

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

HOWARD B. HOFFMAN :
 :
v. : Civil No. WMN-04-3072
 :
BALTIMORE POLICE DEPT. et al. :

MEMORANDUM

Pending before the Court is Defendants' Motion for Summary Judgment. Paper No. 166. The briefing of the summary judgment motion also spawned two additional motions, a motion to strike and a motion for sanctions, both filed by Plaintiff. Paper Nos. 174 and 177. All motions are now ripe. Upon a review of the pleadings and the applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6) and that Defendants' motion will be granted in part and denied in part and Plaintiff's motions will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was employed for slightly less than two years by the Baltimore City Law Department. During his tenure, he worked exclusively on matters related to the Baltimore Police Department (BPD), concentrated in employment law. He alleges that while so employed he was himself discriminated against on the basis of his race (Caucasian) and eventually terminated on account of his race, in retaliation for his complaining about that discrimination, and in retaliation for his having requested documents pursuant to the Maryland Public Information Act, Md.

Code Ann., State Gov't § 10-501, et seq. (MPIA). In addition to denying that Plaintiff was discriminated against on any of these grounds, Defendants contend that Plaintiff was lawfully terminated from his position because of his refusal to offer a written apology to his "client," i.e., certain individuals in the BPD. The facts relevant to Plaintiff's claims and Defendants' defenses, viewed in the light most favorable to Plaintiff, as the nonmoving party, are as follows.

Several years after completing law school, having been admitted to the bar, and having worked for at least two different law firms, Plaintiff submitted an application to the City Law Department. His application was initially rejected, by letters from Defendant Donald Huskey, the Deputy City Solicitor. In early 2002, however, Plaintiff was contacted by the City Law Department to interview for a position concentrating on the management of employment claims and litigation against the BPD. It is undisputed that there was at that time a backlog of claims and cases against the BPD due to the recent departure of two African American attorneys who had been working in this area.

Plaintiff was initially interviewed by Sean Malone, then-Chief of BPD Legal Affairs, and Daniel O'Connor, then-Chief of Human Resources for BPD, and Marcus Brown. All three men are Caucasians. Malone called Plaintiff to ask him to come back for a second round of interviews where Plaintiff met briefly with Huskey and Huskey's superior, Thurmon Zollicoffer, the City Solicitor. Husky and Zollicoffer are African American.

Plaintiff describes Zollicoffer as seeming "angry, upset, and annoyed" with Plaintiff during the interview and relates that Zollicoffer abruptly terminated the interview by simply walking out of the room, never shaking Plaintiff's hand. Pl.'s Aff. ¶ 7. Plaintiff represents that he became aware, by happenstance, of two other individuals who were also applying for this position and both were Caucasians. Pl.'s Aff. ¶ 4.¹

Despite the unpromising interview with Zollicoffer, Malone told Plaintiff that he (Malone) would recommend Plaintiff for the position.² After a few weeks passed, Huskey called Plaintiff and stated that he would be offered the position, subject to the Mayor's approval. Subsequently, Malone formally offered the position to Plaintiff and he began working within the BPD in mid-February 2002.

Plaintiff's first interaction with Zollicoffer after being hired occurred two weeks after Plaintiff began working for the City. Plaintiff relates that Zollicoffer "dragged [Plaintiff] into his office with Huskey, sat [him] down, said I'm hearing bad

¹ Plaintiff concludes from his awareness of these two candidates that "the only other persons interviewed [for his position] were two other Caucasians." Opp. to Summ. J. Mot. at 2. Without challenging that conclusion Defendants note, correctly, that Plaintiff has insufficient grounds to leap to the conclusion that these were the only other applicants. Reply in Support of Summ. J. at 2.

² Defendants note that Plaintiff has no firsthand knowledge that Malone actually recommended him for the position. Id. Plaintiff can, of course, testify as to what Malone said to him and a jury could reasonably infer, with a proper foundation, that Malone did what he said he would do.

things about you." Pl.'s Dep. at 29. Zollicoffer then threatened, "I just want you to know, I can hire you and I can fire you." Id. at 30. Zollicoffer then got up and just walked out of the room. Id.

Shortly after this exchange, Zollicoffer and Huskey had Plaintiff moved from an office space within the BPD to one in the City Law Department. Plaintiff's new office was "littered with trash" and had no computer. Pl.'s Aff. ¶ 13. Plaintiff testifies that his office was moved back and forth at least four different times in the next six months, for no apparent reason, each time causing serious disruption to his work and making him, in his view, the "laughingstock of the Law department." Pl.'s Dep. at 30. His last office was a secretary's office in a remote corner of the City Law Department. Plaintiff avers that African American new hires were given regular offices amongst their fellow staff.

After this exchange with Zollicoffer, Plaintiff was also put under the supervision of Deborah St. Lawrence, an African American, who served in the role of Chief of Labor and Personnel for the City Law Department. Zollicoffer had known St. Lawrence for a significant period of time and he describes her as a casual friend and a "very trusted" chief. Zollicoffer Dep. at 208. Zollicoffer also described her as a "task master" who "demanded perfection," id. at 200, and she subjected Plaintiff to what he considered intense scrutiny and "nonsensical" complaints that were designed to frustrate him and force him to quit. Pl.'s Aff.

¶ 19. A former City attorney has submitted an affidavit in which he recites that he heard St. Lawrence refer to Plaintiff as a "crazy white boy" and inquire "in a negative tone" if Plaintiff was Jewish. Aff. of Michael Dypski ¶ 3.³

As the Court understands the reporting structure for Plaintiff's position, Plaintiff, in a sense, served two masters, the City Law Department and the BPD. Throughout their depositions and in their pleadings, Defendants persistently describe the BPD as having been Plaintiff's "client." Plaintiff's immediate supervisor in the BPD for much of the relevant time period was the Deputy Chief of Legal Affairs for the BPD, Peter Saar, a Caucasian. At the time of Plaintiff's hiring, Saar reported to Malone. By 2003, however, Malone had left his position as Chief of Legal Affairs for the BPD and was replaced by Sheila Anderson, an African American, who thus became Plaintiff's second line supervisor in the BPD chain of command.

Plaintiff notes that, in selecting Anderson for this position, Zollicoffer passed over two Caucasian applicants who had considerably more experience with the legal issues related to police departments: Peter Saar, who had served as the acting Chief after Malone left the post; and Michael Fry, an individual with more than ten years of police litigation experience and who ultimately was hired to replace Anderson after Zollicoffer

³ Defendants' opposition to the admissibility of this affidavit is a subject of Plaintiff's motion to strike and is discussed infra.

resigned. Fry, who testified as BPD's Rule 30(b)(6) designee, described Anderson as having a "demanding style" that led to a "tumultuous" tenure which Fry opined "was destructive to that office and its reputation. And I don't know that we'll ever recover to where we were prior to her assuming that position. . . . [B]ecause of her demeanor, everybody wanted to leave [a]nd now I am suffering from that." Fry Dep. at 57, 61.⁴

As part of Plaintiff's job responsibilities, he occasionally⁵ interacted with the Equal Employment Opportunity Unit (EEO Unit) of the BPD. The EEO Unit investigates complaints of unlawful discrimination and harassment and is staffed by police officers who are detailed to the unit. The EEO Unit was headed at all times relevant to this action by its Director, Joan Thompson, an African American.

In working with the EEO Unit, Plaintiff observed that the police officers detailed to the Unit were poorly trained in the investigation of discrimination complaints and Plaintiff saw this as potentially impeding the successful assertion of certain defenses to discrimination claims brought against the BPD. Plaintiff was particularly concerned about these issues as they

⁴ Fry obviously does not have firsthand knowledge of Anderson's demeanor and management style. He would, however, have firsthand knowledge of the condition and morale of the office he inherited from her.

⁵ Plaintiff testifies that he interacted directly with the EEO Unit less than once a month. Pl.'s Aff. ¶ 28. Huskey avers that Plaintiff "worked with these people on a daily basis," Huskey Dep. at 35, but it does not appear from the record that Huskey would have had any firsthand knowledge of that fact.

related to a pending federal action brought by white police officers alleging reverse discrimination, Robinson v. Baltimore Police Dept., Civil Action No. WDQ-02-3236 (the Robinson case). On September 17, 2003, Plaintiff initiated an email exchange with Thompson in which he offered to provide substantial additional training for the officers in the EEO Unit. Thompson rejected the offer of training. Plaintiff also brought his concerns about the EEO Unit to the attention of Kevin Enright, who served in the office of the BPD Police Commissioner. After talking to Enright, Plaintiff also discussed his concerns about the EEO Unit with Anderson. Anderson told Plaintiff not to make any further offers of training to Thompson, and instructed him to prepare a memorandum laying out his concerns.

The following day, Enright requested that Plaintiff give a quick briefing of his concerns regarding the EEO Unit to George Mitchell, who had just started a few days earlier as the Chief of Staff for the Police Commissioner. Plaintiff met with Mitchell after work hours on September 18, 2003, and relayed his observations. On September 19th, Mitchell ran into Thompson before a briefing in the BPD's Comstat Room. In a brief conversation, Thompson relayed to Mitchell that Anderson "had apologized for [Plaintiff's] behavior and that Anderson knew nothing about the meeting between [Plaintiff] and [Mitchell] of the 18th." Mitchell Dep. 38.

The next business day, Monday, September 22, 2003, Thompson, along with two police officers who were detailed to the EEO Unit

and were involved in the investigation of the Robinson case, Ronald Weinreich and Keith Stagers, met with Anderson. Plaintiff was apparently aware of the meeting but was not allowed to participate in it. See Pl.'s Aff. ¶ 37. On September 23, 2003, Plaintiff observed Anderson and Thompson going out for lunch together.

On Friday of that week, Plaintiff was summoned to a meeting with Anderson and Huskey in Defendant Huskey's office. Huskey accused Plaintiff of conduct akin to telling the Mayor "how to run the City." Pl.'s Aff. ¶ 39. When Plaintiff responded that Enright requested that he talk with Mitchell and that he could show him Enright's email to prove it, Huskey responded that he was not interested in seeing the email. Huskey ordered that any further suggestions about how the Police Department should be run should be communicated to Anderson. Anderson ordered that Plaintiff complete his memorandum regarding his concerns about the EEO Unit. Plaintiff provided that memorandum to Anderson the next day.

Plaintiff heard nothing further about this issue until October 14, 2003, when Anderson instructed Plaintiff to come with her to City Hall for another meeting with Huskey. Huskey informed Plaintiff that he had received complaints from Plaintiff's "client" and then placed in front of him, very briefly, a number of documents that Defendants describe as complaint letters, one of which was from Thompson. Huskey testified that when confronted with these documents, Plaintiff

"just sat there and looked at me." Huskey Aff. ¶ 10. Plaintiff counters that he was not provided any opportunity to respond before Huskey took away the documents and handed him a letter, signed by Zollicoffer and Huskey, which instituted the following disciplinary actions: (1) Plaintiff was suspended for five days, without pay; (2) Plaintiff was "placed on probation for six months with a written plan for improvement to be supervised by Sheila Anderson; and (3) Plaintiff was instructed to "verbally apologize and present a written letter of apology to each client for his offending conduct." Pl.'s Ex. 20.

Defendants submitted with their motion for summary judgment the "Letters of Complaint" that they represent are the same as those shown to Plaintiff in the October 14, 2003, meeting. Defs.' Ex. 6.⁶ These letters or memos were written by three individuals, Thompson, Weinreich, and Mitchell. There is no question that the Thompson material is correctly characterized as a complaint. She accuses Plaintiff of exhibiting "supreme arrogance," "threatening her staff," of breaching confidences, and even suggesting that Plaintiff might "throw [a pending] case to say it was [the EEO Unit's] fault to prove his point." Id. (Sep. 26, 2003, Memo from Thompson to Huskey). Weinreich's memo relates to a single incident, and states in the form of double

⁶ Plaintiff challenges this representation and testifies that he distinctly remembers seeing a passage in a letter written by Thompson to the effect, "Mr. Hoffman thought he was so clever complaining about me to Lt. Col. Mitchell, but Lt. Col. Mitchell is my friend." Pl's Aff. ¶ 42. A letter containing this language is not part of the packet produced by Defendants.

hearsay that a particular police officer (who told another police officer who, in turn, told Weinreich) had heard Plaintiff publically state in the hearing of opposing counsel that "the thing wrong with this case is the [EEO Unit] did not move fast enough on the case." Id. (Sept. 25, 2003, Memo from Weinreich to Thompson).⁷

The Court, however, has considerable difficulty (and believes that a jury would as well) in concluding that the Mitchell memo can be considered a "complaint." Although Defendants now seem to be attempting to back away from their earlier testimony, see Reply at 5 (characterizing Mitchell as "the one complaining client least offended"), in their depositions, Defendants repeatedly highlighted Mitchell as one who was offended by Plaintiff's conduct and to which Plaintiff owed an apology. See, e.g., Zollicoffer Dep. at 8, 9, 30, 31, 46, 82. Defendant Huskey testified in his deposition that, in order to apologize to the "client," Plaintiff should have started with Mitchell and that this alone might have been sufficient. Huskey Dep. at 83-84 ("as I previously stated and I've stated it several times, that I feel that as Mr. Zollicoffer stated that an

⁷ The Court mentions the double hearsay in the Weinreich memo not as a comment on its admissibility in this action. Obviously, it is not offered for the truth of whether Plaintiff made such a comment, but for whether Zollicoffer and Huskey believed that he did. The hearsay problem is mentioned in light of Zollicoffer's testimony in his deposition that he thought it was important to have the oral complaints about Plaintiff committed to writing because he was uncomfortable with "he said, she said" complaints. Zollicoffer Dep. at 175; see also id. at 23, 29.

apology would have been sufficient if he would have spoke with Colonel Mitchell").

Mitchell's testimony in his deposition, however, seriously undermines Defendants' position. Mitchell testified that he had no experience with Plaintiff being rude except on the day that Plaintiff was fired, when "he had a right to be." Mitchell Dep. at 71. Mitchell testified that he had "no feelings" concerning Plaintiff "one way or another." Id. at 58. When asked if he wanted Plaintiff fired, or disciplined, or if he ever said anything about people in the BPD being unwilling to work with Plaintiff, Mitchell responded, "absolutely not." Id. at 58-59. Mitchell testified that he could not recall ever telling any Defendants or anyone else in the City Law Department that he or anyone in the BPD would not work with Plaintiff, thought that Plaintiff was rude or abusive, or that Plaintiff had client communications problems. Id. at 60-61.

An inference that could readily be made from Mitchell's testimony is that it was the Defendants that went to Mitchell in order to solicit a complaint about Plaintiff. Mitchell reports that when he first talked with Anderson about the concerns raised by Plaintiff about the EEO Unit, Anderson became "enraged" and "jumped on" Mitchell. Id. at 19. Anderson then asked Mitchell if he would submit to her an official report from the BPD and he refused. Id. at 20. He did agree to type up and provide Anderson his notes from his September 28, 2003, meeting with Plaintiff. Notwithstanding the fact that nothing in these notes

is in any way critical of Plaintiff, it is these notes that Defendants have proffered throughout this litigation as a "Letter of Complaint." Mitchell states that it was obvious that "there were some issues that went on between [Anderson and Plaintiff], id. at 22-23, but, in his view, it was not an issue for the BPD. Id. at 25; see also id. at 24 ("I viewed it as personnel issues in [Anderson's] shop.")

Mitchell also seems to reject Defendants' entire premise that the BPD was somehow Plaintiff's "client." He recounts that it was Huskey that "kept saying we [the BPD] were the client." Id. at 46; see also id. at 47 ("I remember [Huskey and Anderson] saying the client, the client I remember them saying we were the client") and 65 (Q: Well, what reason would [Huskey and Anderson] have had to tell you that [you were the client]? A: You're going to have to ask them. I don't know. It kept coming up that we were clients, we were clients.") Mitchell stated that this was not his understanding of the relationship, id. at 66, and that he believed "[Anderson's] shop . . . worked for the City Solicitor, not for the Baltimore Police Department." Id. at 24.

The closest that Mitchell comes to offering comments critical of Plaintiff is his opining that if Plaintiff had "jumped the chain of command," in coming to him against a direct order, that would have been "unprofessional." Id. at 49.⁸ Even

⁸ Earlier in his deposition Mitchell even qualified that opinion and stated that "there are times" where "it is acceptable to jump the chain of command." Id. at 27. Mitchell states that he tried to explain this exception to Anderson, "[b]ut she was

that opinion, however, originated with Huskey, not Mitchell. Mitchell relates, "Huskey asked me whether or not I felt as though [Plaintiff's] action were unprofessional . . . if it was in fact true that he had disobeyed a direct order or direction of his chief and jumped the chain of command and I said yeah, I consider that unprofessional." Id. at 46. He further clarified, "I don't know that it was my opinion as much as I concurred with a statement that [Huskey] was making." Id. at 50.

After Plaintiff was handed the letter outlining his discipline, he asked for copies of the complaint letters but Huskey and Anderson refused. He also attempted to explain to them that Thompson was simply trying to retaliate against him for his criticisms of her EEO Unit, but neither Huskey nor Anderson responded.

Plaintiff served his five day suspension. Upon his return, he requested that Anderson set up a meeting with him and the EEO Unit so that he could "clear the air," but Anderson indicated that she did not have time. Although Anderson at first testified that she started to prepare a performance improvement plan for Plaintiff, the rest of her deposition testimony reveals that she did very little in that regard.⁹ After his return, Plaintiff

just enraged." Id. at 27-28.

⁹ Defendants attempt to obscure the failure to provide Plaintiff with a written performance improvement plan by referring to the letter handed to Plaintiff at the October 14, 2003, meeting as providing him the "Performance Improvement Process." See Summ. J. Mot. at 8 ("Hoffman signed the document to acknowledge his receipt of the Performance Improvement

prepared Thompson and others from the EEO Unit for their depositions in the Robinson case and appeared as their counsel for those depositions. It is undisputed that there were no further complaints from anyone concerning Plaintiff after his post-suspension return.¹⁰

Plaintiff testified that, after he returned from his suspension, Anderson rescinded Huskey's order that he verbally apologize. He also indicates that he was given no further information as to whom he should apologize, nor was he provided the "complaint letters" so that he could frame the substance of his apology. He asserts that he heard nothing further regarding the written apology until Friday, November 14, 2003, when he received an email from Peter Saar stating, "Ms. Anderson has asked that I remind you of the need to get the letters to the EEO drafted for her to review (apology). This is deemed a priority." Defs.' Ex. 11.

The following Wednesday, November 19, 2003, sometime before

Process."). The document in question was a memo from Huskey to Zollicoffer titled "Client Complaints regarding Howard Hoffman," and does nothing more than set forth the nature of the alleged "client" complaints and lists the 3 disciplinary actions noted above. Defs.' Ex. 8. This memorandum clearly anticipated another separate "written plan for improvement." Id. ("I would recommend that the written work improvement plan inform Mr. Hoffman that during his probation period a violation of the plan will result in immediate discharge.").

¹⁰ Plaintiff relates that he felt he was "walking on pins and needles with the EEO Unit and after he had several meetings with them regarding the Robinson case, Anderson told him, "like enough of the apology, or enough laying on the, you know, the politeness here." Pl.'s Dep at 256.

10 o'clock in the morning, Defendant Anderson walked into Plaintiff's office and inquired as to the whereabouts of the written apology. Plaintiff responded that, before he could write that apology, he would need more information as to whom he must apologize and the criteria by which that apology would be judged. Plaintiff testifies that he also told Anderson that he believed he was the victim of reverse discrimination on the basis of his race. Furthermore, he told Anderson that his attorney would be sending a letter shortly to detail his complaint of disparate discipline and requesting the "letters of complaint" pursuant to the Maryland Public Information Act. When asked by Anderson when that letter from Plaintiff's attorney would be received, Plaintiff indicated, by the end of that week. After Anderson left his office, Plaintiff responded to Saar's email of November 14, stating that he had retained an attorney who is preparing a letter for Zollicoffer. "It requests certain information which will assist me in making an apology, if I choose to make one at all. We will also be requesting, as part of a larger [Public Information Act] request, the complaint letters against me." Defs.' Ex. 12. Plaintiff copied this response to Zollicoffer, Huskey, and Anderson.

For the next two hours, Plaintiff positioned himself outside of Anderson's office, pretending to be looking at files. During that time, he overheard her on two telephone calls with Defendant Huskey. In those calls, Anderson relayed the substance of her conversation with Plaintiff, including Plaintiff's allegations of

a pattern of racial discrimination in the City Law Department and that Plaintiff had hired a lawyer. Pl.'s Dep. at 294-95. Plaintiff also testifies that he heard Anderson say, "you're going to have to do something about this. You've got to let [Zollicoffer] know. Oh, okay, good, you already let him know, good." Pl.'s Dep. at 299.

After those telephone calls, Plaintiff observed Anderson fax a document. By looking at the fax confirmation cover page, he discovered that the fax was sent to Defendant Huskey and the confirmation page stated "as we discussed." Pl.'s Aff. ¶ 61. Plaintiff then printed the list of recent fax transmissions which establishes that a fax was sent to Huskey at 11:51 a.m.

At 1:06 that afternoon, Huskey replied to Plaintiff's email and instructed Plaintiff to "[p]lease come to my office this afternoon at 4:30. Please bring all of your files, badge, and any other property belonging to the City." Defs.' Ex. 14. Huskey also instructed in that email for Anderson to also come to his office at that time. At 3:00 p.m., Plaintiff's attorney faxed a letter to Huskey and Zollicoffer outlining the substance of Plaintiff's complaint about his treatment, including his contention "that a pattern of disparate discipline and treatment exists in [the City Law Department]." Defs.' Ex. 13.

At 4:30, Plaintiff and his attorney appeared at Huskey's office. Huskey, Zollicoffer, and Anderson refused to allow Plaintiff's attorney to participate in the meeting, to the extent there was a meeting. Plaintiff was handed a letter stating

simply that Plaintiff's "service is no longer required" effective that same date. Defs.' Ex. 16. After that termination, Plaintiff's attorney repeatedly wrote to Zollicoffer requesting an explanation for Plaintiff's termination but received no response.

Less than two weeks after Plaintiff's termination, Defendants made the decision to hire Kimberly Johnson-Ball, an African American, to fill Plaintiff's position.¹¹ See Pl.'s Ex. 29 (Dec. 8, 2003 letter from Zollicoffer to Mayor requesting approval for hiring Johnson-Ball). The circumstances leading to Johnson-Ball's hiring are very different from those attendant to Plaintiff's hiring and are such that could lead a trier of fact to conclude that Plaintiff was fired to make way for her hiring. Johnson-Ball's resume was on file prior to Plaintiff's termination and, although Zollicoffer opines that he is sure it was submitted with a cover letter, the copy produced in this litigation simply has a post-it note stating, "Thurmon, please call me when you receive this, Kim." Pl.'s Ex. 11. Neither Huskey nor Zollicoffer can remember if anyone else was interviewed for the position. Both Huskey and Zollicoffer testified that they remembered or were "fairly sure" that Anderson interviewed Johnson-Ball prior to the decision to hire her, Huskey Dep. at 355-56; Zollicoffer Dep. at 123, and both

¹¹ In his deposition, Zollicoffer was reluctant to acknowledge that Johnson-Ball filled the slot created by Plaintiff's termination. See Zollicoffer Dep. at 110. Huskey, however, acknowledged that she did. Huskey Dep. at 350.

opined that Anderson's opinion of the candidate was critical to the decision. Anderson, however, testifies that she does not remember ever interviewing Johnson-Ball and she believes that she did not speak with her at all until after she was hired. Anderson Dep. at 168.

Based upon this series of events, Plaintiff filed a Complaint which was subsequently amended to contain 24 counts against various entities and individuals in the City government. Included as defendants are: the Mayor and City Council of Baltimore (the City), Zollicoffer, Huskey, and Anderson. As narrowed by this Court's ruling on Defendants' Motion to Dismiss, Hoffman v. Baltimore Police Dept., 379 F. Supp. 2d 778 (D. Md. 2005), the Amended Complaint now asserts claims against the City under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (Title VII) of disparate discipline (Count XI), retaliation (Count X), and unlawful termination (Count XXIV). Claims of retaliation against Zollicoffer, Huskey, and Anderson under 42 U.S.C. § 1983 (Count XXI) also survived the motion to dismiss, as well as a claim of disparate discipline against Zollicoffer and Huskey under § 1983 (Count XXII). Finally, a claim of abusive discharge under Maryland common law against Zollicoffer, Huskey, and Anderson (Count XIII) survived the motion to dismiss, albeit by a hair's breadth. This last claim was based upon Plaintiff's assertion that he was fired for expressing his intent to exercise his rights under the Maryland Public Information Act in requesting the complaint letters. Defendants have moved for

summary judgment as to all claims.

II. MOTION TO STRIKE AND MOTION FOR SANCTIONS

Before addressing the merits of Defendants' summary judgment motion, the Court must turn briefly to Plaintiff's motion to strike and motion for sanctions. In the motion to strike, Plaintiff takes issue with portions of the evidence and argument submitted by Defendants with their reply memorandum. Specifically, Plaintiff challenges Defendants' evidence and arguments related to (1) secondary evidence offered by Defendants related to the contents of a memo written by Anderson on the morning of the day in which Plaintiff was fired; (2) Plaintiff's identification of another City Attorney, Michael Dypski, as a potential witness; (3) Plaintiff's employment prior to his employment with the City and judicial criticism of Plaintiff's post termination conduct as an attorney in other cases unrelated to this case; and (4) Defendant's representation, which Plaintiff contends is patently false, that Chief Magistrate Judge Grimm in an unrelated case ordered Plaintiff to apologize to opposing counsel.

Defendants' preliminary argument in opposing this motion is that a motion to strike is an improper vehicle for the challenges Plaintiff raises. Plaintiff's pleading is more in the line of a surreply in which Plaintiff responds to argument and evidence presented for the first time in a reply. Defendants are technically correct and the Court will deny the motion to strike for that reason. Nonetheless, because Plaintiff's motion raises

some evidentiary issues that must be resolved before deciding the summary judgment motion and that will certainly surface again at trial if not resolved now, the Court will address the substance of the issues raised by Plaintiff in his motion to strike.

A. Secondary Evidence Concerning Anderson Memo

It is undisputed that after Anderson met with Plaintiff on the morning of November 19, 2003, she jotted down some notes memorializing the conversation. She also testified that when she met with Zollicoffer later that day she read him those notes. Those notes are now missing and Defendants have no explanation as to their whereabouts. Because the issue of whether Plaintiff mentioned race in his conversation with Anderson has significant impact on Plaintiff's retaliation claim, the disappearance of these notes take on considerable importance in this litigation.

In an oral ruling delivered in a September 11, 2007, hearing, Chief Magistrate Judge Grimm granted Plaintiff's motion for sanctions for Defendants' spoliation of evidence related to the disappearance of these notes. Judge Grimm recommended that, at trial, the Court "permit the fact that the [Anderson memo] was not produced to be brought out during the examination of the witnesses for purposes of allowing the jury to reach an adverse inference, if they believe that would be appropriate." Tr. at 75. In addition, he recommended that Defendants "not be permitted to offer secondary evidence [about the memo] through the testimony of Zollicoffer, who has read the memo, Huskey, who has read the memo, or Anderson, who authored the memo." Id.

Defendants objected to that ruling and on February 26, 2008, this Court upheld Judge Grimm's granting of the motion for sanctions, although based on slightly different reasoning. In response to the Defendants' complaint that the adverse inference sanction was too severe, the undersigned responded,

[h]ere, the adverse inference the jury would be instructed it could make, if it determined it to be appropriate, would be that Anderson wrote in her memo that Plaintiff complained about disparate treatment because of his race. The jury would only reach that conclusion and draw that inference if it concludes that Anderson is not a credible witness and that she is lying when she claims she simply cannot find the note, as opposed to having purposely destroyed it. But if the jury finds that Anderson is not a credible witness, it is unlikely to believe and credit her testimony that she did not understand that Plaintiff was complaining about race. Thus, if the jury questions Anderson's credibility, it will conclude that Defendants knew that Plaintiff was complaining of racial discrimination, regardless of any inference drawn from the disappearance of the note.

Feb. 26, 2008, Memorandum at 7 (emphasis in original).

In his motion to strike, Plaintiff protests Defendants' citation to and argument from Anderson's deposition testimony in which she discusses the contents of her notes. Defendants argued in their reply memorandum, that "the uncontradicted sworn testimony is that the Anderson note was not favorable to Hoffman." Reply at 20-21 (citing Anderson Dep. at 74-75). In opposing the motion to strike, Defendants justify this introduction of secondary evidence with their contention that "Hoffman opened the door to a fuller description of the Anderson

note by seeking an overbroad evidentiary inference based on a misrepresentation of the note's content[s]." Opp. to Mot. to Strike at 11.

Plaintiff did not "open the door" and his argument based upon the disappearance of the notes is precisely the argument anticipated by this Court's rulings on the spoliation motion. Plaintiff can, and certainly will, argue that Defendants rendered the notes unavailable because their contents were harmful to Defendants' case. In response, Anderson can give whatever explanation she has as to why she failed to preserve the notes and, if she is believed, the jury would draw no further inference about the notes. Defendants, however, cannot testify as to their contents.

B. The Michael Dypski Affidavit

With his opposition, Plaintiff submitted the affidavit of Michael Dypski, a former attorney in the City's Law Department, in which Dypski stated that he had overheard St. Lawrence on more than one occasion refer to Plaintiff as a "crazy white boy." Pl.'s Ex. 1-A. Defendants argued in their reply that Plaintiff is barred from relying on Dypski's testimony because Plaintiff failed to produce Dypski's affidavit in discovery or to name him in his answers to interrogatories as a person with knowledge of facts relevant to his claims. Reply at 18. Plaintiff counters that he did identify Dypski in his supplemental interrogatory answers and that he has previously produced the Dypski Affidavit as an exhibit to his spoliation motion.

Defendants' Interrogatory No. 7 asked if Plaintiff had taken or received any statements related to facts alleged in the Amended Complaint including those concerning alleged statements made by St. Lawrence about Plaintiff. Interrogatory No. 8 instructed that, if the answer to Interrogatory No. 7 was yes, Plaintiff was to provide details as to those statements. Interrogatories Nos. 17 and 18 sought similar information more specifically aimed at St. Lawrence's alleged statements. When Plaintiff initially answered these interrogatories, he objected to Interrogatory No. 7 as well as the other interrogatories on the ground that the Court's dismissal of Plaintiff's harassment claim rendered St. Lawrence's alleged statement irrelevant. On November 21, 2005, Plaintiff supplemented his answers to Interrogatories 8, 17, and 18 to identify Dypski as having heard St. Lawrence make these statements. Because Plaintiff failed to supplement Interrogatory No. 7, Defendants maintain that all that Plaintiff's supplemental answers did was to identify Dypski as "having knowledge of non-relevant facts." Opp. to Mot. to Strike at 13.

The Court finds that Plaintiff had sufficiently disclosed Dypski as a person with knowledge and that Defendants were not unfairly surprised by Plaintiff's submission of his affidavit in opposition to the motion for summary judgment. Despite a technical failure to explicitly supplement Interrogatory No. 7, Defendants could certainly assume that Plaintiff was not supplementing his answer for the purpose of disclosing irrelevant

information. If there was some confusion, they had more than adequate time to seek clarification.

C. Plaintiff's Past Employment History/Post-Termination
Judicial Criticism of Plaintiff's Conduct.

In their Reply, Defendants interject a three page discussion of alleged difficulties that Plaintiff had with two previous employers and relate an instance where Plaintiff was chastised by Judge Grimm for incivility for his conduct in a pair of cases¹² that were pending in this court after Plaintiff's departure from the City Law Department.¹³ Defendants justify the

¹² These were two separate cases in which Plaintiff represented individuals bringing claims against the former Baltimore City Police Commissioner. Andrews v. Clark, Civ. No. AMD-04-3772, and Franklin v. Clark, Civ. No. CCB-04-2042. They were consolidated for the purpose of discovery before Judge Grimm.

¹³ Defendants attempt to inflate and bootstrap Judge Grimm's comments into a claim that Plaintiff has been censured by three different judges by citing decisions from two other judges who simply endorsed Judge Grimm's comments. For example, Defendants state that "Judge C. Blake reviewed Judge Grimm's finding and 'agree[d]' Hoffman, in her words, had been 'inconsiderate, and rude.' Judge Blake wrote that Hoffman's conduct 'could charitably be described as unprofessional.'" Reply at 7 (quoting Franklin v. Clark, Civ. No. CCB-04-2042 (D. Md. Sep. 29, 2006)). Judge Blake did mention in a single sentence in a 27 page opinion that: "while Hoffman's behavior toward opposing counsel could charitably be described as unprofessional, it is not so egregious as to warrant the use of disqualification as a sanction." Id. at 23-24. Judge Blake also opined in a footnote that she "agree[s] with Judge Grimm's assessment that while the conduct of [Plaintiff] had oftentimes been unprofessional, inconsiderate, and rude, there are also several instances where defendants' lawyers engaged in similar behavior." Id. at 24 n.10.

Defendants also opine that Judge Thieme of the Maryland Court of Special Appeals recently "based an opinion on Hoffman's incivility." Reply to Mot. for Summ. J. at 7 (citing Franklin v. Mayor & City Council of Baltimore, No. 1599 (Md. Ct. Spec. App.

inclusion of this material by arguing, "Hoffman's habit of interpersonal conflict and incivility in professional settings is relevant to prove that Hoffman generated conflict with his clients and other professional associates when he was employed with the City." Opp. to Mot. to Strike at 9.

The Fourth Circuit has long held that "habit or pattern of conduct is never to be lightly established, and evidence of examples, for purpose of establishing such habit, is to be carefully scrutinized before admission." Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977). The court explains:

The reason for such an attitude toward evidence of habit is the obvious danger of abuse in such evidence resulting from the confusion of issues, collateral inquiry, prejudice and the like, or, as one court has phrased it, the collateral nature of such proof, the danger that it may afford a basis for improper inferences, the likelihood that it may cause confusion or operate to unfairly prejudice the party against whom it is directed. It is only when the examples offered to establish such pattern of conduct or habit are numerous enough to base an inference of systematic conduct and to establish one's regular response to a repeated specific situation or, to use the language of a leading text, where they are sufficiently regular or the circumstances sufficiently similar to outweigh the danger, if any of prejudice and confusion, that they are admissible to establish pattern or habit.

Id. (internal quotations and citations omitted).

July 9, 2008)). Judge Thieme obviously had no firsthand knowledge of Plaintiff's conduct but simply quoted Judge Grimm's observations as a small part of his analysis of whether Plaintiff's client was entitled to attorney's fees in a MPIA case brought in the state Circuit Court.

The briefing on the motion to strike exemplifies the potential pitfalls of the admission of "habit" evidence like that proffered by Defendants. Defendants claim that Plaintiff was terminated from prior positions for incivility and Plaintiff counters with his own explanations and evidence about the dissolution of his previous employment relationships. Defendants cite an example where Plaintiff was chastised by a court and Plaintiff responds with his explanation for the mutual incivility in that litigation and then with examples where opposing counsel in other cases commended him for his civility. Admission of any of this evidence would quickly lead the trial of this matter into a series of mini-trials of issues tangentially related, at best, to Plaintiff's claims and Defendants' defenses.

The Court will not consider in deciding the motion for summary judgment nor will it admit at trial evidence about Plaintiff's previous employment or post-termination litigation conduct from Defendants or from Plaintiff.

D. Judge Grimm's Alleged Order to Plaintiff to Apologize

The final issue raised in the motion to strike is closely related to the last and is also the focus of the motion for sanctions. After Judge Grimm expressed his concerns about incivility in the Andrews and Franklin cases, Plaintiff wrote to opposing counsel "pursuant to and in the spirit of Judge Grimm's recent ruling and the Court's general view that all counsel are not communicating in a courteous and positive manner" and expressed that "[i]f any of my communications have lacked

civility . . . please understand that my intention was to simply move this matter forward, and that no offense was intended toward counsel." Pl.'s Ex. 1-G to Mot. to Strike (July 19, 2006, letter from Plaintiff). Plaintiff also suggested in that letter what were, in this Court's view, some practical and reasonable guidelines for going forward in a more civil manner. Opposing counsel responded by rejecting, for the most part, Plaintiff's suggested guidelines. Pl.'s Ex. 1-H to Mot. to Strike (July 20, 2006, letter from St. Lawrence).¹⁴

On October 26, 2006, Plaintiff wrote to Judge Grimm to express his concerns about "a continuing lack of civility" in the pending cases. Pl.'s Ex. 3 to Mot. to Strike. He stated in that letter that he had "taken the following steps in this case to comply with the letter and spirit of the Court's Order of July 18, 2006 concerning the lack of civility in this case" and then listed several actions including, "I have written to all counsel in the case, apologizing for any offending conduct." Id. (referencing and attaching his July 19, 2006, letter). In their Reply, Defendants characterize Plaintiff's October 26, 2006, letter to Judge Grimm as an acknowledgment that Plaintiff had been ordered by Judge Grimm to apologize to opposing counsel and then make the somewhat spurious argument that "when directed to apologize by the Court Hoffman had no trouble complying." Reply

¹⁴ By this time, St. Lawrence had left her employment with the City and was employed in a law firm retained by the City as outside counsel.

at 9.

In his motion to strike and his motion for sanctions, Plaintiff vehemently denies that he was ordered by Judge Grimm to apologize and accuses Defendants of misrepresenting the facts for the "transparent purpose of prejudicing Hoffman in the eyes of the Court." Mot. to Strike at 9. Citing Defendants' refusal to correct this misrepresentation, Plaintiff seeks sanctions under Rule 11.

Defendants' decision to include this material in their Reply and their motivation for so doing is certainly open to question. First, the issue in this case was never whether Plaintiff had the ability or willingness to apologize in some generalized or hypothetical sense. Rather, the issue is whether he knew to whom and for what he was to apologize in the specific situation that arose in the City Law Department. It would be a reasonable conclusion that counsel included this argument and evidence in their Reply memorandum, not to prove a point not truly at issue, but because they could not resist the temptation to submit material in their possession that reflected poorly on Plaintiff, despite its lack of probative value. Second, it is a questionable interpretation of Plaintiff's October 26, 2006, letter that Plaintiff was ordered to apologize.¹⁵

¹⁵ The Court notes, in passing, that the sarcastic tone of Defendants' rhetoric in making this argument is similar to some of the conduct for which Judge Grimm criticized Plaintiff. For example, Defendants write, "[d]rafting an apology should be a straightforward task for a published author such as Hoffman, who received the highest grade in his law-school employment law

While Defendants' counsel's conduct in this regard is not particularly commendable, the Court does not find it sanctionable. While one can surmise the true motives for including this material, Defendants' reading of the letter is a plausible interpretation supporting a marginally relevant argument. Most significantly, however, Defendants included both Plaintiff's October 26, 2006, letter and the complete transcript of the hearing before Judge Grimm with their Reply memorandum which allowed the Court to make its own assessment.

III. SUMMARY JUDGMENT MOTION

A. Legal Standard

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure only when there is no genuine issue as to any material fact, and the moving party is plainly entitled to judgment in its favor as a matter of law. In Anderson v. Liberty Lobby, Inc., the Supreme Court explained that, in considering a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. 242, 249 (1986). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. Thus, "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but

class." Reply at 9.

whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." Id. at 252. In undertaking this inquiry, a court must view the facts and the reasonable inferences drawn therefrom "in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see also E.E.O.C. v. Navy Federal Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

B. Discussion

1. Discriminatory Termination Claim

In the absence of direct evidence of discrimination, a plaintiff asserting claims under Title VII or § 1983 can rely upon the now familiar McDonnell Douglas¹⁶ burden shifting scheme. To make out a prima facie case for discriminatory termination, a plaintiff must demonstrate that: (1) he is a member of a protected class; (2) he was performing his job duties at a level that met his employer's legitimate expectations at the time of his termination; (3) he was fired; and (4) his position remained open or was filled by a similarly qualified applicant outside of the protected class. Holland v. Washington Homes, Inc., 487 F.3d 208 (4th Cir. 2007). Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the defendant to offer a legitimate, non-discriminatory explanation for the adverse employment action. Reeves v. Sanderson Plumbing Prods.,

¹⁶ McDonnell Douglas v. Green, 411 U.S. 792 (1973).

Inc., 530 U.S. 133, 142 (2000). If the employer does so, the ultimate burden falls on the plaintiff to establish that the reasons offered by the defendant were not its reasons, but were a pretext for discrimination. Id. "Proof that the defendant's explanation is unworthy of credence is [] one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." Id. at 134 (citations omitted).

Defendants' primary argument in favor of summary judgment on Plaintiff's discrimination claims relies upon the "strong inference" that discrimination was not a determining factor in an adverse employment decision where the same person making the adverse employment decision was also the person that made the decision to hire the plaintiff. Mot. for Summ. J. at 21-22 (citing Proud v. Stone, 945 F.2d 796 (4th Cir. 1991)). The Proud v. Stone inference recognizes that "[f]rom the point of view of the putative discriminator, it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job." Id. (citations and internal quotations omitted). Contending that "Zollicoffer alone made the hiring decision," Reply at 1, and that Zollicoffer made the decision to fire Plaintiff, Defendants assert that this "dual role undercuts any

plausible inference of discrimination." Mot. at 23.

The application of the Proud v. Stone inference is not as clear cut in this instance as Defendants would present. First, there is evidence in the record from which the jury could conclude that there was a dire need for the immediate hiring of an attorney to handle a backlog of cases and claims brought against the BPD. Although Plaintiff may not be able to testify that the only other applicants for the position were Caucasian, the two other applicants of which he was aware were Caucasians and Defendants certainly had the opportunity to come forward with evidence that an application of an African American candidate was passed over when Plaintiff was hired but have not done so. If the jury credits Plaintiff's testimony concerning Zollicoffer's apparent hostility during the interview process and his threat to fire Plaintiff just two weeks after his hire, the jury could conclude that hiring Plaintiff was a decision into which Zollicoffer was reluctantly forced. These circumstances would undercut any inference of non-discrimination. See Waldron v. SL Indus., Inc. 56 F.3d 491, 496 n.6 (3rd Cir. 1995) (declining to apply Proud v. Stone presumption where "it was plausible under the evidence presented at summary judgment that [the employer] would hire [the plaintiff], use his skills for a few years while a younger person was being 'groomed' for his position, then fire [the plaintiff] because of his age").

Furthermore, while Zollicoffer technically may have had authority as the "sole" decision maker, the record does not

support the conclusion that, in making his decision, he was immune from the influence of others. Malone and O'Connor were certainly very involved in the process and it would have been difficult for Zollicoffer to turn down a qualified candidate without offering some explanation. When Plaintiff's successor, Johnson-Ball, was hired, Zollicoffer testified that he gave great deference to Malone's successor, Anderson, in making that decision. Zollicoffer Dep. at 122 (stating that if Anderson liked Johnson-Ball she would probably be hired but if Anderson did not, she probably would not be hired). A jury might find it significant that both Malone and O'Connor were gone by the time Plaintiff was fired.

Defendants next argue that Plaintiff cannot make out a prima facie case of discrimination because he was not performing his job duties at a level that met his employer's legitimate expectations at the time of his termination.¹⁷ In making this argument, Defendants are narrowly constrained as to the conduct they can now deem inadequate. They cannot argue that he was not performing his substantive legal work as it is undisputed that all Defendants agreed that Plaintiff was a capable attorney. See Zollicoffer Dep. at 203 ("I don't have a problem with his substantive issues."); Huskey Dep. at 319 (testifying that

¹⁷ As is often the case in claims evaluated under the McDonnell Douglas burden shifting scheme, the reasons that employer proffers as grounds that the plaintiff was failing to meet his employer's legitimate expectations are also offered in the later stage of the analysis as the legitimate non-discriminatory reason for the termination.

Plaintiff was a good attorney); Anderson Dep. at 10 (opining that Plaintiff was a passionate attorney and, at most times, a good attorney). Huskey opined in the first of the two formal reviews Plaintiff received, that Plaintiff "delivers outstanding representation to the client," and "exceeded our expectations," and in the second review, that Plaintiff's "work continues to be very good." Pl.'s Ex. 6 (Evaluations dated May 16, 2002, and Aug. 16, 2002).

Nor can Defendants argue that the conduct about which Thompson complained was the basis for his termination as Zollicoffer testified that the EEO Unit's complaints "did not warrant termination." Zollicoffer Dep. at 27; see also id. at 30-31 (opining of the complainers' "most serious charge" that it "clearly wasn't grievous enough to be terminated"). Nor can Plaintiff's post-suspension job performance nor his post-suspension working relationship with the EEO Unit be relied upon to justify his termination. As noted above, Defendants acknowledge that there were no complaints from anyone in the EEO Unit after Plaintiff returned from his suspension. Zollicoffer Dep. at 183 (testifying that, to the extent he could tell, everything appeared to be going smoothly after Plaintiff's return); Huskey Dep. at 330 (acknowledging that he had no evidence to support a conclusion that Plaintiff was not achieving the same high level of performance after his suspension as was reflected in his earlier evaluations); Anderson Dep. at 243 ("I am unaware of any complaint after his suspension").

To justify his termination, Defendants are left to focus exclusively on Plaintiff's "failure" or alleged "refusal" to apologize. Undoubtedly, a jury could find that, if an employer reasonably believed that an employee flat-out refused to obey a direct order from a superior to tender an apology, this could constitute legitimate grounds for termination. See, e.g., Fries v. Metropolitan Management Corp., 293 F. Supp. 2d 498, 504 n.2 (E.D. Pa. 2003) (considering the plaintiff's failure to provide a letter of apology for his insubordination was a factor in finding that employer had non-pretextual reason for his termination). In this instance, however, Defendants' explanation of this apology requirement is fraught with sufficient inconsistencies which, in turn, depend upon findings of credibility to resolve, to render summary judgment inappropriate.

While not an exhaustive list of the inconsistencies and other problems, the Court notes the following. First, the circumstances surrounding Huskey's "investigation" of the complaints of the client which led to Plaintiff's suspension and the imposition of the apology requirement are somewhat suspect. Huskey has no notes of his investigation. Huskey never talked with Plaintiff to get his side of the dispute until he handed Plaintiff the letter of suspension. Regarding Plaintiff, Zollicoffer testified that he owed him no duty to hear his side of the story before imposing sanctions, Zollicoffer Dep. at 252, yet when asked how Huskey should go about investigating a complaint that was filed against Anderson, see infra, Zollicoffer

indicated his investigation should "start with [Anderson]." Id. at 239. Furthermore, from Mitchell's account of his conversation with Huskey, discussed above, one could conclude that Huskey was more interested in soliciting a complaint than in investigating a complaint.

In addition, there is no apparent justification for Defendants' refusal to allow Plaintiff to review the letters allegedly setting out the complaints for which Plaintiff was to apologize. This is particularly troublesome given that the "complaint letter" from Mitchell, the individual repeatedly identified by Defendants as the prime potential recipient of the apology, was not a complaint letter at all. Even Anderson, who was charged with evaluating the sufficiency of Plaintiff's written apology, acknowledged, albeit reluctantly, that she would need the complaint letters in order to be certain to address the issues raised in those letters. See Anderson Dep. at 315-319.¹⁸

Defendants' motion for summary judgment as to the discriminatory termination claims will be denied.

2. Disparate Discipline

To make out a prima facie case under a discriminatory discipline theory, a plaintiff must demonstrate: (1) that he is a

¹⁸ The somewhat nebulous nature of this apology requirement is highlighted by Anderson's testimony. She opines that "any apology would be fine" as long as the "tone is appropriate" and "[a]nything in that neighborhood [of communications and willingness to work with the client] that would have addressed even globally or superficially the complaints that were submitted by the client" would have been sufficient. Anderson Dep. at 314-15, 316.

member of a protected class; (2) that the prohibited conduct in which he engaged was comparable in seriousness to misconduct of employees outside the protected class; and (3) that the disciplinary measures enforced against him were more severe than those enforced against other employees. Cook v. CSX Transp. Corp., 988 F.2d 507 (4th Cir. 1993). In establishing such a claim, the plaintiff must identify a "comparator," i.e., someone who is "similarly situated" to the plaintiff and who engaged in similar misconduct. Courts have varied in their articulation of the degree of similarity in situation and conduct that must be found before another employee can serve as an appropriate comparator. In Mitchell v. Toledo Hosp., 964 F.2d 583 (6th Cir. 1992), a decision relied upon by Defendants, the Sixth Circuit held that the plaintiff and the comparable employee must be "similarly-situated in all respects. . . . [They] must have dealt with the same supervisor, have been subject to the same standards and engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." (emphasis in original). In Humphries v. CBOCS West, Inc., one of the primary cases relied upon by Plaintiff, the Seventh Circuit applied a broader view, stressing that

the similarly situated inquiry is a flexible one that considers all relevant factors, the number of which depends on the context of the case. As to the relevant factors, an employee need not show complete identity in comparing himself to the better treated employee, but he must show substantial

similarity. In addition, our case law does not provide any "magic formula for determining whether someone is similarly situated. Put a different way, the purpose of the similarly situated requirement is to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination.

It is important not to lose sight of the common-sense aspect of this inquiry. It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees - distinctions can always be found in particular job duties or performance histories or the nature of the alleged transgressions. Now, it may be that the degree of similarity necessary may vary in accordance with the size of the potential comparator pool, as well as to the extent to which the plaintiff cherry-picks would-be comparators, but the fundamental issue remains whether such distinctions are so significant that they render the comparison effectively useless. In other words, the inquiry simply asks whether there are sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury to reach an inference of discrimination or retaliation - recall that the plaintiff need not prove anything at this stage.

474 F.3d at 405 (internal quotations and citations omitted).¹⁹

Defendants argue that they are entitled to summary judgment on Plaintiff's disparate discipline claim as he can proffer no

¹⁹ Of note, post-Mitchell, the Sixth Circuit has also broadened the scope of those that can serve as comparators. See Perry v. McGinnis, 209 F.3d 597, 601 (6th Cir. 2000) ("in applying the [similarly situated] standard courts should not demand exact correlation, but should instead seek relevant similarity").

similarly situated "comparator." In opposing the motion, Plaintiff points to Anderson, noting that, in contrast to their treatment of Plaintiff, Huskey and Zollicoffer apparently took no action, whatsoever, against Anderson after receiving an unsolicited complaint about her from a BPD employee, Jackie Hollis. Hollis was a secretary in the BPD Office of Legal Affairs and filed a complaint with the EEO Unit against Anderson, alleging, inter alia, that Anderson made derogatory comments about staff, spoke to staff in a demeaning, derogatory manner, showed favoritism in approving training, and, in general, has a "vindictive, retaliatory demeanor and is belittling to any member who does not rank in the same command or above as she." Pl.'s Ex. 1H. Thompson forwarded Hollis's complaint to Zollicoffer on October 20, 2003, but there is no indication that any action was taken by Zollicoffer or Huskey against Anderson because of that complaint.²⁰

The Court agrees with Defendants that Anderson's job description and her position relative to Hollis are too dissimilar to Plaintiff's job description and his position relative to Thompson and the others in the EEO Unit for Anderson to serve as a meaningful comparator. Anderson was responsible for the entire Office of Legal Affairs, with significant

²⁰ A few months later, Anderson was disciplined for other unrelated conduct. In March of 2004, after missing a filing deadline which resulted in the entry of default against the BPD, Zollicoffer gave her the option of accepting a demotion or resigning. She resigned.

management and supervisory responsibilities. Plaintiff had no such responsibilities. Furthermore, while Defendants' characterization of Plaintiff's relationship with the EEO Unit as an attorney/client relationship may not be the most accurate, it is certainly different than the supervisor/subordinate relationship between Anderson and Hollis. Finally, the alleged offending conduct is different. While Plaintiff and Anderson were both criticized for having abrasive personalities and acting uncivilly, the complaints about Plaintiff also included allegations that he breached confidentiality and violated the chain of command.

The two cases relied upon by Plaintiff do not support his disparate discipline claim. In Humphries, the plaintiff and the purported comparator "held the same associate manager position . . . , with the same duties . . . [and] shared the same supervisor." 474 F.3d at 406. In the other decision relied upon by Plaintiff, this for the proposition that "whether two employees are similarly situated ordinarily presents a question for the jury," George v. Levitt, 407 F.3d 405 (D.C. Cir. 2005), the plaintiff and the alleged comparator were all professional engineers employed doing similar work under similar employment statuses.²¹ Under those circumstances, the court concluded that a reasonable jury could conclude that the plaintiff "and the

²¹ The Plaintiff in George was a probationary employee in the United States Environment Protection Agency. The comparators were, according to the court, "de facto 'at-will' employees." 407 F.3d at 415.

other engineers were similarly situated." 407 F.3d at 415.

Summary judgment will be granted in favor of Defendants on Plaintiff's disparate discipline claims.²²

3. Retaliatory Discharge

Like other discrimination claims, in the absence of direct proof of unlawful retaliation, a plaintiff can establish a claim through circumstantial evidence under the McDonnell Douglas burden shifting scheme. To establish a prima facie case of retaliatory discharge, a plaintiff must show that (1) he engaged in protected activity; (2) the employer took adverse employment action against him; and (3) the protected activity was causally connected to the adverse action. Holland v. Washington Homes, Inc., 487 F.3d 208, 218 (4th Cir. 2007). Here, Defendants challenge Plaintiff's ability to establish both the first and the third elements. Defendants contend that Plaintiff complained generally about disparate treatment in the Law Department but did not identify that alleged disparate treatment as being based upon

²² The Court notes that its conclusion that Plaintiff cannot employ the comparator proof scheme to establish a disparate discipline claim does not render all evidence concerning Anderson's conduct or Zollicoffer's response to complaints about that conduct completely irrelevant to Plaintiff's discrimination claim. For example, Zollicoffer's statement as to his belief that he owed Plaintiff no duty to allow him to explain himself before imposing sanctions could be impeached by his statement that he would "start with Anderson" when complaints were made about her. Similarly, Zollicoffer's testimony that he made a "very quick decision" to terminate Plaintiff's employment upon hearing that Plaintiff refused to apologize, Zollicoffer Dep. at 75, stands in stark contrast to the deliberative process he employed that led to Anderson's resignation, which he justified on the basis that he "take[s] terminations very seriously because they affect people's way of life." Id. at 139.

race. Defendants also contend that Zollicoffer made the decision to fire Plaintiff before he was aware of any complaint of disparate treatment, racial or otherwise.

Both contentions, however, turn on resolutions of disputes of fact and findings of credibility that cannot be made as part of a summary judgment analysis. While Anderson claims that Plaintiff never mentioned race in their conversation on the morning of November 19, 2003, and that she did not understand Plaintiff's use of the term "disparate treatment" to refer to racial discrimination,²³ Plaintiff testified that he "certainly told Miss Anderson that there was a pattern of racial discrimination in the city law department." Pl.'s Dep. at 280. Plaintiff also testified that he recalled Anderson using the term race in her telephone conversation with Huskey. Id. at 296.

As to Zollicoffer's claim that he was unaware that Plaintiff was raising complaints about racial discrimination before he determined to fire him, that claim is also challenged by Plaintiff's testimony. Plaintiff states that he overheard Anderson confirm with Huskey in their telephone call on the morning of November 19, 2003, that Huskey had "let Thurmon know" about the substance of Plaintiff's conversation with Anderson.

²³ Anderson testified that she understood Plaintiff's use of the term "disparate treatment" to refer to a "[g]eneralized impression by Mr. Hoffman that there was unfairness in the City Law Department." Anderson Dep. at 58. Remarkably, Anderson refused in her deposition to even acknowledge that Plaintiff's assertion of "unfairness" was a complaint. She testified that she simply considered it a "comment," "opinion," or "commentary." Id. at 59-61.

Id. at 299. He also testified that he heard Anderson tell Huskey that he has to "get rid of Mr. Hoffman" before they receive the letter from Plaintiff's attorney. Id. at 300.

Given all of the testimony in this action concerning the close working relationship between Huskey and Zollicoffer, a jury could reasonably conclude that Huskey relayed the information concerning Plaintiff's complaint of racial discrimination before Zollicoffer made the decision to terminate Plaintiff's employment. While Defendants have constructed a detailed timeline to establish that Zollicoffer made that decision by 10:30 in the morning of the 19th, within 20 minutes of receiving Plaintiff's email, the jury need not credit that self serving testimony, nor co-Defendant Huskey's equally self serving testimony confirming Zollicoffer's. The first communication not between co-Defendants that indicated that the decision to fire Plaintiff had been made did not come until 1:06 p.m.²⁴

Defendants raise an additional argument related to the claims against Anderson. Defendants contend that Plaintiff cannot establish a prima facie case of retaliation against Anderson because she "was not in any way involved in the

²⁴ Plaintiff even questions if Huskey's 1:06 email indicated that the decision had been made to fire him. He testified that he believed that the instruction to "bring all of your files, badge, and any other property belonging to the City" was just an indication that he was going to be transferred from the police department. Pl.'s Dep. at 310. The Court questions if that is a reasonable understanding of that instruction but it makes no difference to the outcome of the pending motion if Plaintiff learned that he was being terminated at 1:06 or 4:30.

termination decision." Mot. at 36. "Liability [under § 1983] will only lie where it is affirmatively shown that the official charged acted personally in the deprivation of the plaintiffs' rights." Vinnedge v. Gibbs, 550 F.2d 926 (4th Cir. 1977).

This argument fails for the same reason as Defendants' other arguments, *i.e.*, there is a genuine dispute of fact concerning Anderson's role in Plaintiff's termination. While Anderson claims she did not participate in any discussions relating to the termination of Plaintiff nor did she recommend that he be terminated, Anderson Aff. ¶ 16, as noted above, Plaintiff testified that he heard her tell Huskey that they needed to get rid of him. That Anderson may have been involved in the decision is bolstered by Mitchell's testimony characterizing Anderson as "obviously outraged" about Plaintiff's conduct and his observation that there was conflict between them. Mitchell Dep. at 26. Fry, who took Anderson's position, testified that he had the authority to recommend that someone in Plaintiff's former position be fired, and in fact, he had made such a recommendation that an attorney be fired and that the attorney was fired. Fry Dep. at 80, 82. The trier of fact is not obliged to simply accept Anderson's testimony that she had no role in the decision to fire Plaintiff and, if her testimony at trial resembles her testimony in deposition, it is doubtful that it will.²⁵

²⁵ Anderson's testimony would be charitably described as evasive, less charitably described as simply lacking credibility. See, supra, n. 23.

The motion for summary judgment will be denied as to Plaintiff's claims of retaliatory discharge.

4. Abusive Discharge/Punitive Damage Claims

In ruling on Defendants' motion to dismiss, the Court held that the Maryland Public Information Act (MPIA) represented a sufficiently clear mandate of public policy to support a wrongful discharge claim. Hoffman, 379 F.Supp.2d at 789. The Court also opined that, while Plaintiff's claim that he was fired for expressing his intention to seek the complaint letters through the MPIA was "tenuous at best" and "seemingly inconsistent with Plaintiff's other claims," it could survive the motion to dismiss. In the motion for summary judgment, Defendants raise many of the same challenges raised in the motion to dismiss. Those challenges are rejected for the reasons previously stated. Defendants do raise one additional argument not previously addressed, however, i.e., that they are entitled to public official immunity.

Under Maryland common law, a municipal official is immune from liability "when he or she is acting as a public official, when the tortious conduct occurred while that person was performing discretionary rather than ministerial acts, and when the representative acted without malice." Livesay v. Baltimore County, 862 A.2d 33, 41 (Md. 2004). There appears to be no dispute that Defendants were, at all times relevant, public officials performing discretionary acts. The issue at hand is whether in performing those acts Defendants acted with malice.

Whether Defendants acted with malice is also determinative of a second issue raised by Defendants in their summary judgment motion, whether Plaintiff can be awarded punitive damages on his tort claim. Under Maryland law, "a party seeking punitive damages must prove actual malice by 'clear and convincing evidence.'" Owen-Illinois v. Zenobia, 601 A.2d 633, 657 (Md. 1992).²⁶

Malice, under Maryland law, can be established by proof that the defendant "intentionally performed an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff." Thacker v. City of Hyattsville, 762 A.2d 172, 188 (Md. Ct. Spec. App. 2000). Because the question of malice turns on the defendant's motive and intent, courts have cautioned that the resolution of the question of malice is seldom appropriate on summary judgment. R.E. Linder Steel Erection Co., Inc. v. Wedemeyer, Cernik, Corrubia, Inc., 585 F. Supp. 1530 (D. Md. 1984) ("cases involving malice necessarily call defendant's state of mind into question and summary judgment often will be refused when that issue is raised.") (quoting 10 A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure (1983) § 2730). More recently, however, at least in the context of the award of punitive damages, Maryland courts have instructed that "a judge must not allow the

²⁶ Plaintiff concedes that he cannot recover punitive damages against the City. Opp. at 48 n.27.

jury to consider the issue of 'actual malice' unless the evidence could establish "actual malice" clearly and convincingly."

Darcars Motors of Silver Springs, Inc. v. Borzym, 841 A.2d 828, 841 (Md. 2004).

Defendants assert that "there is no evidence of any kind that Zollicoffer, Huskey, or Anderson harbored malice toward Hoffman." Mot. at 44. To the contrary, if Plaintiff's testimony is believed, Zollicoffer exhibited animosity toward Plaintiff as early as his initial interview and consistently throughout Plaintiff's tenure in the Law Department. As noted above, Mitchell observed that there was some conflict between Anderson and Plaintiff, about which Anderson was sufficiently animated that she raised her voice at Mitchell and Mitchell described her as "obviously outraged." Mitchell Dep. at 26-28.²⁷ The Court finds that there is sufficient evidence in the record to allow the issue of malice to be presented to the jury.²⁸

²⁷ There is less evidence in the record to demonstrate malice on the part of Huskey but, as Defendants elected to treat the three individual defendants as a unity, the Court will do the same for the purposes of this motion.

²⁸ Defendants raise a separate challenge to Plaintiff's claim for punitive damages under § 1983. To sustain a claim for punitive damages under the civil rights statute, a plaintiff can show either malice or "reckless indifference" to his federally protected rights. See Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 443-45 (4th Cir. 2000). Defendants argue that Plaintiff cannot show reckless indifference because "[t]he legitimate, non-discriminatory reason for the discipline and termination was clear: Hoffman offended his primary client, was suspended and ordered to apologize, and had failed to take the simple step of apologizing, despite the City's repeated requests that he do so." Mot. at 48. Essentially, this is the same

