints cannot be dismissed because of "some initial skepticism" as to plaintiffs' claims. *Id.*

ARGUMENT

I. HNLEA and UBPOA Have Standing

A. Defendants Concede That Plaintiffs Have Standing

Defendants concede that the Individual Plaintiffs have standing. *See* Mot. 3. This concession is fatal to their standing challenge, because the presence of even one plaintiff with standing is sufficient for this Court to deny a Rule 12(b)(1) motion. *See, e.g., Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement"); *Bostic v. Shaefer*, 760 F.3d 352, 370 (4th Cir. 2014) (citing *Dep't of Commerce v. U.S. House of Representatives,* 525 U.S. 316, 330 (1999) ("a case is justiciable if. . . plaintiffs have standing as to a particular defendant"). Given Defendants do not dispute that 12 of the 14 plaintiffs have standing, the Court here need not evaluate whether HNLEA and UBPOA have independent standing at this stage. *See id.*; *La Union Del Pueblo Entero v. Ross*, No. GJH-18-1570, 2018 WL 5885528, at *11 (D. Md. Nov. 9, 2018).

But further, Defendants also concede that HNLEA and UBPOA do have standing to seek injunctive relief on behalf of their members, *see* Mot. 10-13, which is the primary form of relief these Plaintiffs seek. *See* Compl., Prayer for Relief. Thus, although Defendants' motion purports to request that the Court dismiss HNLEA and UBPOA entirely as plaintiffs, *see* Mot. 5, on its own terms Defendants' motion provides no valid basis for such dismissal. The ***only*** question the motion raises is whether HNLEA and UBPOA have standing to seek other remedies—damages for themselves (based on organizational standing), or "certain forms of relief" for their members (based on associational standing). As explained further below, they do.

B. HNLEA and UBPOA Have Organizational Standing[4]

An organization has standing to bring a claim where a defendant's actions have "perceptibly impaired" the organizational plaintiff's ability to carry out its established mission by creating a "drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). At the pleading stage, an organizational plaintiff must allege facts showing that "the Defendants' actions would cause them to divert resources to counteract Defendants' actions or that the challenged actions would frustrate Plaintiffs' missions." *La Union Del Pueblo Entero*, 2018 WL at 5885528, at *6; *see also Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d 707, 725 (D. Md. 2011) (expenditure and diversion of resources to investigate agency's action sufficient to show standing). HNLEA and UBPOA have done so here.

The Complaint establishes HNLEA and UBPOA's injuries and organizational standing at the pleading stage. HNLEA's mission is to "unify Hispanic (Latino) and minority law enforcement employees in all communities throughout the United States by serving as positive liaisons between the Hispanic (Latino) and minority officers and the community." Compl. ¶ 12. In addition to its charitable initiatives, HNLEA engages in public education, legislative advocacy, and other initiatives to foster more equality and diversity within PGPD. *See id.* ¶ 13-14. HNLEA's mission includes the improvement of the department and the betterment of the circumstances of its members. *See id.* ¶ 18. Similarly, UBPOA's mission is to "help with the relationship between law enforcement, and the culturally diverse minority communities it serves" by engaging in public education, charitable initiatives that support minority youth, and advocacy for more diversity and

[4] Plaintiffs are submitting the declarations of Joseph Perez (on behalf of HNLEA) and Thomas Boone (on behalf of UBPOA). Where a defendant "contends that the jurisdictional allegations of the complaint are not true," a trial court "may look beyond the complaint," including to affidavits to establish jurisdiction. *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017).

equality within PGPD. *See id.* ¶¶ 22-23. Defendants' persistent discrimination and retaliation against its members have frustrated HNLEA and UBPOA's missions to bridge the divide between law enforcement and advocate for equality within PGPD, *see id.* ¶¶ 14, 22, and it has forced HNLEA and UBPOA to shift attention and resources from serving its mission and the Prince George's community. *See id.* ¶¶ 19, 30. Defendants do not dispute that the Complaint alleges facts showing that Defendants caused such injuries to HNLEA and UBPOA. *See* Mot. 6. Instead, Defendants (1) purport to mount a factual challenge to standing; (2) argue that HNLEA and UBPOA's injuries do not confer standing as a matter of law; and (3) seek dismissal on the basis of "prudential" standing. Each of these arguments fails.

1. Defendants' Purported "Factual Challenge" to Organizational Standing Lacks Merit

The case on which Defendants rely, *Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012), holds that "an organization may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission." That impact on their mission is precisely what HNLEA and UBPOA allege here. *See* Compl. ¶¶ 14, 19, 22, 30.

By and large, Defendants do not dispute this injury. Rather, Defendants challenge ***one example*** of the ways in which HNLEA and UBPOA shifted attention and resources from serving the Prince George's community: allegations that Defendants conduct has hampered both organizations' ability to conduct their "usual fundraising activities for local children." *See* Mot. 7 (citing Compl. ¶¶ 19, 30). Relying exclusively on a description of a single event—HNLEA and UBPOA's 18th Annual Food Baskets Drive for Needy Families—posted on one page of HNLEA's website, Defendants argue that the page "suggests that [HNLEA and UBPOA's] jurisdictional allegations are not true." Mot. 7.

In asserting a factual challenge to standing, the defendant has the burden of production. *See GBForefront, L.P.*, 888 F.3d at 35. Defendants do not come close to satisfying that burden here, because the content of the webpage Defendants cite in no way undermines the factual allegations concerning HNLEA and UBPOA's injuries. To start, the page contains just ***one*** statement concerning UBPOA: that "events such as this bring[] us in contact with the community's needs . . ." Mot. 8. This cannot possibly "suggest[] that" UBPOA's "jurisdictional allegations are not true." *Id.* 7. HNLEA organizes many community outreach events which have been negatively impacted by Defendants conduct. *See* Ex. 1, HNLEA Decl. ¶¶ 6-7, 10, 16-17. And Defendants do not address that after many years of the PGPD co-sponsoring the event (and allowing the event to be held in a County-owned building),[5] following the filing of the Department of Justice complaint in 2016, PGPD refused to co-sponsor the event in 2017 and 2018, falsely claiming that it no longer partnered with community groups on such events. Without PGPD's partnership, HNLEA and UBPOA were unable to secure a building to hold the event and lost the partnership of the radio station (107.9 "El Zol") that historically provided live coverage of the event. In light of the Defendants' efforts to undermine the event, HNLEA and UBPOA had to put additional resources into organizing the event. HNLEA and UBPOA's other charitable initiatives have been similarly impacted. *See* Ex. 1, HNLEA Decl., ¶¶6, 10, 16; Ex. 2, UBPOA Decl., ¶¶ 5, 16.

Moreover, the fact that much of HNLEA's work is carried out through member advocacy and service rather than events, is not surprising given the nature of the organization. In short,

[5] *See* Hispanic Nat'l Law Enf't Ass'n, Nat'l Capital Region, Christmas Baskets 2015, 2014, and 2013, respectively, available at http://www.hnlea.com/christmas_baskets_2015.11.html;http://www.hnlea.com/christmas_baskets_2014.8.html; http://www.hnlea.com/christmas_baskets_2013.2.html (last accessed Mar. 7, 2019).

Defendants' failure to adduce any evidence to substantiate its arguments provides an independent basis for the Court to reject their "factual challenge" to standing.

In any event, as confirmed by their organizational declarations HNLEA and UBPOA have organizational standing. To start, while Defendants focus exclusively on the Christmas Baskets Event, they ignore other "fundraising activities for local children" that were featured on the same HNLEA website for 2017 but not 2018, such as Bikes for Kids on Halloween.[6] For instance, HNLEA and UBPOA have had to postpone three of the seven bike giveaways planned between 2017 and 2019 because they have not had the funds to buy helmets.

The declarations of Capt. Perez and Sgt. Boone detail how PGPD has impeded the organizations' mission critical efforts, including, among others: expanding the employment opportunities for qualified Hispanics (Latinos) and minorities entering law enforcement; fostering a diverse police force with equitable employment practices; and promoting positive relationships between officers of color and the communities that they are sworn to serve. *See generally* Ex. 1, HNLEA Decl.; Ex. 2, UBPOA Decl. The declarations explain that PGPD has impeded HNLEA's ability to provide individualized guidance to officers given the sheer number of Officers of Color who have experienced discrimination within PGPD. *See id.* And the declarations explain how PGPD's culture of retaliation has caused pervasive fear and hesitation among officers of color in PGPD to freely associate with HNLEA and UBPOA, including attending regular meetings and events, and how that has directly strained the organizations' already stretched organizational capacity and constrained their abilities to fundraise to fund various community initiatives. *See id.*

[6] *See* Hispanic Nat'l Law Enf't Ass'n, Nat'l Capital Region, Law Enforcement Association Halloween Bike for Kids in the Community Giveaway, available at http://www.hnlea.com/#Bikes%20for%20Kids%20on%20Halloween (last accessed Mar. 7, 2019).

2. Defendants' Argument That Injuries They Are Causing HNLEA and UBPOA Do Not Confer Standing as a Matter of Law is Baseless.

Defendants also argue that the injuries that they have and continue to cause HNLEA and UBPOA do not confer standing as a matter of law. This argument ignores several recent cases where Judges on this Court have denied motions to dismiss under analogous circumstances. Most recently, in *La Union Del Pueblo Entero*, 2018 WL at 5885528, at *6, a challenge to the Census Bureau's decision to add a citizenship question to the 2020 Census, Judge Hazel held sufficient to establish standing the allegation that organizational plaintiffs will "imminently divert resources away from other advocacy activity to secure more funding and resources for increased outreach and ensure an accurate count of hard-to-count populations in" the communities they serve. In *Casa De Maryland v. U.S. Department of Homeland Security*, 284 F. Supp. 3d 758, 771 (D. Md. 2018), Judge Titus observed that organizational plaintiffs seeking to enjoin rescission of the Deferred Action for Childhood Arrivals ("DACA") program are "directly focused on aiding immigrants and their communities," and held "[t]he fact that one of their primary functions has been assisting their members with 'tens of thousands of DACA initial and renewal applications is sufficient for standing in and of itself.'" And, in *International Refugee Assistance Project v. Trump*,[7] this Court held that a Presidential Proclamation that barred the entry into the U.S. of nationals of seven predominantly Muslim countries injured the organizational interests of several organizations by "impeding their efforts to accomplish their missions and by disrupting their ability to raise money, train staff, and convene programs designed to foster the free flow of ideas on topics of significance to their organization's purpose." *Int'l Refugee Assistance Project*, 265 F. Supp. 3d at 598; *accord The Equal Rights Ctr. v. AvalonBay Communities, Inc.*, No. AW-05-

[7] 265 F. Supp. 3d 570 (D. Md. 2017), *aff'd*, 883 F.3d 233 (4th Cir. 2018), *as amended* (Feb. 28, 2018), *cert. granted, judgment vacated on other grounds*, 138 S. Ct. 2710 (2018).

2626, 2009 WL 1153397, at *4 (D. Md. Mar. 23, 2009) (holding organization sufficiently pled injury based on allegations that defendants' conduct frustrated its mission and caused it to divert significant resources).[8]

3. Defendants' Prudential Standing Argument Lacks Merit

Defendants also argue that the Court should dismiss HNLEA and UBPOA on prudential standing grounds, urging that HNLEA and UBPOA should not be permitted to "rais[e] another person's legal rights." Mot. 10. Defendants' argument is baseless. HNLEA and UBPOA do not need to establish third-party standing because—as Defendants concede, *see* Mot. 10-13—HNLEA and UBPOA have standing to sue on behalf of their members. *See, e.g.*, *La Union Del Pueblo Entero*, 2018 WL 5885528, at *7 (holding organizational plaintiffs "need not establish third-party standing because . . . they have established standing to sue on behalf of their members").

C. HNLEA and UBPOA Have Associational Standing on Behalf of Members

Each of the Individual Plaintiffs is a member of HNLEA, UBPOA, or both, and has experienced adverse conduct resulting from PGPD's policy and custom of retaliation and discrimination against Officers of Color. *See* Compl. ¶¶ 32-43; 95-197. HNLEA and UBPOA also have numerous other members that have experienced such conduct but are not Individual Plaintiffs in this case. *See id.* ¶¶ 15, 25. Defendants concede that HNLEA and UBPOA have standing to seek injunctive relief on behalf of their members. *See* Mot. 10-13. Defendants argue

[8] Defendants' reliance on the 18-year-old decision in *Buchanan v. Consolidated Stores Corp.*, 125 F. Supp. 2d 730 (D. Md. 2001), is unavailing. There, the organizational plaintiff had no prior connection to the individual plaintiffs and alleged only that it had diverted resources to investigate the alleged discrimination at issue in the case. *See id.* at 737-38. In *Shield Our Constitutional Rights & Justice v. Hicks*, No. CIVA DKC 09-0940, 2009 WL 3747199, at *5 (D. Md. Nov. 4, 2009), the court dismissed the plaintiffs' case for failure to plead a diversion of resources theory; the case does not support Defendants' argument that such injury does not confer standing as a matter of law.

instead that HNLEA and UBPOA do not have associational standing to seek "certain forms of relief that require individualized proof of injury." *Id.* However, HNLEA and UBPOA seek only declaratory, injunctive, and equitable relief. *See* Compl., Demand for Relief. And the only Fourth Circuit cases on which Defendants rely arose from rulings at summary judgment, *see* Mot. 11 (citing *Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 200 (4th Cir. 2017), *cert. granted sub nom. The Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 451 (2018) and *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 183 (4th Cir. 2007)), reinforcing that the Court need not address Defendants' arguments at this stage.

Defendants also argue that the Court should dismiss HNLEA and UBPOA as Plaintiffs because they would be entitled to "no greater declaratory or injunctive relief" than the Individual Plaintiffs. Mot. 12-13. This argument is wrong on the facts and wrong on the law. HNLEA and UBPOA both have many members that have experienced adverse conduct resulting from PGPD's policy and custom of retaliation and discrimination against Officers of Color but are not Individual Plaintiffs in this case. *See* Compl. ¶¶ 15, 25, 33-43; 95-197; Ex. 1, HNLEA Decl., ¶¶ 8-9; Ex. 2, UBPOA Decl., ¶¶ 10-11. Accordingly, HNLEA and UBPOA ***are*** entitled to broader declaratory and injunctive relief than the Individual Plaintiffs.

Defendants' argument also presumes incorrectly that HNLEA and UBPOA lack standing to assert claims in their own right, *see supra* Part I.B.—and the Court may reject it for that reason alone. *See, e.g.*, *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 29 n. 2 (D.C. Cir. 1990) ("Because we conclude that the organizations have standing on their own behalf, we do not decide whether individual plaintiff Spann or the organizations as representatives of their members possess standing.") (citing *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264 n. 9 (1977)). Moreover, the sole authority on which Defendants rely—*Maryland Minority*

Contractors Association Inc. v. Maryland Stadium Authority ("MMCA"), 70 F. Supp. 2d 580, 587 (D. Md. 1998)—does not support Defendants' argument; it undercuts it. The court in *MMCA* held that because individual plaintiffs had standing, it did not need to decide whether the organization also had standing in a representative capacity. *Id.* In doing so, the *MMCA* court cited *Spann v. Colonial Village, Inc.*—a case that upheld standing. *See id.* The *MMCA* court did not dismiss the organization for lack of standing; consistent with *Spann*, it did not decide the issue. *Id.* at 593.

II. Defendants' Arguments Do Not Warrant Dismissal of Any Plaintiffs or Claims

A. Legal Standards

1. Statute of Limitations

Defendants argue that certain claims are time barred. Defendants contend that the statute of limitations for a claim under 42 U.S.C. § 1983 is three years, and that "claims based on conduct that occurred before December 12, 2015 are time-barred." Mot. 10. This is wrong. "[T]he statute of limitations is an affirmative defense that a party typically must raise in a pleading under Fed. R. Civ. P. 8(c) and is not usually an appropriate ground for dismissal." *Butler v. VisionAIR, Inc.*, 385 F. Supp. 2d 549, 552 (D. Md. 2005) (collecting cases). Dismissal is proper only "when the face of the complaint clearly reveals the existence of a meritorious affirmative defense." *Id.* (citing *Brooks v. City of Winston–Salem, North Carolina,* 85 F.3d 178, 181 (4th Cir. 1996)). Moreover, although the statutory limitations period for § 1983 actions is "borrowed from state law, the time of accrual of a civil rights action is a question of federal law." *Nat'l Advert. Co. v. City of Raleigh*, 947 F.2d 1158, 1162 (4th Cir. 1991) (internal quotation marks omitted) (citing cases). "In the Fourth Circuit, the statute of limitations will be tolled if the injuries are of a continuing nature." *Carter v. PrimeCare Med.*, No. CV 3:17-1337, 2018 WL 1419340, at *3 (S.D.W. Va. Mar. 22, 2018) (citation omitted). To establish injuries of a continuing nature, a plaintiff must allege that there have been "continual unlawful acts." *Id.*

2. Retaliation and Discrimination Claims

Plaintiffs' retaliation and discrimination claims are governed by Federal Rule 8(a), which require a "short and plain statement of the claim showing that the pleader is entitled to relief." The Fourth Circuit has repeatedly recognized—including in the two cases on which the Defendants rely—that First Amendment retaliation claims should not be resolved at the motion to dismiss stage. *See* Mot. 14 (citing *McVey v. Stacy*, 157 F.3d 271, 275 (4th Cir.1998) (affirming denial of motion to dismiss First Amendment retaliation claim because "the record ha[d] not been developed"); *id.* (citing *Ridpath v. Bd. of Governors*, 447 F.3d 292, 316-19 (4th Cir. 2006) (holding plaintiffs' allegations in complaint as sufficiently pled)).

At this early stage, this Court must accept plaintiffs' claims as true and give plaintiffs the "benefit of reasonable factual inferences." *Ridpath*, 447 F.3d at 316. The Fourth Circuit has concluded that so long as an inference of retaliatory conduct can be made, a 12(b)(6) motion is not proper. *Id.* at 318 ("Once a factual record is developed through discovery, the evidence could support the inference that [plaintiff's] workplace was impaired as a result of his comments and that he simply had to be terminated from his adjunct teaching position. Such a question, however, is not to be assessed under Rule 12(b)(6) but in Rule 56 summary judgment proceedings.").

Similarly, the Fourth Circuit requires that employment discrimination plaintiffs "must satisfy only the simple requirements of Rule 8(a)." *Bala v. Commonwealth of Virginia Dep't of Conservation and Recreation*, 532 F. App'x 332, 334 (4th Cir. 2013) (citation omitted); *McCleary-Evans v. Maryland Dept. of Transp.*, 780 F.3d 582, 585 (4th Cir. 2015) (endorsing Rule 8(a) language while acknowledging that *Twombly* and *Iqbal* require factual allegations that raise plaintiff's right to relief above a speculative level). To survive a motion to dismiss a plaintiff need

not make out a prima facie case of employment discrimination.[9] *Bala*, 532 F. App'x at 334 ("In the employment discrimination context . . . a plaintiff need not establish a prima facie case . . . to survive a motion to dismiss."); *see also Miller v. Carolinas Healthcare Sys.*, 561 F. App'x 239, 241-42 (4th Cir. 2014) (holding district court erred in dismissing discrimination claim when it "essentially required [plaintiff] to allege a prima facie case").

B. Defendants' Statute of Limitations and Pleading Arguments Lack Merit

Defendants' motion does not provide a basis for dismissal of any claims. As set forth in 65 pages, Plaintiffs have alleged facts setting forth their claims and entitlement of relief which are more than sufficient to satisfy Rule 8's requirements. Notably, each of the Individual Plaintiffs is a member of HNLEA, UBPOA, or both, and on October 31, 2016 each of these individuals signed the complaint filed with the U.S. Department of Justice ("DOJ Complaint") concerning PGPD's policy and custom of discrimination and retaliation against Officers of Color. *See* Compl. ¶¶ 16, 26. The DOJ Complaint has been amended several times to supplement the allegations and add additional signatories (including most recently on October 15, 2017). *See id.* Since filing the DOJ Complaint, each of the Individual Plaintiffs has continued to experience adverse consequences (including discrimination and/or retaliation), including in direct response to their participation in the DOJ Complaint itself. *See, e.g.*, Compl. ¶¶ 95-197.

The Defendants repeatedly suggest that some form of heightened pleading is required, but cite no basis in the Federal Rules or case law for imposing such a requirement. *See* Mot. 13-23. And in addition to applying the wrong legal standard, the Defendants fail to acknowledge or address the full and complete allegations of the Complaint. Rather, Defendants repeatedly seek

[9] The Fourth Circuit evaluates § 1983 claims of racial discrimination in the employment context under the Title VII framework. *Swaso v. Onslow Cty. Bd. of Educ.*, 698 F. App'x 745, 747 (4th Cir. 2017); *Love-Lane v. Martin*, 355 F.3d 766, 786 (4th Cir. 2004).

challenge the sufficiency of isolated allegations in the narratives of particular Individual Plaintiffs, ignoring the forest for the trees. Defendants' summary of the claims of particular individuals omits critical allegations from the Complaint, and misstates several key points of law. For example, Sgt. Boone (as well as many of the other plaintiffs) alleges that after he complained about the conduct of White officers, he was involuntarily transferred to a less desirable position. *See* Compl. ¶¶ 33, 35, 38, 66, 110-114, 123-27, 153-55. Defendants do not acknowledge Boone's allegations of involuntarily transfer, *see* Mot. 14-16, and misstate the law when they assert that a "transfer is not an adverse action," Mot. 18. *See Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000) ("a public employer adversely affects an employee's First Amendment rights . . . when it makes decisions[] which relate to . . . transfer") (citing *Rutan v. Republican Party*, 497 U.S. 62, 79 (1990) (internal quotation marks omitted)); *see also Hoyle v. Freightliner, LLC*, 650 F.3d 321, 337 (4th Cir. 2011) (finding that district court erred in holding reassignment "does not constitute actionable adverse employment action"). Similarly, the Defendants incorrectly assert that the charges filed against Officer Wall or Boone's negative job evaluation do "not constitute an actionable employment action," Mot. 14, 18, ignoring that these actions prevented these officers from being eligible for promotion. *See, e.g.*, *Lewis v. Forest Pharmaceuticals*, 217 F. Supp. 2d 638, 648 (D. Md. 2002) ("a warning letter in an employee's record" can be retaliatory because "it can absolutely bar advancement").

Defendants also argue that Cpls. Anis and Smith have failed to allege facts concerning each of the open positions to which they sought transfer but ignore the breadth of their allegations: Cpl. Anis' claim is not limited to being barred from attending "investigator school," Opp. 19; he alleges was denied transfer in 13 instances under circumstances giving rise to discrimination and alleges facts sufficient to establish each element of a discrimination claim, *see, e.g.*, Compl. ¶¶ 39, 157-

58; and Cpl. Smith repeatedly requested a transfer ***out*** of a hostile environment after he complained about such conduct, *see id.* ¶¶ 113, 165, 168, 169.

1. Sergeant Thomas Boone

Sgt. Boone, who serves as President of UBPOA, has been subject to retaliation and to discrimination in the form of a hostile work environment, disparate discipline, and discriminatory non-promotion by the PGPD. *See, e.g.*, Compl. ¶¶ 33, 110-12. Although Defendants do not that dispute Sgt. Boone has stated a discrimination claim under Count I, they dispute he has been subject to retaliation (Count II). *See* Mot. 14.

In March 2016, in his capacity as President of UBPOA, Sgt. Boone co-authored and submitted the complaint to the U.S. Department of Justice. *See* Compl. ¶ 109. Since December 2016, Sgt. Boone has reported additional instances of inappropriate language, unfair transfers, unequal discipline, unfair hiring practices, racially insensitive and offensive pictures, retaliation for reporting wrongdoing and other racially motivated incidents to superiors. *See id.* ¶ 110. Sgt. Boone met with Defendant Stawinski and other superior officers several times to address these issues, but Stawinski never acted on them. *See id.* Following these meetings, PGPD retaliated against Sgt. Boone.

- After Sgt. Boone expressed concerns about disparities in performance in psychological evaluations between applicants of Color and White applications, Boone was asked by his superior in January 2018 to stop complaining. A week later, the same officer gave him a negative performance review. *See id.* ¶ 111.

- After Boone appealed his performance review and it was corrected, Boone was told in October 2018 that he would be transferred. *See id.* ¶ 112.

- Despite the agreement of Sgt. Boone and two Deputy Chiefs that he would be transferred to the Property Division, he was transferred to the Bureau of Patrol Division II, an outcome that would have required intervention from the Chief of Police—to whom Sgt. Boone has personally complained. *See id.* ¶¶ 110, 112. A transfer to patrol is viewed as a demotion within PGPD. *See id.* ¶ 113. Once in patrol, Sgt. Boone was assigned to the midnight shift.

Despite these allegations alleging a course of retaliatory conduct by Defendants within the limitations period, Defendants argue—based on the Performance Assessment form and performance score in isolation, *see* Mot. 15—that the Complaint fails to allege "detriment to [Sgt. Boone's] pay, benefits, terms of employment, or employment status" resulting from protected activities. *Id.* This argument ignores most of Sgt. Boone's allegations, including his transfer and assignment to the midnight shift. And Defendants' argument that the retaliatory adjustment to Sgt. Boone's Performance Assessment form and performance score are not "sufficiently adverse" to support a retaliation claim in isolation, Mot. 14, as applied to Sgt. Boone is wrong. The Complaint does not allege action that "simply criticizes, falsely accuses, or verbally reprimand," as Defendants argue. Mot. 15 (citing *Farrell v. Bd. Of Educ. Of Alleghany Cty.*, No. GLR-16-2262, 2017 WL 1078014, at *4 (D. Md. Mar. 21, 2017). At a minimum—and irrespective of the motive underlying Sgt. Boone's demotion to patrol—the Complaint alleges facts supporting an inference that future "deleterious effect[s]" resulted from the retaliatory adjustment to his Performance Assessment form. *Lewis*, 217 F. Supp. 2d at 648.[10]

2. Sergeant Paul Mack

Sgt. Paul Mack, who serves as Vice-President of UBPOA, has been subject to retaliation and to discrimination in the form of non-promotion by the PGPD. *See, e.g.*, Compl. ¶¶ 34, 115.

[10] Defendants' challenge to the non-promotion theory also lacks merit. Defendants are wrong that Sgt. Boone identifies "no open position to which he should have been promoted," "no facts demonstrating that he was qualified," and "no facts to create a plausible inference of racial discrimination" Mot. 16. The Complaint specifically alleges that Sgt. Boone was recommended for an open position in the Property Division, that two Deputy Chiefs agreed with the recommendation (he was qualified), and that the Chief of Police intervened to deny the promotion based on Sgt. Boone's participation in the complaint to the Department of Justice. *See* Compl. ¶ 112.

Defendants do not challenge the sufficiency of allegations regarding Sgt. Mack's retaliation claim (Count II). Defendants challenge only Sgt. Mack's discrimination claim (Count I).

Defendants argue that Sgt. Mack's claim should be dismissed for failure to identify comparators in alleging that White officers were promoted above him in 2016. *See* Mot. 17. Such a requirement is inconsistent with Rule 8. And the Fourth Circuit does not require that a plaintiff name comparators who were promoted above him; it only requires that facts pled indicate plaintiff "was rejected for the position under circumstances giving rise to an inference of unlawful discrimination." *Evans v. Tech. Applications & Service Co.*, 80 F.3d 954, 959 (4th Cir. 1996). Plaintiffs' allegations need only "sustain a plausible inference that Defendant failed to promote her under circumstances giving rise to an inference of unlawful discrimination." *Crockett v. SRA Int'l*, 943 F. Supp. 2d 565, 573 (D. Md. 2013). An inference of discrimination can arise from a wide range of factors, such as "offensive remarks, the existence of comparators, 'me too' evidence, or any other words or acts probative of racial animus." *Id.*

Sgt. Mack does not merely allege that there were not enough African Americans holding positions for which he sought promotion. *See Crockett*, 943 F. Supp. 2d at 572. Rather, in 2016, Sgt. Mack tested to be promoted to a Lieutenant, and despite receiving a high ranking, White officers were promoted and he was not. *See id.* ¶ 118. Other evidence supports an inference of discrimination: Among other things, Sgt. Mack had a similar experience with regard to non-promotion in 2018, *see* Compl. ¶¶ 119, and he previously had been subject to discrimination and retaliation in connection with a complaint he filed against a White officer, Sergeant Lisa Seger. *See* Compl. ¶¶ 116.

Defendants' reliance on *McCleary-Evans v. Maryland Department of Transportation, State Highway Administration*, 780 F.3d 582 (4th Cir. 2015), is misplaced. In that case, the

plaintiff failed to plead adequate facts to give rise to reasonable inference of discrimination—she merely stated in conclusory fashion that she was an African American woman, and that she was passed up for a position in the Highway Administration in favor of white men and white women. *See id.* at 586. The court found those bare allegations insufficient. *See id.* at 588. Sgt. Mack has alleged facts amply supporting an inference that he was denied a promotion due to discrimination.

3. Corporal Danita Ingram

Cpl. Danita Ingram, a member of UBPOA, has been subject to and continues to suffer from discrimination in the form of a hostile work environment and disparate discipline, and retaliation by the PGPD. *See, e.g.*, Compl. ¶ 120. Defendants do not dispute that Cpl. Ingram has stated a claim for discrimination based on disparate discipline (Count I) and for retaliation because she filed a complaint, later substantiated, about unprofessional conduct by a White officer (Count II). *See* Mot. 17-18.

Defendants argue only that Cpl. Ingram fails to state a claim regarding her "retaliatory transfer," Mot. 17, seeking to isolate this one aspect her claim from the harm she suffered. As alleged in the Complaint, in February 2017, a White officer, Officer Rushlow, demanded that Cpl. Ingram (who was undercover) give up her seat for him in court and verbally harassed her when she declined. Compl. ¶ 123. After Cpl. Ingram filed an internal written complaint against Officer Rushlow, *see id.*, she experienced retaliation. Specifically, Defendant Mills ordered one of the Individual Plaintiffs in this case (Lt. Zollicoffer) to charge Cpl. Ingram without basis. *Id.* ¶ 36. With the encouragement of other officers, Officer Rushlow then filed a baseless counter-complaint against Cpl. Ingram. *See id.* ¶ 125. While the case was pending for over ten months, Cpl. Ingram was ineligible for a promotion. *See id.* ¶ 126. Then, in further retaliation, Cpl. Ingram was transferred. *See id.* ¶ 66.

Cpl. Ingram has alleged a series of retaliatory actions by PGPD within the limitations period. Defendants' argument that Cpl. Ingram has failed to "sufficiently allege an adverse employment action or a causal connection between her supposed transfer and her alleged protected speech" ignores her actual allegations. Mot. 18. Both her transfer and the filing of baseless charges which prevented her from being promoted constitute "adverse action." Further, the Complaint contains more than sufficient detail for this Court to infer a causal connection between Cpl. Ingram's complaint against a White officer and the various acts of retaliation she suffered, including her involuntarily transfer. *See Lane v. Anderson*, 660 F. App'x. 185, 193 (4th Cir. 2016). This is all that Rule 8 requires.

4. Officer Thomas Wall

Officer Wall, a member of UBPOA, has been subject to discrimination in the form of a hostile work environment and disparate discipline, and to retaliation, by PGPD. *See, e.g.*, Compl. ¶¶ 38, 153, 155. Although Defendants do not dispute that Officer Wall has stated a claim under Count I, they dispute he has been subject to retaliation under Count II, because his allegations of retaliation are not "sufficiently adverse." Mot. 18-19. Defendants are wrong.

After Officer Wall confronted a White officer about his rough handling of a female African-American citizen, the other officer responded angrily, threatening he might go after Officer Wall next, and asking Officer Wall what he would do if he put his hands on Officer Wall. *See* Compl. ¶ 153. So provoked, Officer Wall responded that he would "Fxxk him up." *Id.* Officer Wall was then written up and transferred to another district within a matter of weeks. *See id.* The White officer—who had not only spoken unprofessionally and threateningly to a fellow officer, but had roughed up a citizen—was not written up. *See id.*

Defendants argue that neither a write up nor a transfer is "sufficiently adverse" to support a retaliation or discrimination claim lacks merit. This argument ignores that the two retaliatory

acts occurred in prompt succession—and further seeks to isolate Officer Wall's allegations from those of Plaintiffs Ingram, Zollicoffer, Perez, Smith, Torres, and others that they were also transferred in retaliation for their complaints about racist or unprofessional conduct of White officers, *see* Compl. ¶ 66. As such, Defendants' argument fails.

Even viewed in isolation, moreover, Officer Wall's allegations suffice to state a retaliation claim. A charge or a transfer "may be materially adverse depend[ing] upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Williams v. Prince William Cty. VA*, 645 F. App'x 243, 245 (4th Cir. 2016) (internal quotation marks omitted) (vacating dismissal of plaintiff's claim because "transfer constituted an adverse employment action"); *cf. also Westmoreland v. Prince George's Cty., Md.*, 876 F. Supp. 2d 594, 605-06 (D. Md. 2012) (triable issue of fact as to whether firefighter's transfer to another station constituted an adverse employment action despite evidence that she received same salary, larger bonuses, and retained rank at her reassignment).

5. Corporal Michael Anis

Cpl. Anis, a member of HNLEA, has been subject to retaliation and discrimination because of his race and association with HNLEA. *See, e.g.*, ¶¶ 39, 156-62. Cpl. Anis has been denied promotional transfers to specialty units in favor of White officers on numerous occasions. *See id.* ¶ 156. The motion concedes in part the validity of Cpl. Anis's discrimination claim based on disparate treatment (Count I) in part. *Compare id.*, with Compl. ¶¶ 157-58 (White officer with disciplinary record who applied for Marine Unit selected over Cpl. Anis); *id.* (White officers selected over Cpl. Anis to Specialty Operations Division beard).

Defendants argue that an allegation concerning conduct that began in 2014 concerning a particular instance of disparate treatment is time barred. *See* Mot. 19. However, the Complaint

alleges a violation of a continuing nature: Cpl. Anis alleges that he has applied for and been rejected from specialty units on thirteen separate occasions leading up to the present.[11] *See Carter v. Primecare Med.*, No. 3:17-13772018 WL 1419340, at *3 (D. Md. 2018).

Defendants also challenge the sufficiency of Cpl. Anis's allegations concerning qualifications, available positions, and rejection under circumstances giving rise to discrimination. Mot. 19-20. The Complaint alleges facts showing each. Since he joined PGPD, Cpl. Anis has amassed qualifications including but not limited to: obtaining a United States Coast Guard Master's 100 Ton Captain License; becoming a Tow Boat Captain; completing hundreds of maritime hours in the Potomac River; becoming an Advanced Scuba Diver with a concentration in deep water diving, wreck diving, and search and recovery; completing sunken boat recoveries; and completing specialty search and rescue trainings with the United States Coast Guard. *See* Compl. ¶ 39. Cpl. Anis has consistently finished as a top applicant on the swim and physical tests but has never been selected for the Marine Specialty Unit. There are no officers of color in the Marine Unit, and Cpl. Anis has significantly more experience and qualifications for the Marine Unit than the White officers who have been selected (for open positions), PGPD has never provided a reason for not selecting Cpl. Anis for the Marine Unit. *Id.* ¶¶ 157-58. A White officer named Taylor Krauss was transferred into the Marine Specialty Unit (into an open position) despite having never applied, and despite being involved in a controversial departmental shooting. *See*

[11] Even if the Complaint did not allege a continuing violation with regard to Cpl. Anis, his claims would not be facially time barred. The Complaint alleges that in 2014, Cpl. Anis was accepted into Investigator School. Compl. ¶ 162. The Complaint does not allege when classes began or when Cpl. Anis was barred from attending classes because he worked midnight shifts. *Id.* It alleges that five months after Cpl. Anis was barred from attending classes, a White officer was permitted to attend classes even though she too worked midnight shifts, but the Complaint does not allege when Cpl. Anis learned this. *Id.* Accordingly, on its face the Complaint does not show that Cpl. Anis knew or had reason to know of the injury caused by PGPD before October 2015. *See Nat'l Advert. Co. v. City of Raleigh*, 947 F.2d at 1162.

Compl. ¶¶ 157-58. Those allegations alone show a plausible claim based on a denial of promotional transfer.

Defendants appear to suggest that to survive a motion to dismiss, the Complaint must allege facts showing the elements of non-promotion with respect to each of the 13 instances in which Cpl. Anis was denied transfer because of his race and association with HNLEA. *See* Mot. 19-20. Defendants cite no support for that proposition, and such a requirement is inconsistent with Rule 8. *See id.*

Defendants also argue that Cpl. Anis has not alleged any "protected speech," Mot. 23, ignoring that Cpl. Anis alleges that because of his race and association with HNLEA, he suffered discrimination, and that he repeatedly complained about denial of his requests to transfer to a specialty unit. *See id.* ¶¶ 156, 159.

6. Corporal Chris Smith

Cpl. Smith, a member of UBPOA, has been subject to discrimination in the form of a hostile work environment, and retaliation. *See, e.g.*, Compl. ¶¶ 40, 163-69. Defendants do not challenge his claims for discrimination resulting from a hostile work environment (Count I). Instead, Defendants argue that Cpl. Smith has failed to allege discrimination or retaliation from his denial of transfer, arguing that he has not identified "all of the positions to which he sought a transfer." Mot. 21.[12] This argument ignores that Cpl. Smith was the only Officer of Color serving on the Special Assignments Team, and that the offensive and unlawful conduct of other members of the unit prompted Cpl. Smith to repeatedly request a transfer ***out*** of the Special Assignments

[12] Defendants recite the elements necessary to prove a *prima facie* case of discriminatory transfer denial, relying on a case that arose in the context of summary judgment and ruled in favor of plaintiff. *See* Mot. 21 (citing *Burgess v. Bowen*, 466 F. App'x 272 (4th Cir. 2012)).

Team, just to get away. *See* Compl. ¶¶ 165, 166, 169. Cpl. Smith observed, experienced, and complained about racial discrimination by other members of the unit, including:

- White members of the squad referring to African American civilians as "Signal 7s" (code for a suspicious individual) and "mother f-ers," and referred to the neighborhood as a "shithole," Compl. ¶ 165;
- A White member of his squad told Cpl. Smith that he looked like a "Signal 7" on days that he wore plain clothes, *id.*;
- A White member of his squad defended the Ku Klux Klan and said the Black Lives Matter movement is the same as the Klan, *id.* ¶ 166;
- White members of his squad referred to President Obama as a "coon" and said that "at least slaves had food and a place to live," *id.*

Under these circumstances, Cpl. Smith complained to his supervisor and requested a transfer, but was denied. *See id.* ¶¶ 165, 168. Then, shortly after his superior was transferred, Smith was transferred involuntarily to the Patrol Bureau, which is considered a demotion within PGPD. *See id.* ¶ 168, 113. In the Patrol Bureau, Cpl. Smith has repeatedly been denied transfers to a Community Oriented Policing position. *See id.* ¶ 169. He continues to work in patrol. *See id.*

This is more than sufficient to allege adverse action under Rule 8. Cpl. Smith has alleged adverse action in the denial of his transfer out of a hostile environment after he complained about such conduct, then in involuntarily transferring him to the Patrol Bureau, and then in denying his transfer to a specialty unit.

In connection with Cpl. Smith's retaliation claim, Defendants also argue that Cpl. Smith has not alleged facts sufficient to allege a "causal link" between his protected speech and the transfer denials. Mot. 21. Defendants ignore that all of the adverse consequences he complains about occurred after Cpl. Smith repeatedly complained about racially hostile conduct by other members of the Special Assignments Team. "When dealing with a First Amendment retaliation claim [at the Rule 12(b)(6) stage], courts generally infer causation based on the facts alleged in the

complaint because at the motion to dismiss stage, [courts] are unable and unwilling to speculate as to the outcome." *Lane*, 660 F. App'x. at 193 (citation and quotation marks omitted); *see also Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013); *Farrell*, 2017 WL 1078014, at *5-6. Accordingly, the causal link here "presents an issue of fact" that can be "swiftly dispensed" at the pleading stage. *Lane*, 660 F. App'x. at 193.

7. Officer Clarence Rucker

Officer Clarence Rucker, a member of UBPOA, has been subject to discrimination and retaliation. *See, e.g.*, Compl. ¶¶ 43, 186-97. Defendants do not challenge his claims for discrimination resulting from disparate discipline (Count I). *See* Mot. 22. Instead, Defendants challenge his discrimination and retaliation claims in part as time barred, and argue that he has failed to state a discrimination claim for "non-promotion." *Id.*

Defendants dispute that Officer Rucker has a timely claim based on his October 2015 suspension or a claim based on his ineligibility for promotion during his suspension. In addition to alleging that he was ineligible to apply for promotion following his suspension (in contrast to White officers under suspension), Compl. ¶ 196, Officer Rucker alleges that after he left the Department, the Defendants interfered with his employment by the Capitol Heights Police Department by "red-flagging" him in December 2017, causing him to be confined to desk duty (unlike similarly situated White officers). Compl. ¶ 194-95. Defendants' argument that Officer Rucker's claims are time barred lacks merit, as does their argument that he has not alleged facts sufficient to state a claim for discrimination. *See, e.g., Hoyle*, 650 F.3d at 337 (failure to remove the reprimand letter led to failure to receive a promotion and constitutes an adverse employment action).

8. Corporal Michael Brown and Officer Tasha Oatis

Although Defendants do not dispute that Corporal Brown or Officer Oatis have stated a claim for discrimination under Count I, they dispute they have been subject to retaliation under Count II. *See* Mot. 22-23. The Complaint states valid retaliation claims with regard to both Plaintiffs. Both Corporal Brown and Officer Oatis are UBPOA members and have signed the Department of Justice complaint. Following each of their terminations (where they were was disciplined differently than White officers), Compl. ¶¶ 179, 185, Corporal Brown and Officer Oatis each complained of their discriminatory treatment DOJ. Since his complaint, the Defendants have repeatedly impeded Cpl. Brown's ability to find comparable employment, including by contesting his Maryland State Police Commission certification, threatening another police department with loss of resources if it retained Cpl. Brown, and interfering with United States Capitol Police's hiring of Cpl. Brown. *Id.* ¶¶ 176-78. Similarly, since her complaint, the Defendants have caused Officer Oatis to be "red-flagged" in the Maryland State Police Commission, causing her to be denied employment by other police departments. Compl. ¶ 184.

* * *

In sum, each of these Plaintiffs has stated a timely cause of action under Rule 8. Defendants' statute of limitations and pleading arguments raise issues that cannot be resolved on the pleadings. This Court should deny the motion.

III. Plaintiffs Allege Facts Sufficient to State a Claim Against Deputy Chief Murtha

Defendants' argument that the Complaint fails to state a claim against Deputy Chief Murtha misconstrues the nature of Plaintiffs' claims. Plaintiffs assert claims against Murtha in his individual capacity, based on his ***direct*** involvement in the discrimination and retaliation alleged in the Complaint, *see, e.g.*, Compl. ¶¶ 4, 5, 48, 66, 98, 99, 101, 102, 103, which Defendants do not contest. Accordingly, Defendants' argument that the Complaint fails to allege facts sufficient to

show that Murtha is liable in a ***supervisory*** capacity does not provide a basis for dismissing Murtha from the case. In any event, Defendants' argument fails.

Plaintiffs' claims against Murtha are subject to basic pleading standards under Rule 8. At the pleading stage, the Court must accept as true the allegations in the complaint and construe them in the light most favorable to Plaintiffs. *See SD3, LLC v. Black & Decker*, 801 F.3d 412, 422 (4th Cir. 2015). Plaintiffs need not assert "detailed factual allegations," but must plead only "enough factual matter (taken as true) to suggest" the alleged conduct occurred . *Twombly*, 550 U.S. at 555-56. A claim is plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable." *Iqbal*, 556 U.S. at 678.

The Complaint alleges facts sufficient to state claims against Murtha based on his direct, personal involvement in the discrimination and retaliation alleged in the Complaint. Defendant Murtha has served as Deputy Chief in charge of the Bureau of Patrol—to which approximately 1,100 of the PGPD's 1,684 officers are assigned—since February 2016. *See* Compl. ¶ 48. Murtha has participated in a pattern of retaliation against Officers of Color, including many of the Individual Plaintiffs, because they have complained about racism and other unprofessional conduct; he is also directly involved in disciplinary issues within the Bureau of Patrol, including the discriminatory administration of discipline. *See id.* ¶¶ 4, 5, 48. Notably, as head of the Patrol Division, Murtha has participated in the "institution of investigative proceedings against complaining officers, imposition of transfers to unfavorable assignments, denial of promotions and favorable transfers, and other adverse changes in work conditions." *See id.* ¶ 4. For example, Plaintiffs Ingram, Perez, Wall, and others were all subjected to retaliatory investigations following their complaints about White officers, and Officers, Boone, Ingram, Zollicoffer, Smith, Torres, Wall, and others were all transferred to or within the Patrol Division following their complaints

about White officers, where they were given undesirable assignments (e.g., the midnight shift, geographically inconvenient assignments far from their residences). *See* Compl. ¶ 66. Murtha was personally involved in such cases: in his role as Deputy Chief, Murtha evaluated "each investigation and disciplinary investigation" involving the Bureau of Patrol. *See id.* ¶ 48.

The Complaint also alleges facts sufficient to hold Deputy Chief Murtha liable in his supervisory role.[13] Defendants rely almost entirely on cases evaluating supervisory liability in the context of prisoner claims. *See* Mot. 24-25. However, this is not a case with plaintiffs asserting based on general administrative oversight. *See, e.g.*, *Comm'r Staten v. Batts*, No. CIV.A. CCB-15-599, 2015 WL 4984858, at *3 (D. Md. Aug. 17, 2015); *Coleman v. Comm'r of Div. of Correction*, No. CIV.A. ELH-13-474, 2014 WL 2547787, at *3 (D. Md. June 4, 2014). Here, Plaintiffs allege, among other things, that in his role as Deputy Chief, Murtha evaluated "each investigation and disciplinary investigation" involving the Bureau of Patrol. *See* Compl. ¶ 48. At the motion to dismiss stage, that is sufficient. *See, e.g.*, *Miller v. Union Cty. Pub. Sch.*, No. 3:16-CV-0666, 2017 WL 3923977, at *8 (W.D.N.C. Sept. 7, 2017) (holding complaint contained "minimally sufficient allegations" as to Principal's indifference based on Principal's receipt of temporary restraining order that provided notice of alleged ongoing harassment); *Ensko v. Howard Cty., Md.*, 423 F. Supp. 2d 502, 511 (D. Md. 2006) (denying summary judgment on supervisory liability of Police Chief where plaintiff complained of harassment to immediate supervisors and to Chief); *see also Panowicz v. Hancock*, No. CIV.A. DKC 11-2417, 2012 WL 4049358, at *11-12

[13] To establish supervisor liability under § 1983 a plaintiff must show: (1) that the supervisor had actual or constructive knowledge that his subordinates were engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury; (2) that the supervisor's response to that knowledge was so inadequate as to show deliberate indifference or tacit authorization of the conduct; and (3) that the supervisor's inaction caused the plaintiff's constitutional injury. *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994).

(D. Md. Sept. 12, 2012) (issue of supervisory liability turns on proximate cause, which is "ordinarily an issue of fact, not law").

The Complaint also alleges facts about Murtha's misconduct and retaliation when Murtha himself was the subject of a complaint. *See id.* ¶ 48. Specifically, Captain Perez experienced retaliation (including being removed from the Internal Affairs Division) after he complained that his investigation of Murtha's unethical conduct was thwarted. Following the inclusion of this incident (among other instances of racist and unethical conduct by White officers) in the October 2016 Department of Justice complaint and Captain Perez's EEOC complaint, Captain Perez advised Chief Stawinski of the complaint. *See id.* ¶¶ 101, 103. Within 45 minutes, Capt. Perez was advised that he was being transferred out of Internal Affairs. *See id.* ¶ 102.

This is more than sufficient to state a claim against Murtha under Rule 8. The Court should reject Defendants' suggestion that the allegations against Murtha are subject to a heightened pleading standard. If the Court requires further information, Plaintiffs hereby proffer that discovery will show:

- In May 2016, the Internal Affairs Division received an anonymous complaint against Deputy Chief Murtha, regarding his approval and falsification of electronic time sheets for Corporal Richard Smith over a period of 14 months.
- At the time Murtha was Defendant Chief Stawinski's Executive Officer, and the second highest ranking officer in the Bureau of Patrol.
- Capt. Perez was assigned to the investigation, and he gathered evidence sufficient to show that Murtha had falsified time sheets for Cpl. R. Smith.
- However, soon after Capt. Perez reported that information to his commanding officer in IAD, Major Rafael Grant, the investigation was taken away from him. Without explanation, the investigation was assigned to an officer outside of IAD, Major Irene Burke. A White officer in IAD beneath Capt. Perez in rank, Lieutenant Lightner, was assigned to assist Major Burke.
- Capt. Perez was instructed to provide all materials concerning the Murtha investigation to Major Burke and Lt. Lightner. Capt. Perez was also ordered to instruct Lightner to

delete from IAD computer systems the investigatory materials concerning the Murtha investigation.

- Capt. Perez continued to express interest in the matter. However, Lt. Lightner had been ordered not to discuss the matter and was not permitted to discuss the status of the matter with Capt. Perez, even though Capt. Perez was his commander.

- In an interview that was recorded and transcribed, Defendant Murtha provided a false statement to Major Burke and Lt. Lightner. Specifically, to explain the absence of scan-card records that would support that Cpl. R. Smith was actually working and present in the County, Murtha stated that he had assigned Cpl. R. Smith to night duty and that Murtha personally observed him working each evening because he let him into the building.

- After taking over the investigation, Major Burke and Lt. Lightner did not sustain the complaint against Murtha. Lt. Lightner was then promoted and reassigned to work for Deputy Chief Murtha.

- In October 2016, when Capt. Perez and other PGPD Officers of Color filed a supplemental complaint with the Department of Justice, it contained a description of Murtha's conduct in approving and falsifying electronic time sheets, as well as the efforts of others within the Department to cover up this misconduct. The Complaint cited additional evidence that Murtha was authorizing overtime pay for White officers who were not entitled to it.

- A few days before filing the supplemental DOJ complaint, Capt. Perez met with and advised Defendant Stawinski that he would be filing the complaint described above, as well as an EEOC complaint.

- Within an hour of informing Stawinski about the supplemental DOJ complaint and EEOC complaint, Capt. Perez was advised he was being removed from Internal Affairs.

In sum, Defendants' motion to dismiss Deputy Chief Murtha lacks merit.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss.

Dated: March 12, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this March 12, 2019, a copy of the foregoing Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss was served via the Court's CM/ECF system on all counsel of record.

/s/ Dennis A. Corkery
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