IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RANDALL NITSCHKE,

Plaintiff,

OPINION AND ORDER

v.

11-cv-514-wmc

KENNETH BLACK,

Defendant.

This is the first of three civil lawsuits in this court brought by employees of the Wisconsin Department of Veteran Affairs against defendant Kenneth Black, its former Secretary, in his individual capacity. Plaintiff Randall Nitschke alleges that Black first demoted him and later terminated him on the basis of Nitschke's race and sex. Black moves for summary judgment on several bases, arguing that (1) Nitschke's 42 U.S.C. § 1981 claim is foreclosed as a "state actor" pursuant to *Jett v. Dallas Independent School District*, 490 U.S. 701 (1989); (2) Nitschke's so-called demotion does not constitute a materially-adverse employment action; and (3) Nitschke cannot demonstrate discriminatory animus. For the reasons that follow, the court will deny defendant's motion for summary judgment as to each of these arguments.

UNDISPUTED FACTS[1]

A. The Parties

Plaintiff Randall Nitschke is a 58-year-old Caucasian male who began his employment with the Wisconsin Department of Veterans Affairs ("the Department") as the Commandant at the Wisconsin Veterans Homes in Union Grove on December 22, 2008. Union Grove is a long-term care facility for Veterans. At the time of his hiring, Nitschke had been a CEO of healthcare facilities since 2000 and had over 20 years of experience running long-term care facilities. Nitschke is also a military veteran.

Defendant Kenneth Black began his employment with the Department in April 2005. Black first worked as the Administrator for the Division of Veterans Benefits at the Department. In that capacity, he was in charge of the veterans benefit programs and cemeteries. Black was appointed Deputy Secretary of the Department in June 2008 by then-Secretary John Scocos. Black is an African-American man.

B. Black's Tenure as Acting Secretary

In September or October 2008, Scocos took a military leave of absence and Black was appointed Acting Secretary. Black contends that shortly after becoming Acting Secretary, he realized that there were several problems at the Union Grove and King Veterans Homes. Nitschke disputes his role, if any, in creating the problems Black identified and contends that he was responsible for resolving at least some of them. The

[1] Except where otherwise noted, the court finds the following facts taken from the parties' proposed findings of fact to be material and undisputed.

court will address this dispute below in the discussion of whether Nitschke was meeting his employer's legitimate performance expectations at the time of the alleged adverse actions. Scocos returned to the Secretary role from his military leave in approximately October 2009 and Black returned to his position of Deputy Secretary. Not long after Scocos's return, however, he appointed Black to the position of Division Administrator of Veterans Benefits.

C. Nitschke's Hiring as Commandant of Union Grove

Shortly after Black became the Acting Secretary, Nitschke was hired as the Commandant of Union Grove, a long-term care facility for Veterans. The parties dispute whether Black hired Nitschke -- Black's position -- or whether Tom Rhatican, Division Administrator for Homes at that time, actually hired Nitschke and simply advised Black of the hire -- Nitschke's position.[2] It is undisputed that Black briefly met with Nitschke

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[2] Black contends that he had hiring authority, citing Wis. Stat. § 15.05(b), which provides:

> Except as provided in pars. (c) and (d), if a department is under the direction and supervision of a board, the board shall appoint a secretary to serve at the pleasure of the board outside the classified service. In such departments, the powers and duties of the board shall be regulatory, advisory and policy-making, and not administrative. *All of the administrative powers and duties of the department are vested in the secretary*, to be administered by him or her under the direction of the board. The secretary, with the approval of the board, shall promulgate rules for administering the department and performing the duties assigned to the department.

(Emphasis added.) While this provision appears to vest hiring authority in the Secretary rather than the Board, the provision does not foreclose at least the possibility that others

after the interview with Rhatican and the hiring panel, at which point Black welcomed Nitschke to the Department and told him that he would see a lot of changes, but to remember that Black had "the big picture."

At some point either before or shortly after Nitschke was hired as the Commandant, Black and Nitschke had a conversation about the position. The parties dispute the contents of that discussion. Black contends that the purpose of the conversation was to determine whether Nitschke was a "team player" and tell him about the problems at Union Grove he wanted Nitschke to resolve. Nitschke recalls Black telling him that he needed to "turn over every rock at Union Grove" and to not trust Pat Shaughnessy or Gary Wistrom, who were Nitschke's two highest ranking reports.[3] The parties also dispute, as described below, whether Nitschke was successful in resolving problems at Union Grove.

Nitschke and the other Commandant at the Wisconsin Veterans Home at King initially reported to Division Administrator Rhatican until he was called to active duty in the United States military in the summer of 2009. At that point, because there was nobody serving in the position of Division Administrator of Homes, both commandants reported to Black.

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in the Department also had hiring authority. The court, therefore, rejects defendant's argument that defendant's proposed fact that Black made the hiring decision cannot be disputed.

[3] Nitschke contends that he interpreted this direction to mean that Nitschke should attempt to find a reason to terminate Shaughnessey and Wistrom.

D. Nitschke's Tenure as Commandant at Union Grove

Before Nitschke's hiring, the rate setting practices at Union Grove had been out of compliance with Wisconsin Administrative Code VA Ch. 6.01(16). The Department Secretary decides what rates are charged at the Wisconsin Veterans Homes. Union Grove's rates were brought into compliance in the summer of 2009, though the parties dispute whether Nitschke initiated a process to bring the rate setting into compliance or whether the Department Office of Policy, Planning and Budget did so.

A factual dispute also exists over Nitschke's other contributions during his tenure as the Union Grove Commandant. Nitschke contends that he encouraged a culture of cooperation between the King and Union Grove Veteran Homes by (1) developing a Pharmacy Performance Action Team ("PAT") that coordinated leadership from both Homes together and ultimately led to an annual cost savings of approximately $250,000 for Union Grove and additional savings for King; (2) implementing an Admissions PAT that was designed to streamline and standardize admissions processes at both Homes; and (3) developing a Financial PAT that was designed to standardize accounts receivable, collections and write-offs policies at both Homes. Nitschke also contends that he facilitated and improved communications between the Homes resulting in improvement in the financial, clinical and regulatory success of both Homes. In contrast, Black contends that he approved the creation of the PATs, and while Nitschke might have

appointed staff to the PATs and may, himself, have served on one of more of the PATs, Nitschke did not develop the PATs.[4]

Nitschke also contends that he improved Union Grove's financial status by increasing the home's operating revenues by $3.4 million in fiscal year 2010 (as compared to the same reporting period in the year before his hire) and decreasing the Home's net operating loss by 99% in fiscal year 2010 (compared to the same period in 2009).[5] During Nitschke's tenure, the revenue deficit at Union Grove dropped from $4.4 million in fiscal year 2008-2009 to $28,000 by May 31, 2010.

The parties also dispute Nitschke's role in developing and implementing procedures concerning the Aid to Indigent Veterans ("AIV") program. This program was

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[4] Defendant also objects to plaintiff's proposed fact because it is Nitschke's own evaluation of his performance and, as such, is "self-serving and a matter of opinion." (Def.'s Resp. to Pl.'s PFOFs (dkt. #30) ¶¶ 10-11.) While it may be self-serving, that is not a basis to strike it. *Whitlock v. Brown*, 596 F.3d 406, 411-12 (7th Cir. 2010) (self-serving testimony may satisfy a non-moving party's evidentiary burden on summary judgment if statement is based on personal knowledge and grounded in observation not speculation). For good reason, defendant does not contend that it is conclusory. The affidavit contains specific allegations, which appear to be based on Nitschke's personal knowledge, satisfying Fed. R. Civ. P. 56(f). As for defendant's attack of Nitschke's affidavit as being a "matter of opinion," the import of this is unclear. The affidavit contains Nitschke's claims of his performance at Union Grove. While Black disputes Nitschke's claims, this is not a basis for striking the opinion. Rather, the parties dispute whether Nitschke was meeting the Department's legitimate performance expectations.

[5] Defendant objects to this proposed finding of fact, contending that Nitschke lacks evidentiary materials in support. While Nitschke did not cite to specific financial data, as the Commandant of Union Grove, it would be reasonable for a jury to infer that he would have personal knowledge of the Home's financial status. Moreover, defendant does not dispute Nitschke's characterization of Union Grove's fiscal year 2010 finances as compared to the prior year. The court also rejects defendant's characterization of these proposed facts as immaterial since they go to the issue of whether Nitschke was meeting the legitimate performance expectations of his employer.

created to "allow the department to provide financial assistance to veterans who are indigent and do not have sufficient means to pay for their care." Wis. Stat. § 45.43. The AIV program, including eligibility, are controlled by written policies and procedures established by the Department in May 2008. Nitschke contends that during his tenure as Commandant, he (1) ensured all applicants were placed through a thorough financial screening and (2) worked with Director of Finance Ken Wiberg and Assistant Administrator / Adjutant Gary Wistrom to complete an assessment of the utilization of the program. Nitschke also contends that he (1) discovered the AIV program was on pace to exceed its budget authority for the 2008-2009 fiscal year -- during most of which Nitschke was not employed with the Department -- and (2) initiated a successful plan to reign in the program's budget. In contrast, Black contends that in early 2010, *he* directed Nitschke to perform a financial screening of members, including an asset search similar to that performed by or on behalf of counties for the Medial Assistance program, and that Nitschke and his staff did not do so.[6]

Over the three-year period that preceded Nitschke's tenure, Union Grove accumulated approximately $2 million in bad debt that was deemed uncollectible because indigent veterans died without family members or estates to pay the debts. At the time Nitschke was hired, Union Grove did not have a "write-off policy," which was required

[6] Black does not expressly dispute much of Nitschke's claims concerning the AIV program, rather defendant states that "[p]laintiff's evaluation of his own performance is irrelevant and does not create a dispute of material fact." (Def.'s Resp. to Pl.'s PFOFs (dkt. #30) ¶¶ 16-18.) As explained above (*see supra* n.4), these allegations go to whether Nitschke was meeting the legitimate performance expectations of his employer and, therefore, are at least potentially material to the present motion.

before the Home could actually write off this kind of bad debt. Nitschke contends that with the assistance of Wiberg and Wistrom, he formed a Financial PAT that developed such a policy. Black challenges Nitschke's role in developing the policy and in achieving the results he claims.

E. Nitschke's Promotion to Division Administrator and Subsequent Demotion

As described above, Scocos returned to the Secretary position in October 2009. On or about November 17, 2009, Scocos (1) appointed Nitschke as "Acting Division Administrator for the Division of Homes" due to his "experience and proven leadership" and (2) named Patrick Shaughnessy as "Acting Commandant for Union Grove."[7] One week later, on November 24, the Board of Veterans Affairs terminated Scocos and appointed Black as Secretary of the Department.

On or about November 27, 2009, Black removed Nitschke from the Division Administrator for Homes position and demoted him to Commandant. At the time, Black provided no reasons for the demotion. Even at his deposition in this case, Black could identify no problems with Nitschke's performance. In his affidavit submitted in support of the present motion, Black now states that he felt Nitschke could best serve the Department as Commandant at Union Grove -- the position for which he hired him when Black was Acting Secretary.

On January 17, 2010, Black hired Wanda Daylin Hurr, a Native American female, as the Division Administrator for Homes. Black represents that he did not have Daylin

[7] Despite these actions, Nitschke was never officially removed from the Commandant position at Union Grove.

Hurr in mind to replace Nitschke at the time of his demotion, nor did he know Daylin Hurr or consult her C.V. before the time of her hiring. Finally, Daylin Hurr did not possess a Nursing Home Administrator license, nor did she have Nitschke's experience with assisted living facilities. During his deposition, Black could identify no specific qualifications that she possessed other than a legal background and some experience with nursing homes or health care facilities. Nevertheless, in his affidavit, Black now avers that he hired Daylin Hurr because (1) he believed her to be highly qualified, (2) she possessed nursing and law degrees, and (3) had a background in long-term care.

Daylin Hurr was Nitschke's supervisor for approximately six months. During this time, Black maintains that Daylin Hurr reported receiving a lot of "push back" from Nitschke, which Black understood to mean that Nitschke was being uncooperative and not following her instructions. At his deposition, Black could not describe any specific "push back" that Daylin Hurr was receiving from Nitschke. During those six months, Nitschke and Daylin Hurr had one face-to-face supervisory meeting and spent less than 30 minutes together on the phone. During this time, Nitschke also claims that he received only positive feedback from Daylin Hurr and that she was always positive and complementary.

F. Black's Statements about Workplace Diversity

After becoming Secretary in November 2009, Black spoke publicly about his mission "to make sure that the Department had a very diverse workforce." (Pl.'s PFOFs (dkt. #30) ¶ 37.) Black made statements to Michael Trepanier, who worked closely with

him at the Department, that the Department employed "too many old white men."[8] Black also praised a local individual for being an achieving minority woman and told Trepanier that the Department needed more people like her.[9] Black would also make offhand comments about the need for a more diverse workforce at the Department, referring to the older, white male population at the Department "reaching retirement age."

On March 4, 2010, Black attended a meeting with personnel at the Union Grove facility. While describing his vision for the future of Union Grove during that meeting, Black again stated that the Department employed too many old white men, implying -- according to plaintiff -- that he was going to change that "problem." (Pl.'s PFOFs (dkt. #17) ¶ 47.) As Black himself testified, he "was always looking for a more diverse population." (*Id.* at ¶ 48.) In making hiring decisions, Black acknowledged at his deposition that he was "looking for a diverse population" and he believed that "there needed to be more diversity" in the Departments' workforce. (*Id.* at ¶ 49.)[10]

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[8] Black objects to this proposed finding of fact on the basis that "plaintiff lacks the foundation, authority, and knowledge to testify as he has done." (Def.'s Resp. to Pl.'s PFOFs (dkt. #30) ¶ 38.) For support of the proposed finding of fact, plaintiff cites to Trepanier's own deposition testimony. As such, defendant's objections are nonsensical.

[9] The individual referenced was Marcia Anderson, the first African-American female to achieve the rank of major general. Anderson also happens to be the clerk of the bankruptcy court for the Western District of Wisconsin, a fact completely immaterial to the issues before the court but noted here simply as a matter of full disclosure.

[10] Without relying on this fact for purposes of summary judgment, nor deciding its ultimate admissibility, plaintiff notes that Black is a member of the "100 Black Men Society." Black reports not knowing if the organization's membership is exclusively African Americans, though he does not know of any members who are not African American.

G. Black's Employment Decisions

As the new Secretary of the Department, Black was not bound to retain employees previously appointed to unclassified positions in upper management, such as Division Administrators and Commandants. Rather, he had the authority to appoint individuals of his choosing. Black avers in his supporting affidavit and testified at his deposition that he wanted people he could trust.[11]

Plaintiff argues that certain of Black's hiring decisions as Secretary show his intent to increase the diversity of the Department. In addition to Daylin Hurr's hiring in early 2010, Black hired Jose Leon, a Hispanic male, as Executive Assistance and James Bond, an African-American male, as Division Administrator for Benefits.[12] At some unknown time, however, Black also hired Michael Telzrow, a white male, as Veterans Museum Director.

Plaintiff also points to other employment-related decisions to support his claim of discriminatory animus. First, on January 21, 2010, Bill Kloster, a Caucasian male, was transferred from the Deputy Secretary position, working out of the Department's central office in Madison, to a bureau director of claims position in Milwaukee. Plaintiff contends that Black transferred Kloster; defendant contends that Kloster tendered his

[11] Black testified that he felt ostracized by management when Scocos returned from military leave in October 2009.

[12] Black later terminated Leon because he did not believe he was a good fit. Black replaced Leon with Max Duhlberger, a white male. Plaintiff argues that this hire is explained by the filing of ERD complaints against the Department based on Black's earlier employment decisions. Daylin Hurr was also replaced by Brian Marshall, a white male. However, plaintiff again points out that this hire was made after ERD complaints were filed.

resignation from the position of Deputy Secretary because he believed it was best for Black to select a Deputy Secretary of his own choosing. Second, during the summer of 2010, Black initiated a process of reorganizing the Department, and, including the Division of Homes. Black was the final decision-maker with respect to the reorganization. This reorganization resulted in the layoff of 16 employees, 15 of whom were Caucasian. (The record however does not reveal whether the proportion of terminated white employees was significant given the racial make-up of the staff of the Division of Homes.) Third, in the fall of 2010, Black reassigned Gary Wistrom from his position at Union Grove to a policy advisor position at the Department's central office in Madison, requiring a two-hour commute. Wistrom retired one day after making the commute, which Wistrom believes was Black's goal in reassigning him. Fourth, in the fall of 2010, Black demoted incumbent Communications Officer Andy Schuster, who was a 60-year-old Caucasian male and hired Sarah Stinski, a Caucasian female, over Tim Donovan, a Caucasian male. According to Nitschke, this last hiring ignored Donovan's superior qualifications and the fact that he -- and not Stinski -- was a veteran entitled to hiring preference according to Wis. Stats. § 45.03 (5)(a).[13]

[13] Nitschke also points to Black's treatment of Ken Wiberg's affirmative request to be demoted due to a serious health condition. (Pl.'s PFOFs (dkt. #17) ¶¶ 43-45.) Black allegedly rejected the request, commenting that he did not want the Department to become a "retirement home." (*Id.*) Given that Nitschke's claims are for race and sex discrimination -- not age -- this proposed fact is not material.

H. Nitschke's Termination

There is no documentation of any written or verbal discipline given to Nitschke during his employment with the Department, nor any documentation or other record to suggest that Nitschke did anything other than properly and competently perform his duties. (Pl.'s PFOFs (dkt. #17) ¶ 81 (citing responses to requests for production).) Nevertheless, Black terminated Nitschke on June 3, 2010, after he refused to resign, providing him with no reason for the termination.

On June 17, 2010, Nitschke filed a complaint with the Wisconsin Equal Rights Division against the Department, alleging that his termination was motivated by race, sex and age discrimination.[14] In responding to the discrimination complaint, the Department provided two justifications for his termination: (1) despite being informed of the Department's pet prohibition policy, Nitschke allowed pets into Union Grove without advanced approval; and (2) Nitschke admitted residents without performing a proper financial screening, which resulted in a member receiving $51,000 worth of care without requiring payment.[15] The ERD found probable cause to believe that Black's

[14] Black contends that Nitschke's proposed facts as to the Wisconsin Equal Rights Division complaint are irrelevant, because Black was not a party to those proceedings. (Def.'s Resp. to Pl.'s PFOFs (dkt. #30) ¶¶ 77-79.) Black would have a point as to any *findings or rulings* by the Commission, which have no binding or even persuasive authority in this court and are irrelevant to the trier of fact here. But statements of fact by the parties (or those aligned in interest) to the Commission *may* have relevance.

[15] The parties' dispute the facts underlying the second purported reason.

decisions to demote and later terminate Nitschke were both motivated by his race, sex, and age.[16]

During his deposition, Black identified four reasons for terminating Nitschke: (1) problems with the AIV program; (2) Nitschke's failure to receive financial statement from members; (3) problems with accounts receivable at Union Grove; and (4) Nitschke's cooperation issues with Daylin Hurr and Marshall, who were the Division Administrators for Homes under Black. At his deposition, Black further testified that Marshall spoke to him about problems he was having with Nitschke. Black was repeatedly asked whether he was certain Marshall identified issues with Nitschke, to which Black responded affirmatively. Despite this testimony, it is now undisputed that Black had not even hired Marshall until after he terminated Nitschke and that Nitschke has never spoken with or even met Marshall.

Now, at summary judgment, in his supporting affidavit, Black avers more generally that he "became aware of" problems at Union Grove for which he believed Nitschke was ultimately responsible. Black specifically identifies nine reasons for terminating Nitschke: (1) concerns about rate setting at Union Grove; (2) concerns about the financial screening portion of the admissions process at Union Grove; (3) concerns about residents of Union Grove paying their bills in a timely manner in light of its having to write off approximately $2 million in bad debt; (4) concerns that Daylin Hurr was receiving "a lot of push back" from an uncooperative Nitschke; (5) concern over Nitschke

[16] Other white male employees, Wistrom and Donovan, also filed complaints with the ERD, and the ERD found probable cause for their discrimination and retaliation claims.

asking Black to appoint Ken Wiberg to a non-appointed position in violation of a state civil service code; (6) a belief that Nitschke could not make difficult decisions when needed; (7) a belief that Nitschke did not want to step on any toes or make people feel uncomfortable; (8) a belief that Nitschke did not hold employees accountable; and (9) a belief that Nitschke did not follow directions from superiors. In response, Nitschke claims there is no factual basis for each of these late proffered reasons, as well as argues that none actually influenced Black's decision to terminate his employment.

After terminating Nitschke's employment, Black appointed Pat Shaughnessey, a white male, as Acting Commandant at Union Grove. Black later hired Reid Aaron, also a white male, as permanent Commandant to replace Shaughnessey.

I. Nitschke's Reinstatement

At some point, Scocos was reinstated as Secretary of the Department. Scocos in-turn reinstated Nitschke to the position of Division Administrator of Homes, the position from which Black demoted Nitschke when he became Secretary.

OPINION

In this lawsuit, Nitschke alleges that Black intentionally discriminated against him because of his race and sex in first demoting and then terminating his employment. Nitschke brings claims pursuant to 28 U.S.C. § 1981 (race) and equal protection violations pursuant to 42 U.S.C. § 1983 (race and sex), which the court will address in turn.

I. § 1981 Claim

Black argues that plaintiff's § 1981 claim must be dismissed as a matter of law because 42 U.S.C. § 1983 provides the exclusive federal remedy for § 1981 violations against state actors. In support, defendant relies on the United States Supreme Court's decision in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989). In *Jett*, petitioner was a white high school football coach, who sued the school district and high school principal, in his individual and official capacities, alleging racial discrimination pursuant to § 1981 and a violation of his equal protection rights under § 1983. As the Court explained, the petitioner's

> equal protection and § 1981 causes of action were based on the allegation that his removal from the athletic director and head coaching positions at South Oak were motivated by the fact that he was white, and that Principal Todd, and through him the [school district], were responsible for the racially discriminatory diminution in his employment status.

Id. at 707.

The Court held that:

> the express "action at law" provided by § 1983 for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed *against a state actor*. Thus to prevail on his claim for damages against the school district, petitioner must show that the violation of his "right to make contracts" protected by § 1981 was caused by a custom or policy within the meaning of *Monell* and subsequent cases.

Id. at 735-36 (emphasis added).

Black points to other language in the opinion as suggesting a broader bar to claims under § 1981 against an individual in both official and individual capacities:

> [t]hat we have read § 1 of the 1866 Act to reach private action and have implied a damages remedy to effectuate the declaration of rights contained in that provision does not authorize us to do so in the context of the "*state action*" portion of § 1981, where Congress has established its own remedial scheme.

Id. at 731 (emphasis added).

The court declines to read the language in *Jett* to bar § 1981 claims against government officials in their individual capacity for a variety of reasons. *First*, both the Court's description of the issue on appeal and its holding is limited to liability of government entities. Specifically, the Court considered whether the school district may be liable for its employees' violations of § 1981 under a *respondeat superior* theory of liability or whether a plaintiff must identify a policy or custom consistent with the requirement under § 1983. *See Id.* at 713 (describing the issue presented in the appeal as "whether a federal damages remedy broader than that provided by § 1983 should be implied from § 1981").

Second, the Court in *Jett* opted not to disturb the jury's verdict against the high school principal even though it, too, was premised on § 1981 liability. The Court

> note[d] that at no stage in the proceedings has the school district raised the contention that the substantive scope of the 'right . . . to make . . . contracts' protected by § 1981 does not reach the injury suffered by petitioner here. Because petitioner has obtained a jury verdict to the effect that Dr. Todd violated his rights under § 1981, and the school district has never contested the judgment below on the ground that § 1981 does not reach petitioner's employment injury, we assume for purposes of these cases, without deciding, that petitioner's rights under § 1981 have been violated by his removal and reassignment.

Id. at 711. At most then, the Court's holding in *Jett* is silent on the viability of a § 1981 claim against a state employee acting in an individual capacity and limiting Nitschke's claim here would be counter to the Supreme Court's *actual* treatment of the individual capacity claim in that case.

Third, in the section of the opinion describing its holding, the *Jett* Court described the import of its opinion as requiring a plaintiff to "show that the violation of his 'right to make contracts' protected by § 1981 was caused by a custom or policy within the meaning of *Monell* and subsequent cases." *Id.* at 735-36. The Court did not describe how its opinion would impact a claim against a government official in his individual capacity, nor does the Seventh Circuit's treatment of *Jett.* In *Smith v. Chicago School Reform Board of Trustees*, 165 F.3d 1142, 1147 (7th Cir. 1999), the Seventh Circuit, citing *Jett*, held that to prove a § 1981 claim, "[t]he plaintiff must show that the body's official policy or custom was discriminatory."[17] This is because the governmental entity is the real party in interest in official capacity claims, and in those claims -- whether asserting a claim under § 1983 or § 1981 -- the plaintiff must show that the entity's policy or custom played a part in the violation of federal law. *Hafer v. Melo*, 502 U.S. 21 (1991). Here, Nitschke is only alleging claims against Black in his individual capacity. (Compl. (dkt. #1) ¶ 2 ("All actions alleged to have been undertaken by Black in this case were undertaken in his individual capacity as Acting Secretary of the [Department]."). There

[17] The Seventh Circuit specifically considered whether the 1991 amendments to § 1981 impacted the holding in *Jett*, and concluded that they did not. In so holding, the court cited approvingly to a case from the Ninth Circuit, *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir. 1996), which defendant now urges this court to disregard as unpersuasive. (*See* Def.'s Reply (dkt. #29) 2.)

is no need, therefore, for him to demonstrate a policy or custom on the part of the Department. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (individual or personal capacity claims "seek to impose personal liability upon a government official for actions he takes under color of state law").

Fourth, while defendant points to other cases in which courts have rejected § 1981 claims against individual actors, most of these opinions lack any analysis as to how *Jett* applies to claims brought against government officials in their individual capacity. Instead, these courts simply dismissed § 1981 claims against all defendants, including individual defendants. *See Greater Indianapolis Chapter of N.A.A.C.P. v. Ballard*, 741 F. Supp. 2d 925, 941 (S.D. Ind. 2010) (dismissing claims against all defendants without any discussion of *Jett*'s application to individual defendants); *Tevebaugh v. City of Indianapolis*, No. 1:08–cv–1177–SEB–DML, 2010 WL 987726, at *3 (S.D. Ind. Mar. 15, 2010) (same); *Easton v. College of Lake Cnty.*, 584 F. Supp. 2d 1069, 1075 (N.D. Ill. 2008) (same).

Defendant cites to only one case where a court actually analyzes and relies upon the holding in *Jett* to bar a § 1981 claim brought against an individual government official. (Pl.'s Reply (dkt. #29) (citing *Felton v. Polles*, 315 F.3d 470 (5th Cir. 2002), *abrogated on other grounds, Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)).) In *Felton*, the court reasoned that the holding in *Jett* extends to foreclose actions against government officials in their individual capacities because "[o]nly officials should be responsible for discriminatory decisions concerning government employees." *Id.* at 481

(quoting *Oden v. Oktibbeha Cnty., Miss.*, 246 F.3d 458, 464 (5th Cir. 2001)).[18] In so reasoning, the court appears to assume that a government official can only be sued in his official capacity for any governmental action, not in his individual capacity, perhaps conflating this issue with the "under color of state law" requirement. The law is clear, however, that individual capacity suits still seek to hold officials liable for actions taken under color of state law. *See Luck v. Rovenstine*, 168 F.3d 323, 327 (7th Cir. 1999) ("Individual capacity claims 'seek to impose individual liability upon a government officer for actions taken under color of state law.'" (quoting *Hafer*, 502 U.S. at 25)).

Putting that apparent misunderstanding aside, the *Felton* opinion lacks any argument or justification for extending the holding in *Jett* to claims brought against an official in his or her individual capacity. Instead, the court simply states in a conclusory fashion that: "needless to say, requiring § 1981 claims against state actors to be pursued through § 1983 is not a mere pleading formality. One of the reasons why the § 1981 claim in this situation must be asserted through § 1983 follows. Although *respondeat superior* liability may be available through § 1981, it is *not* available through § 1983." *Felton*, 315 F.3d at 482 (internal citations omitted). While the court implies that there are other reasons for requiring § 1981 claims to be brought pursuant to § 1983, the *only* reason articulated by the court is a reason which has no relevance to claims against

[18] Defendant also cites to *Oden*, but, in that case, the court dismissed the individual capacity claim against the defendant sheriff because the court reasoned that discrimination claims could only be brought against a government official in his official capacity. *Oden*, 246 F.3d at 464 (dismissing claim against sheriff in his individual capacity because discrimination claims can only be brought against individuals in their official capacity).

individuals. The court offers no further analysis or other examples as to why *Jett* implicates a § 1981 claim against an individual as compared to a governmental entity. As such, this court declines to follow the Fifth Circuit's opinion in *Felton.*

Finally, and of real concern for the court, it is not at all clear why defendant raised this issue in the context of this case, since it does not appear to streamline the issues for trial, nor does it remove possible remedies. Similarly, plaintiff does not explain why a § 1981 claim is important to him. Plaintiff simply states that "§ 1981 grants specific substantive rights and remedies against race discrimination, distinct from § 1983, to citizens like Nitschke" and that [h]e is entitled to pursue them in the manner that he has." (Pl.'s Opp'n (dkt. #27) 32.) Both statutes allow for compensatory and punitive damages and an award of attorneys' fees pursuant to 42 U.S.C. § 1983. As described below, the elements of both claims appear to be the same.

While the court may be puzzled by Nitschke's strategy, this is not a reason to dismiss his § 1981 claim, at least not at this time.[19] The holding in *Jett* -- which concerns the necessary showing for governmental entity liability -- does not apply to Nitschke's claim against Black in his individual capacity. Not only does this court decline defendant's invitation to emphasize the "state actor" language in the *Jett* case and apply it more broadly, this approach is at least consistent with the Seventh Circuit's recent treatment of § 1981 claims against government officials in their individual capacity, even

[19] In preparing for trial, the court encourages plaintiff to consider limiting his claim to an equal protection claim pursuant to § 1983. Under the court's view, such an approach may simplify the verdict form, allowing the jury to consider race and sex discrimination together, rather than separately -- as would be required if plaintiff also pursues a § 1981 claim.

though, as far as the court can discern, the Seventh Circuit has not considered the exact issue posed here. *See, e.g.*, *Thanongsinh v. Bd. of Educ.*, 462 F.3d 762, 782 (7th Cir. 2006) (reversing district court's grant of summary judgment to defendant, plaintiff's supervisor at his public employer, in his individual capacity brought pursuant to § 1981). Accordingly, the court will simply read plaintiff's complaint as alleging a violation of § 1981 pursuant to § 1983 consistent with current case law, rather than reach this potentially important legal issue on what may amount to an advisory opinion, or at least one not fully informed as to its implications. And, after having been critical of defendant's for even raising this issue, the court has spent sufficient time on this ancillary issue and will move on to the merits.

II. Discrimination Claims

A. Overview of the Law

At summary judgment, plaintiff must "show through specific evidence that a triable issue of fact remains on issues for which [he] bears the burden of proof at trial. . . . [T]he evidence submitted in support of [his] position must be sufficiently strong that a jury could reasonably find for [him]." *Knight v. Wiseman*, 590 F.3d 458, 463-64 (7th Cir. 2009) (internal quotation omitted). "In resolving a summary judgment motion, [the court] draw[s] all reasonable inferences and resolve[s] factual disputes in favor of the non-moving party." *Id.* at 462.

Nitschke alleges discrimination pursuant to 42 U.S.C. § 1981, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

under 42 U.S.C. § 1983. For the purposes of establishing intentional discrimination, the court applies the same analysis to both of these claims. *See, e.g., Franklin v. City of Evanston*, 384 F.3d 838, 848 (7th Cir. 2004) ("[E]qual protection claims and § 1981 claims are analyzed using the same framework."). These claims also share the same framework with Title VII claims. *Radentz v. Marion Cnty.*, 640 F.3d 754, 757 (7th Cir. 2011) ("Our cases make clear that the same standards for proving intentional discrimination apply to Title VII and § 1983 equal protection." (internal citation and quotation marks omitted)); *see also Burnell v. Gates Rubber Co.*, 647 F.3d 704, 708 (7th Cir. 2011) (applying same analysis to Title VII and § 1981 claim).

Nitschke claims that Black demoted him and subsequently terminated his employment because of his race and sex. When pursuing a discrimination claim, a plaintiff may proceed under the direct or indirect method. *Silverman v. Bd. of Educ. of the City of Chi.*, 637 F.3d 729, 733 (7th Cir. 2011). Under the direct method, Nitschke must put forth "evidence leading *directly* to the conclusion that an employer was illegally motivated, without reliance on speculation." *Good v. Univ. of Chi. Med. Ctr.*, 673 F.3d 670, 676 (7th Cir. 2012) (emphasis in original). "It can be a high threshold, particularly in a reverse discrimination case." *Id.* at 676-77.

Under the indirect method of proving race or gender discrimination, the familiar *McDonnell Douglas* burden-shifting analysis applies. *Everroad v. Scott Truck Sys., Inc.*, 604 F.3d 471, 477 (7th Cir. 2010) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Under the indirect method, the plaintiff first must establish a *prima facie* case of discrimination, demonstrating:

(1) he is a member of a protected class,

(2) he met his employer's legitimate job expectations,

(3) he suffered an adverse employment action, and

(4) that he was replaced by someone outside of the protected class.

Hague v. Thompson Distrib. Co., 436 F.3d 816, 820 (7th Cir. 2006). To satisfy the first element of proof of "reverse discrimination" under the indirect method the plaintiff "must set out 'background circumstances' that show that the employer discriminates against the majority, or he must show there is something 'fishy' going on." *Farr v. St. Francis Hosp. & Health Ctrs.*, 570 F.3d 829, 833 (7th Cir. 2009) (citing *Phelan v. City of Chi.*, 347 F.3d 679, 684 (7th Cir. 2003)). If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the plaintiff's termination. *Everroad*, 604 F.3d at 477. If the employer satisfies this burden, the burden shifts back to the plaintiff to offer evidence that the employer's non-discriminatory reason is pretext. *Id.*

Here, Nitschke alleges that he was discriminated against as a white male. Nitschke purports to meet this burden by proceeding under both the direct and indirect method, arguing that he survives summary judgment by combining these methods. (Pl.'s Opp'n (dkt. #27) 9 (citing *Simple v. Walgreen Co.*, 511 F.3d 668, 671 (7th Cir. 2007)).) The court agrees that he can pursue his claims at summary judgment under both methods, or some combination of the two.[20] At its core, Nitschke's claim seeks to

[20] At trial, these frameworks fall out since the jury will simply be asked whether plaintiff has proven that he was the victim of discrimination. *Hossack v. Floor Covering Assocs. of*

proceed to trial based on circumstantial evidence of Black's discriminatory animus. This approach is arguably consistent with the Seventh Circuit's long-standing approach to employment discrimination claims, which would appear to permit a plaintiff to survive summary judgment by introducing circumstantial evidence allowing a reasonable inference of discrimination. *See Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1169 (7th Cir. 1998) ("[A] plaintiff should be free to meet his or her initial burden with this kind of evidence as well, whether we describe it as 'mosaic' evidence or something else." (internal citation omitted)).

In his opposition brief, Nitschke's discussion of the indirect method is limited, which is not surprising given that the primary function of this method is to permit a potentially meritorious case to go to trial despite a lack of evidence of discriminatory animus. *See McDonnell Douglas*, 411 U.S at 801 (developing burden-shifting method to address "subtle" discrimination); *Perfetti v. First Nat'l Bank of Chi.*, 950 F.2d 449, 451 (7th Cir. 1991) ("The theory behind the indirect method of proof is that evidence of discrimination, including even circumstantial evidence, may be extremely difficult for a plaintiff to discover."). In any event, the court finds Nitschke has failed to establish a *prima facie* case under the indirect method, because he has failed to identify a similarly-

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Joliet, Inc., 492 F.3d 853, 861 (7th Cir. 2007) (explaining that the "*McDonnell Douglas* burden shifting framework should no longer be considered" after summary judgment and that at trial, "the sole legal issue is whether the plaintiff presented sufficient evidence to permit a rational jury to determine that she was the victim of intentional discrimination" (internal citations omitted)).

situated employee or employees outside of his protected class who received more favorable treatment.[21]

The closest Nitschke comes to meeting this burden is Black's decision to hire Daylin Hurr, but the record is not sufficiently developed for the court to conclude that she was similarly situated to Nitschke. *See Gates v. Caterpillar, Inc.*, 513 F.3d 680, 690 (7th Cir. 2008) (internal quotations omitted) (explaining that a plaintiff "must at least show that [the similarly-situated employees] dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them"). Even if plaintiff had a more favorable record, Daylin Hurr would only be similarly-situated with respect to Nitschke's demotion claim, not with respect to his termination claim.

For all these reasons, Nitschke's argument and proffer of evidence of Black's discriminatory animus fits best within the scope of the direct or conventional method of proof. Accordingly, the court analyzes his claim using that method.

B. Demotion as Adverse Material Action

As an initial matter, defendant challenges whether Nitschke's alleged "demotion" from Acting Division Administrator to Commandant of Union Grove constitutes a

[21] Indeed, to prevail on his termination claim under the indirect method, Nitschke would also have to demonstrate that he was replaced by a non-white male. *See Hague*, 436 F.3d at 820 (describing the fourth element as "that he was replaced by someone outside of the protected class"). It is undisputed that Nitschke initially was replaced by Shaughnessy as Acting Commandant, and replaced permanently by Reid -- both of whom are white men.

"materially adverse employment action" under federal discrimination law. To establish a materially adverse employment action, a "plaintiff must show that a reasonable employee would have found the challenged action materially adverse." *Hicks v. Forest Pres. Dist. of Cook Cnty.*, 677 F.3d 781, 787 (7th Cir. 2012) (quoting *Burlington N. & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 68 (2006)).

"[C]ourts have found the criteria for materially adverse employment action to be met where the employee's compensation, benefits or other financial terms of employment are diminished." *Tart v. Ill. Power Co.*, 366 F.3d 461, 475 (7th Cir. 2004) (internal quotations omitted). But such a change in financial terms are not required: "adverse job actions can include changes that do not involve quantifiable losses in pay or benefits." *Fortier v. Ameritech Mobile Commc'ns, Inc.*, 161 F.3d 1106, 1111 n.7 (7th Cir. 1998). Here, plaintiff offers no evidence that his salary or benefits were reduced in the transition from Acting Division Administrator to Commandant, but Nitschke's reassignment to Commandant of a specific Veterans facility rather than the Division Administrator for the Division of Homes may constitute a materially adverse action if less responsibility is involved. *Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993) (noting that reassignment to a position with less responsibilities can constitute a materially adverse employment action). Although the record is sparse on this point, there is enough for a reasonable jury to infer that the Division Administrator shoulders greater responsibility than his direct reports.

Defendant also contends that Nitschke's appointment as *Acting* Division Administrator was temporary (he never held the position of permanent Division

Administrator) and, therefore, he could not be "demoted" from that position. (Def.'s Opening Br. (dkt. #11) 14.) While the court agrees that "acting" suggests the position was temporary, a return to Commandant might still be reasonably viewed as a demotion, or at least some courts have found. *See, e.g.*, *Thomas v. Geren*, 393 Fed. Appx. 182, 187, 2010 WL 3377239, at *5 (5th Cir. Aug. 25, 2010) (unpublished) ("[I]t is undisputed that Thomas was removed from the Acting Clinical Director position, and that this was an adverse employment action."); *Booth v. Maryland*, 337 Fed. Appx. 301, 310, 2009 WL 2158096, at *8 (4th Cir. July 21, 2009) (unpublished) (describing demotion from acting lieutenant position as an adverse employment action).

Finally, defendant argues that Nitschke only held the position for ten days total, and just one week before Black took over as Secretary. The combined fact that Nitschke held a temporary position for a short period of time only to be returned to his permanent position with equal compensation is strong evidence that this change of position was not a demotion, but the court is not prepared to find these facts would *foreclose* a reasonable jury from finding that the action was materially adverse. Indeed, if "failing to promote" an employee can constitute a materially adverse employment action, *see Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998), then it seems at least arguable that removal from a temporary position, even if held for a limited period of time, may also be a materially adverse action. Accordingly, the court concludes that a reasonable jury could find Nitschke's reassignment or demotion -- regardless of its label -- to Commandant from Division Administrator to be a materially adverse employment action.

C. Discriminatory Intent

Under the direct method, Nitschke must present "either direct evidence of discriminatory intent (such as an admission) or enough circumstantial evidence to allow a rational jury to infer that discriminatory intent motivated" Black's decision to demote him and terminate his employment. *Burnell*, 647 F.3d at 708. Nitschke claims that he has direct evidence of Black's discriminatory animus: Black's alleged March 4, 2010 statement that the Department employed "too many old white men." (Pl.'s PFOFs (dkt. #17) ¶47.) Taken in context, Nitschke contends that a reasonable jury could infer from this statement that Black "intended to change that problem in the WDVA workforce." (Pl.'s Opp'n (dkt. #27) 12.) And if so, plaintiff argues, this statement (and its implications) constitutes direct evidence that Black's discriminatory animus played a role in Nitschke's termination three months later. (*Id.*)

In *Ellis v. United Parcel Service, Inc.*, the court of appeals noted that derogatory remarks can be direct evidence of discrimination if they are (1) made by the decisionmaker (or by a person who influences the decisionmaker), (2) near the time of the adverse decision, and (3) in relation to the adverse decision. 523 F.3d 823, 829 (7th Cir. 2008); *see also Walker v. Glickman*, 241 F.3d 884, 888 (7th Cir. 2001) ("Remarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria will suffice as direct evidence of discrimination even if evidence stops short of a virtual admission of illegality.").

Putting aside for the moment the issue of whether Black's comment could be construed as a derogatory remark and whether it was made in relation to Nitschke's

demotion, a finding of discriminatory animus would require the jury to infer (1) that Black intended to take affirmative actions to remove old white men from the Department; and (2) that Black intended to remove Nitschke for this reason. The evidence that Black "was philosophically favorable to the hiring of minorities, . . . does not prove that any particular decision he made was for discriminatory reasons." *Mlynczak v. Bodman*, 442 F.3d 1050, 1058 (7th Cir. 2006); *see also Fortier*, 161 F.3d at 1112 (finding that supervisor's comment that she wanted a woman in his position was not sufficiently tied to the "ultimate termination decision," which occurred five months later to constitute "direct evidence of discrimination"). Moreover, this evidence falls short of direct evidence, which is typically an "admission that an adverse employment action was taken against an employee based solely on an impermissible ground." *Dandy v. United Parcel Serv.*, 388 F.3d 263, 272 (7th Cir. 2004).

Black argues, incorrectly, that absent direct evidence, Nitschke must proceed with circumstantial evidence through the indirect method outlined in *McDonnell Douglas*. (Def.'s Opening Br. (dkt. #11) 7.) Although it seems to be a bit of a misnomer, Nitschke may also rely on circumstantial evidence under the direct method, which includes "suspicious timing; ambiguous statements; behavior or comments directed at others in the protected class; and evidence that similarly situated employees outside the protected class received systemically better treatment." *Burnell*, 647 F.3d at 708; *see also Darchak v. City of Chi. Bd. of Educ.*, 580 F.3d 622, 631 (7th Cir. 2009). "Whatever circumstantial evidence a plaintiff presents 'must point directly to a discriminatory reason for the

employer's action.'" *Burnell*, 647 F.3d at 708 (quoting *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 939 (7th Cir. 2003)).

In addition to Black's statement that the Department had too many old, white men, Nitschke points to the following "bits and pieces" of evidence in opposition to defendant's motion for summary judgment:

- Black's admissions that he "was always looking for a more diverse population" in the Department's workforce.
- Black's membership in an exclusive African American organization that he idealized as a networking vehicle for its members.
- Black's treatment of other white male employees, namely Schuster, Wistrom, Kloster, and Donovan.
- Black's instruction to Nitschke to "uncover every rock," which Nitschke inferred meant find ways to terminate Wistrom and Shaughnessey, two older Caucasian men.
- Black's non-white male hirings, including Jose Leon, Wanda Daylin-Hurr and James Bond.
- Black's decision to demote Nitschke and replace him with a Native-American female.
- Black's firing Nitschke without warning or explanation and his shifting rationale since then.
- ERD decision that race and sex discrimination motivated the decision.

Some of this evidence is not admissible, much less probative of Black's claimed discriminatory intent. For example, the ERD's finding of probable cause is simply not probative. *See Silverman*, 637 F.3d at 733 (affirming district court's exclusion of EEOC's reasonable cause determination). Nor is Black's membership in an African-American club probative of his employment practices, much less to the reason or reasons behind his decisions to demote and terminate Nitschke's employment.

Still, the court finds there is sufficient evidence, albeit barely, from which a jury could infer that Black was motivated by discriminatory intent in his decisions to demote Nitschke and terminate his employment. Although plaintiff provides not data as to how many unclassified senior position were held by white men over the age of 50, anecdotal evidence of Black's early hiring of non-white, non-male employees coupled with some evidence of his treatment of white male employees constitutes sufficient circumstantial evidence from which a reasonable jury could find that Nitschke's demotion and termination were motivated, at least in part, by discriminatory animus. *See Sun v. Bd. of Trustees of Univ. of Ill.*, 473 F.3d 799, 813 (7th Cir. 2007) ("Although the sample size is insufficient to provide statistically reliable evidence, the PTC's voting pattern has some probative value regarding discriminatory employment practices.").)

Black's statement about creating a more diverse workforce and his concern that the Department contained too many old, white men were only three months before Nitschke's termination. *See Darchak*, 580 F.3d 622, 632 (7th Cir. 2009) ("[T]hree to four months between a remark and an employment action is not so long as to defeat the inference of a causal nexus." (citing *Bellaver v. Quanex Corp.,* 200 F.3d 485, 493 (7th Cir. 2000)). A jury could reasonably conclude that Black's flat-footed and poorly-phrased statement amounted to no more than shorthand for a general need to promote diversity, not a statement that the Department should demote or terminate employees because they are old or white males. Indeed, Black himself contends his comments about the Department employing too many old white men "merely showed concern about his

statutory duty to ensure that the WDVA was in compliance with an affirmative action plan." (Def.'s Reply (dkt. #29) 7 (citing Wis. Stat. § 230.06(1)(g)–(i)).)[22]

On the other hand, a reasonable jury might also conclude that these statements, when made by the Secretary of the Department, who is himself a black man, indicates the adoption of a policy to discriminate on the basis of race, age and or sex, or at least that Black himself intended to act on that basis.

While Black could have, as required by statute, created an affirmative action plan and ensured compliance with that plan, he cannot implement and act pursuant to a policy which "prefer[s] minority candidates in the group." *Mlynczak*, 442 F.3d at 1058 (explaining that an affirmative action policy which "expand[s] the pool of persons under consideration is permitted," but not "an explicit policy of preferring the minority candidates in the group" (internal citations omitted)). Indeed, a recent decision by the

[22] This statute provides:

> (1) An appointing authority shall:
>
> (g) Prepare an affirmative action plan which complies with the standards established by the director under s. 230.04(9)(a) and which sets goals and outlines steps for incorporating affirmative action and principles supporting affirmative action into the procedures and policies of his or her agency.
>
> (h) Ensure that his or her agency complies with its affirmative action plan.
>
> (i) Explore and implement innovative personnel policies to ensure affirmative action.

Wis. Stat. § 230.06. "'Appointing authority' means the chief officer of any governmental unit unless another person is authorized to appoint subordinate staff by the constitution or any law. Wis. Stat. § 230.80(1m).

Seventh Circuit suggests that "a reasonable finder of fact could conclude that [the defendant] was motivated by improper, racially-based motives when it terminated [the plaintiff's] employment" based in part on evidence that a "formal or informal 'affirmative action' policy was in force in her workplace." *Good v. Univ. of Chi. Med. Ctr.*, 673 F.3d 670, 679 (7th Cir. 2012); *see also Hague v. Thompson Distrib. Co.*, 436 F.3d 816, 822 n.5 (7th Cir. 2006) ("evidence that those 'running the company are under pressure from affirmative action plans . . . or corporate superiors imbued with belief in "diversity" to increase the proportion of [minorities] in the company's workforce,' would satisfy" the background circumstances requirement). While the parties may wish to consider what, if any, instructions the jury should receive on the relevance of an affirmative action plan, the presence of such a policy -- even one mandated by state law -- does not empower Black to not make employment decisions based on "improper, racially-based motives." *Good*, 673 F.3d at 679.

While the above evidence may not have been enough alone to propel this case to trial, the tipping point for the court is Black's ever shifting and often questionable reasons for Nitschke's termination, several of which involve purported performance concerns not rooted in the facts.[23] Ordinarily, Nitschke "does not bear the burden of proving that the defendant's reasons for terminating [him] were pretextual -- such a burden attaches only under the indirect method of proof." *Darchak*, 580 F.3d at 633. But these apparent fabrications also support a finding that discriminatory intent

[23] For example, Black appears to rely on claimed conduct by Nitschke as Commandant of Union Grove either pre-dating or post-dating his tenure there.

motivated Black's actions. *Brunker v. Schwan's Home Serv., Inc.*, 583 F.3d 1004, 1007 n.1 (7th Cir. 2009) ("An employer's shifting explanations are evidence that its stated reasons did not truly motivate the adverse action and that an impermissible one actually did.").

Similarly, the court further finds numerous genuine issues of fact exist on this record as to Black's claimed belief that Nitschke was not meeting his employer's legitimate performance expectations as Division Administrator or Commandant of Union Grove. If this belief is found incredible, a reasonable jury may find that Black was instead motivated by Nitschke's race and/or sex in deciding to demote him to Commandant or terminate his employment. *See Darchak*, 580 F.3d at 633 ("Employment discrimination cases often center on parties' intent and credibility, which must go to a jury unless 'no rational factfinder could draw the contrary inference.'" (quoting *Veprinsky v. Fluor Daniel, Inc.,* 87 F.3d 881, 894 (7th Cir. 1996))). Defendant's evidence that he hired other white men, similarly does not foreclose a finding of liability. *Diaz v. Kraft Foods Global, Inc.*, 653 F.3d 582, 588 (7th Cir. 2011) ("Under the direct method, the fact that Michalec treated another Hispanic worker well at most might be a piece of evidence tending to negate discrimination with respect to Diaz and Peña, but that is the precise question of intent that a jury must resolve.").

More credible from the court's perspective is Black's claimed and understandable concern about the loyalty of the highest level of employees within the Department, including Division Administrators. The changes in management and Black's frame of mind in transitioning into the Secretary position is certainly relevant to a jury's

determination of whether he was motivated by discriminatory animus or some other reason. *See Jordan v. City of Gary, Indiana*, 396 F.3d 825, 832 (7th Cir. 2005) (considering that the alleged discrimination occurred "when the Department was undergoing managerial, as well as structural changes").[24] Still, this, too, is a question for the jury, not for this court. *Darchak*, 580 F.3d at 633.

III.Remaining Issue for Trial

In their submissions to this court, both parties argued that plaintiff can demonstrate a violation of his equal protection rights or of § 1981 if he demonstrates that Black's "discriminatory animus was a 'motivating factor' in his decisions" to demote and terminate Nitschke. (Def.'s Opening Br. (dkt. #11) 7; *see also* (Pl.'s Opp'n (dkt. #27) 11 ("To survive summary judgment, all Nitschke must provide is evidence that allows a rational jury to believe that Black's actions against him were *motivated by* Nitschke's status as a 'white man.'" (emphasis added)).) Neither party, however, cites any support for this proposition specific to the claims asserted here.

While a Title VII claim allows for relief, albeit limited, upon a showing that race was a "motivating factor," Nitschke's § 1981 and equal protection claim may require proof of "but-for causation." On this issue, the law is unsettled. In *Gross v. FBL Financial Services Inc.*, 557 U.S. 167 (2009), the United State Supreme Court held that a claim under the ADEA required but-for causation, focusing on the lack of "mixed motives"

[24] Unlike the court in *Jordan*, the court finds here that Nitschke has put forth sufficient circumstantial evidence from which a jury could infer discriminatory animus on Black's part.

language in the text of that Act. *Id.* at 177-178. Subsequent Seventh Circuit cases have applied the same textual analysis as *Gross* to other civil rights laws. *See Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961 (7th Cir. 2010) ("Although the *Gross* decision construed the ADEA, the importance that the Court attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination statute lacks comparable language, a mixed-motive claim will not be viable under that statute."); *Fairley v. Andrews*, 578 F.3d 518, 525-26 (7th Cir. 2009) (applying *Gross* to a First Amendment retaliation claim and specifically holding that "unless a statute . . . provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law").[25]

To date, the Seventh Circuit has yet to consider whether the holding in *Gross* applies to § 1981 or § 1983 equal protection claims but the language in *Serwatka* and *Fairley* certainly suggest that a but-for test is appropriate absent express language adopting the motivating factor test.[26] On the other hand, in a case which post-dates *Gross*, the Seventh Circuit analyzed a § 1981 and Title VII claim together and stated that "[r]egardless of the type of evidence presented, [the plaintiff] may avoid summary judgment only by presenting sufficient evidence to create a triable issue as to whether his

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[25] *But see Kidwell v. Eisenhauer*, 679 F.3d 957, 965 (7th Cir. 2012) (discussing *Gross* and *Fairley* and holding that a showing that plaintiff's "protected speech was at least a motivating factor in the defendants' alleged retaliatory employment actions" is sufficient to make out a *prima facie* case at summary judgment).

[26] In the face of no opposition from the parties, however, one court of appeals declined to apply the import of *Gross* to § 1981 claims, and applied the mixed motives framework to a § 1981 claim. *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3rd Cir. 2009).

demotion had a discriminatory *motivation*." *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 389, 393 (7th Cir. 2010) (emphasis added). Similarly, in a recent case considering a discrimination claim brought pursuant to § 1983 equal protection and Title VII, the Seventh Circuit reviewed the district court's grant of judgment as a matter of law, finding that "[n]o reasonable jury could have concluded that plaintiff's gender *played a role* in her March 2007 termination." *Passananti v. Cook Cnty.*, No. 11-1182, 2012 WL 2948524, at *17 (7th Cir. July 20, 2012) (emphasis added).

In light of this seemingly inconsistent guidance and the parties' joint adoption of a "motivating factor" standard, the court has applied this standard for purposes of summary judgment. However, in anticipation of trial, the court will direct the parties to brief as part of their jury instructions submissions the question of which test under a § 1981 claim and § 1983 equal protection claim: (1) whether race was a motivating factor in Black's decisions with respect to plaintiff's demotion and/or termination, or (2) whether Black demoted and/or terminated Nitschke because of race and/or sex.

ORDER

IT IS ORDERED that:

1) Defendant Kenneth B. Black's motion for summary judgment (dkt. #10) is DENIED; and

2) in anticipation of the upcoming trial, the court sets forth the following deadlines and guidelines on pre-trial submissions:

    a) on or before Friday, August 17, 2012 the parties shall provide opposing counsel and the court:

        i. Rule 26(a)(3) disclosures.

ii. Motions in limine.

b) On or before Friday, August 24, 2012, the parties shall provide opposing counsel and the court:

i. Exhibit lists. Any exhibits not listed shall be excluded from admission into evidence except upon good cause shown.

ii. A list of portions of depositions, to be offered into evidence at trial, by page and line references for witnesses unavailable at trial. Extensive reading from depositions is strongly discouraged. Toward that end, the proponent of a deposition may -- though is not required to -- prepare a written narrative summary of some or all deposition transcripts the party intends to offer into evidence, with annotated page and line references in parenthesis after each sentence, in lieu of part or all of the narrative of questions and answers.

iii. A short, written narrative statement of each expert's background and experience. These statements will be read to the jury and no proof will be received on the matters covered unless an objection to the narrative statement is filed.

iv. Additional voir dire questions.

v. Proposed verdict forms.

vi. Proposed jury instructions, including the briefing ordered above.

vii. In addition to electronically filing voir dire questions, verdict forms and jury instructions, please submit to the court an electronic copy of each in Microsoft Word format to wiwd_wmc@wiwd.uscourts.gov.

c) On or before Friday, August 31, 2012, the parties shall provide opposing counsel and the court:

i. Responses to motions in limine.

ii. Objections to exhibits.

iii. Responses to opposing parties' voir dire questions, verdict forms, and jury instructions.

iv. Objections and counter designations to proffered deposition designations.

d) Counsel are directed to consult in good faith and reach resolution on the admissibility of exhibits to the extent possible. Each party shall file copies of any *contested* exhibits they intend to offer with the court by 12:00 p.m. on Thursday, September 6, 2012.

e) The final pre-trial conference shall be held on Thursday, September 13, 2012 at 2:00 p.m. (Please not the change in date and time from the preliminary pretrial conference order.)

f) The trial shall commence Monday, September 17, 2012 at 9:00 a.m. The parties shall meet with the court at 8:30 a.m. that morning for any matters that need to be brought to the court's attention. The court notes that this trial may start later in the week, as a criminal trial is also scheduled to commence on Monday. The timing of this trial will be determined at the final pre-trial conference.

Entered this 17th day of August, 2012.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge