IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DAWN M. DAY,

Plaintiff,

v.

CITY OF BARABOO,
POLICE CHIEF DENNIS KLUGE,
BARABOO BOARD OF POLICE AND FIRE COMMISSIONERS,
PRESIDENT DIANA ZICK,
COMMISSIONER DALE FLOODY,
COMMISSIONER J. HENRY RATHJEN,
COMMISSIONER MARY DEPPE,
individually and in their official capacities,

Defendants.

OPINION AND ORDER

06-C-188-C

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Plaintiff Dawn Day is an officer for the Baraboo Police Department. In 2005, she was denied a promotion by defendants Dennis Kluge (the chief of police) and the Baraboo Board of Police and Fire Commissioners, despite receiving the highest score on the test used to screen candidates. She contends that she was discriminated against because of her age and sex, in violation of Title VII of the Civil Rights of 1964, the Age Discrimination in Employment Act and the equal protection clause of the Fourteenth Amendment.

Both sides have moved for summary judgment. Plaintiff's motion will be denied in full; defendants' motion will be denied in part. I conclude that, on the current record, a reasonable jury could find that the reasons defendants City of Baraboo and Dennis Kluge give for rejecting plaintiff for the promotion are pretexts for discrimination. Although their stated reasons are legitimate, plaintiff has adduced evidence that these reasons did not actually motivate the decision.

The remaining defendants are members of the board that approved Kluge's decision. The facts show that the board members relied on Kluge's judgment without making an independent assessment of plaintiff's qualifications. Because plaintiff adduces no evidence that the board members were aware of any discriminatory motive that Kluge may have had, those defendants are entitled to summary judgment.

From the parties proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Dawn Day began working for the Baraboo Police Department in 1997. At some point, she began working as a shift leader. She also became a field training officer, which means that she trains new officers and assesses their abilities. She was assigned this position by defendant Dennis Kluge, the chief of police for the City of Baraboo. By

December 2004, plaintiff had approximately 12 years of law enforcement experience.

Plaintiff received a written evaluation for each year from 1999 to 2004. There are five possible overall ratings: substantially below expectations, below expectations, meets expectations, exceeds expectations and substantially exceeds expectations. For the year 1999, plaintiff's overall rating was "below expectations"; in 2000 it was "meets expectations"; in 2001, 2002 and 2003 it was "exceeds expectations." (Because plaintiff's evaluation for 2004 was not completed until July 2005, after plaintiff was rejected for the promotion, I have not considered it.) Defendant Kluge did not review these evaluations in deciding whether to promote plaintiff.

In 2003, plaintiff became an instructor for the department's Emergency Vehicles Operations Course. During the fall, Lt. Sinden asked plaintiff to set up an in-house training program on this topic. As of March 21, 2005, plaintiff had failed to do this.

On December 2, 2004, defendant Kluge posted a vacancy notice for a patrol sergeant. Before posting such a notice, Kluge must have approval from defendant Baraboo Board of Police and Fire Commissioners, which has authority to approve or disapprove of appointments made by the chief of police. Generally, the duties of a patrol sergeant include supervising patrol personnel, insuring that orders of the chief are carried out and resolving questions and problems of other officers. Included in the seven-page position description for a patrol sergeant is a category called "knowledge and skills," which includes in part:

"Ability to maintain efficiency, courtesy and discipline in subordinates; initiates and promotes cooperative efforts and good will; and exhibits qualities of leadership, integrity, positive attitude, loyalty, dedication and initiative. Ability to speak and write effectively." Under "Qualifications," the description includes: "Ability to direct and supervise, and command the respect of subordinate officers"; "Ability to react quickly and calmly in emergency stress situations"; and "Ability to maintain accurate and complete records and prepare detailed reports."

The December 2 posting listed the following under a heading titled "position qualifications":

> Graduation from a college or university with a degree (with a minimum of 60 credits) in a police related field; at least three years of full-time law enforcement experience; or an acceptable combination of training and experience that provides the required knowledge, skills and abilities. Certification by the Wisconsin Law Enforcement Standards Board.

With respect to the selection process, the posting stated: "Members of the department meeting the position qualifications are encouraged to apply. Applicants will be required to participate in an examination process, which may include a written examination, oral interview and practical assessments."

As directed by the posting, on December 13, 2004, plaintiff filed a letter with defendant Kluge expressing her interest in the patrol sergeant position. Two days later, Kluge identified in an interoffice memorandum four officers who applied for the position,

including Jessica Pilcher, a female in her 20s, Chris Collar and Matt Gilbert, both males in their 20s and plaintiff, who was 42 years old at the time. Kluge wrote that each of the officers who applied were "credible candidates." This means that each of them met the initial requirements for the position. (Two other officers applied for the position, but one, Ryan La Broscian, was disqualified for failing to meet the qualifications in the posting, and the other, Brett Myers, was disqualified because he submitted a late application.)

At the time he sent his December 15, 2004 letter to the four candidates, defendant Kluge knew he was not going to appoint plaintiff to the sergeant's position.

Defendant Kluge informed the applicants in the memo that the first part of the selection process would include a written examination and that a passing grade for such exams was usually set at 75%. After the written exam, each candidate would be informed of his or her score and whether he or she would continue the process with an interview.

On January 18, 2005, Kluge informed plaintiff that she had passed the exam. Of the four candidates who applied, plaintiff was the only one who passed and thus, the only candidate who qualified to proceed to the next part of the promotional process.

An interview for plaintiff was scheduled for February 3, 2005. The interview was conducted by two members of the board: a sergeant from the Columbia County Sheriff's Department and a police officer from Richland Center. Plaintiff passed the oral interview with a score of 78.1%. On the same day, she took the "practical assessment in-basket

examination" with Captain Craig Olsen. Olsen provided plaintiff with a list of tasks and asked her to prioritize them within 15 minutes. Plaintiff's score on that exam was 66%. Her final score was 75.2%, which was an average of the written test, interview and in-basket exercise.

On or about February 6, 2005, defendant Kluge received an email from Sergeant Janet Klipp, the leader of the Sauk County Critical Incident Negotiations team, a group to which plaintiff had submitted an application. Klipp informed Kluge that plaintiff was not going to be accepted on the team.

Defendant Kluge met with the board on February 21, 2005. Kluge told the board that plaintiff was the only candidate to pass the testing process, but he did not believe she should be given the promotion. As a result, the board decided to "table" the promotional process. The board asked Kluge to inform plaintiff of this decision so she was not "just wondering" what happened. The following day, plaintiff received a memo from Kluge, informing her of the board's decision and that he "anticipate[d] that these matters" would be "addressed at [the board's] March meeting."

Defendant Kluge spoke with Sinden, Olsen, Sgt. Jeffrey Dodge and Lt. Schauf about plaintiff's application for the sergeant position. (It is not clear when these conversations took place; defendants do not propose any facts on this question. However, because defendant Kluge refers in his March 21, 2005 letter to comments made by plaintiff's

supervisors and evaluators, I assume these conversations took place at some time before March 21.) Olsen supervised Day when she was first hired and administered the "in-basket" exam; Dodge had been plaintiff's supervisor for more than a year and conducted her 2002 evaluation. Schauf had conducted one of plaintiff's earlier performance evaluations. Each of them told Kluge that plaintiff should not be given the promotion.

Sinden spoke to defendant Kluge about his request to plaintiff to create the Emergency Vehicles Operations Course. Sinden told Kluge he could not get plaintiff motivated to put the program together.

On March 21, 2005, after receiving approval from the board, defendant Kluge informed plaintiff in a memo that she had been rejected for the promotion. Kluge wrote that he and the board had discussed her "job performance and past evaluations":

> Those issues, both pro & con, were discussed and eventually brought about the ultimate decision. Some of those concerns came in direct conflict with the traits, which the PFC & I are looking for in a Patrol Sergeant, with added emphasis due to this being an 11-7 Shift Sergeant. Of which some of those concerns are:
>
> • The fact that the CIN Team has for a second time declined to accept you as a member.
>
> • Supervisory staff comments as well as Evaluation comments of - needing more confidence in making decisions; needs to show independence; occasionally needs direction to validate her decisions; needs to increase self-initiated activity, especially traffic enforcement; a need to improve time management (as related to case investigation & reports); etc.
>
> • As the Department EVOC Instructor where the goal has been to develop an

in-house training program - it has never happened.

(In their briefs and proposed findings of fact, defendants discuss a number of other perceived deficiencies of plaintiff, but most of these opinions were held by individuals other than defendant Kluge or the board members. Such opinions have no relevance unless they were communicated to one of the decision makers and there is no evidence that they were. Balderston v. Fairbanks Morse Engine Division of Coltec Industries, 328 F.3d 309, 323 (7th Cir. 2003) (refusing to consider alleged deficiencies of plaintiff when there was no evidence that those deficiencies influenced decision maker). Other perceived deficiencies that Kluge relies on now were never communicated to plaintiff at the time and are not supported by documentary evidence, so defendants cannot rely on them to obtain summary judgment. O'Neal v. City of New Albany, 293 F.3d 998, 1005-06 (7th Cir. 2002).)

In a meeting with plaintiff the same day, defendant Kluge told plaintiff that he and the board were surprised that plaintiff was the only candidate to pass the examination process and this created a dilemma for them. He offered plaintiff the opportunity to withdraw her application. If she accepted, she could return his letter to him and it would not be placed in her personnel file.

On March 24, 2005, defendant Kluge again asked plaintiff to withdraw her application, but she declined. The following day, the board authorized Kluge to post a new vacancy notice for the patrol sergeant position. Unlike the December 2004 notice, the new

posting allowed for applicants outside the Baraboo Police Department.

Defendant Kluge told plaintiff that she would not be successful if she tried to participate in the next promotional process because there was not enough time for her to correct the problems in her performance. As a result, plaintiff chose not to reapply.

Six officers applied: Nick Defiel, Ruth Browning, Jessica Pilcher, Matt Gilbert, Brett Myers and Ryan La Broscian. The latter five candidates were under the age of 40. All but Browning and Pilcher were men. Although Gilbert had failed the written examination the first time he took it, he was allowed to go through the application process . However, his previous score for the written examination was "carried forward," which meant that his application was "doomed from the start."

Myers passed the examination process; Defiel, Pilcher, Gilbert and Lobroscian did not. Kluge does not remember whether Browning passed. (As it turns out, Browning passed the written examination, but did not pass the other parts of the process, giving her a final score of 68%.)

Defendant Kluge chose to promote Myers. Defendant Diana Zick, a member of the board, does not remember why defendant Kluge chose Myers. However, Kluge told the board that Browning did not really want the position. Defendant Deppe believed that Kluge selected Myers because Myers had performed the best in the examination process. Defendant Floody believed that Myers had the experience to be a patrol sergeant, but

plaintiff did not. Defendant Rathjen does not know why Kluge chose Myers.

In a letter dated June 20, 2005, defendant Kluge circulated a memo identifying Myers as his choice for promotion. As the reason for his choice, Kluge wrote, "It is the belief that Officer Myers is a worthy candidate for advancement to Patrol Sergeant." The same day, the board approved Myers's appointment.

Defendant Kluge has been the chief of police since 1972. Before plaintiff applied, defendant Kluge had always promoted the candidate who passed the examination process.

Within the past 13 years the department has employed the following female police officers other than plaintiff:

- Kaye Ahlm-Hoover (patrol officer) - March 25, 1991 to May 11, 2001.
- Ruth Browning (police school liaison officer) - July 25, 1994 to the present.
- Kelly Bluedorn (patrol officer) - November 17, 1997 to November 30, 1999.
- Jessica Pichler (patrol officer) - June 26, 2001 to the present.
- Leigh Wildermuth (patrol officer) - December 11, 2002 to April 7, 2006.
- Jennifer Rupert (sergeant) - Hired August 31, 1998. Promoted to Sergeant August 19, 2002. Resigned December 25, 2002.

OPINION

A. Scope of Plaintiff's Claims

Plaintiff brings her discrimination claims against defendant City of Baraboo under Title VII and the ADEA. Title VII prohibits discrimination "because of" sex; the ADEA prohibits discrimination against persons over the age of 40. Plaintiff's claims against the remaining defendants are brought pursuant to 42 U.S.C. § 1983 and the equal protection clause of the Fourteenth Amendment.

Neither side does a very good job of separating the potential liability of the different defendants under the different statutes. In her motion for summary judgment, plaintiff essentially lumps all of the claims and defendants together under one analysis, devoting all but one paragraph in her brief to liability under Title VII and the ADEA. In her terse discussion of her claim under § 1983, plaintiff merely observes that the "same standards govern liability" under Title VII and § 1983, so that if she prevails on her Title VII claim, she must prevail also on her claims under §1983. Plt.'s Br., dkt. #12, at 19.

Plaintiff is only half right. It is true that, despite differences in the language of Title VII, the ADEA and § 1983, the court of appeals has assumed generally that the basic evidentiary framework is the same for discrimination cases brought under these three statutes. Cerutti v. BASF Corp., 349 F.3d 1055, 1061 n.4 (7th Cir. 2003); Malacara v. City of Madison, 224 F.3d 727, 729 (7th Cir. 2000); Halloway v. Milwaukee County, 180 F.3d 820, 82n.6 (7th Cir. 1999). But this means only that the type and quantum of evidence necessary to succeed may be the same. It does not mean that employment discrimination

claims brought under § 1983 are duplicates of claims brought under Title VII and the ADEA, at least in cases such as this one in which plaintiff has sued multiple defendants on her § 1983 claim.

Important differences remain among the three statues. Most relevant to this case is the difference in the way liability is imposed. Title VII and the ADEA impose liability on the "employer" under agency principles. 42 U.S.C. § 2000e(b); 29 U.S.C. § 623(a). Thus, the City of Baraboo is liable under these statutes if plaintiff can show she was denied her promotion "because of" her age and sex; it does not matter whether the city itself had a discriminatory police or practice. Any discriminatory acts of plaintiff's supervisors are imputed to the city.

In contrast, § 1983 is not grounded in agency principles, but in personal responsibility. In other words, a defendant may not be held liable unless he somehow participated in or contributed to the violation. Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995). Thus, to prevail on her claims against the individual defendants, plaintiff must show that *each one* discriminated against her. The short of this is that plaintiff does not automatically prevail on her § 1983 claim if she prevails on her other claims. A finding that the city is liable under Title VII or the ADEA simply means that some employee of the city caused plaintiff to lose the promotion. It does not mean necessarily that *any* of the other defendants are liable as well.

Defendants appear to have at least a hint of understanding this concept, but they also seem to lack a firm grasp of the big picture. Their motion for summary judgment includes a separate section on the liability of the individual defendants, but their discussion of personal involvement is limited to an argument that none of the individual defendants except for Kluge may be held liable because it was Kluge alone that made the decision to deny plaintiff the promotion. They cite Wis. Stat. § 62.13, which gives police chiefs the authority to "appoint subordinates."

Although plaintiff's view of liability under § 1983 is too broad, defendants' view is too narrow. An official may be liable even if she is not the final decision maker so long as she was otherwise personally involved. The test is whether the constitutional violation occurred with the defendant's knowledge or consent. Gentry, 65 F.3d at 761. In this case, defendants concede that members of the board are "involved in" promotional decisions. Further, § 62.13 requires board approval for appointments, which is demonstrated by the facts of this case. Defendant Kluge sought and obtained approval from the board on every decision he made with respect to the patrol sergeant promotion. If plaintiff could show that any of the board members sought to deny plaintiff the promotion because of her sex or age and that the board member used his or her authority to influence defendant Kluge's decision, that board member could be held liable under § 1983. E.g., Morfin v. City of East Chicago, 349 F.3d 989, 1002-03 (7th Cir. 2003) (defendant may be held liable under § 1983 if he

influenced constitutional violation). I may not dismiss the individual board members simply because defendant Kluge was primarily responsible for making appointments.

Given the parties' failure to discuss the personal involvement of each defendant, I will do as the parties have done and focus first on plaintiff's claims under Title VII and the ADEA. If she cannot succeed on those claims, her § 1983 claim fails as well.

B. Title VII and ADEA Claims

1. Plaintiff's motion for summary judgment

I begin with plaintiff's motion for summary judgment, which merits only brief discussion. It is highly unusual for a plaintiff in a discrimination case to move for summary judgment. One could read hundreds if not thousands of decisions in these cases without coming across one in which a plaintiff moved for summary judgment, much less prevailed.

The reason for this is not difficult to surmise. To prevail on summary judgment, the moving party must show that there are no genuine issues of material fact left for trial. Fed. R. Civ. P. 56(c). When one of the issues is whether the defendant acted with discriminatory intent, a plaintiff could not meet this standard unless the defendant *admitted* he had relied on an impermissible factor in making a decision. Once the defendant testifies that he did not have a discriminatory motive, as all of the defendants have done in this case, it would be the rarest of instances in which the plaintiff could prevail at summary judgment. A court

would have to conclude that the defendant was lying, but this is a determination almost always reserved for the factfinder. In re Chavin, 150 F.3d 726, 728 (7th Cir. 1998) (court may not discredit witness testimony unless it is "utterly implausible in light of all relevant circumstances").

Plaintiff has not shown that this is one of the "extreme" and "exceptional" cases in which it would be appropriate to conclude as a matter of law that defendants are not credible. Id. Accordingly, plaintiff's motion for summary judgment must be denied.

2. Defendants' motion for summary judgment

a. Evidentiary framework for discrimination claims

As is the case in the vast majority of employment discrimination cases, the primary question raised in defendants' motion for summary judgment is whether plaintiff has adduced sufficient evidence to allow a reasonable jury to find that defendants discriminated against her for an unlawful reason. Plaintiff has not adduced any evidence that points directly to her sex or age as motivating factors in the decision not to promote her. This does not necessarily doom her case, however. The Supreme Court recognized long ago that evidence of discriminatory intent is often hard to come by. E.g., U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."). Very few employers today are so foolish

or brazen as to leave a smoking gun behind, or even a trail of breadcrumbs. If plaintiffs were required in every case to come forward with an acknowledgment of discriminatory intent by the employer, it would be only the very rare employee who would be able to prevail on her claim.

This type of evidence is not required in a criminal case, e.g., Holland v. United States, 348 U.S. 121, 140 (1954), so there would be little justification for requiring it in a civil action. Rather, like a plaintiff in any other type of case, a plaintiff in a discrimination suit may prove her claim in a number of different ways, with direct or circumstantial evidence, with one piece of damning evidence or with a "mosaic" of evidence that together shows a genuine issue of material fact. Paz v. Wauconda Healthcare, 464 F.3d 659, 665-66 (7th Cir. 2006); Phelan v. Cook County, 463 F.3d 773, 779-80 (7th Cir. 2006). See also Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir.1996) ("Any demonstration strong enough to support judgment in the plaintiff's favor . . . will do, even if the proof does not fit into a set of pigeonholes.").

In cases in which a party's intent is at issue, one way to prove the necessary intent is to show that the party's stated reason for its action is a lie. 2 Wigmore, Evidence § 278(2) at 133 (rev. 1979). The underlying rationale for this is straightforward: if a defendant has a lawful reason for taking a particular action, it follows that it will point to that reason in defending the action. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

If it fails to do this or if the reasons it gives are lies, in many cases it would be reasonable to infer that it is holding back on the real reason because that reason is prohibited by law. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147-48 (2000).

In McDonnell Douglas v. Green, 411 U.S. 792 (1973), the Supreme Court affirmed that this general principle applies to discrimination cases as well. This is the route under which plaintiff tries to prove her case. Under McDonnell Douglas and its progeny, the question for plaintiff is this: did a man or a person over the age of 40 get the promotion despite plaintiff's qualifications for the position and are the reasons defendants give for denying plaintiff the promotion all lies, or, more precisely, could a reasonable jury make this finding?

b. Plaintiff's qualifications

Whether plaintiff was qualified for the promotion is genuinely disputed. Plaintiff had the best score of all the candidates on the examination process; had 12 years of law enforcement experience with the department; received favorable performance reviews, particularly in recent years; and had been placed in leadership positions by defendant Kluge himself. Most important, defendant Kluge told plaintiff that she was a "credible" candidate when she applied, thus suggesting that he believed plaintiff was qualified, at least before assessing her skills as measured by the examinations. Although Kluge disavows this

statement now, a jury could reasonably find that he meant what he said at the time. Merillat v. Metal Spinners, Inc., 470 F.3d 685, 691-92 (7th Cir. 2006) (finding genuine dispute when plaintiff's performance reviews were "mostly positive," even though negative comments were included); Ballance v. City of Springfield, 424 F.3d 614, 618 (7th Cir. 2005) (finding genuine dispute on question whether plaintiff was meeting employer's legitimate expectations when record showed that he was both disciplined and "highly commended" by supervisors).

Defendants argue that plaintiff was not qualified because she received a failing score on the "in-basket" exam, but I agree with plaintiff that defendants cannot rely on this to obtain summary judgment. Plaintiff's overall score for the examination process was passing. More important, defendant Kluge treated plaintiff as if she had passed and he told the board that she had. Finally, Kluge did not inform plaintiff of her score on the "in-basket" exam and did not list it as one of the reasons he was denying plaintiff the promotion. Accordingly, I cannot conclude that plaintiff's score on the "in-basket" exam establishes as a matter of law that she was unqualified to be promoted.

c. Pretext

With respect to the issue of pretext, I conclude that plaintiff manages to scrape by, if only barely. The question is a close one because defendants have identified three reasons

for denying plaintiff the promotion and plaintiff has not shown that there is "no basis in fact" for the deficiencies identified in Kluge's March 21, 2005 letter to her. Davis v. Wisconsin Dept. of Transportation, 445 F.3d 971, 977 (7th Cir. 2006). Although plaintiff attempts to argue that those reasons are not "legitimate," she does not deny that other officers objected to her promotion, that she was rejected by the Critical Incidents Negotiations team and that she failed to set up an instruction program requested by her supervisor. These are all nondiscriminatory reasons for denying someone a promotion and are therefore "legitimate" under Title VII and the ADEA, regardless whether they are reasonable or fair. Forrester v. Rauland-Borg Corp., 453 F.3d 416, 417-18 (7th Cir. 2006).

However, even if defendant City of Baraboo had grounds for denying plaintiff the promotion (and it is difficult to imagine an employee so outstanding that there could be *no* objection to promoting her), plaintiff may establish pretext if she can show that those reasons did not *actually* motivate the decision makers. Id. ("If the stated reason was not the actual one, it is a pretext even if it had some basis in fact.") I conclude that plaintiff has made this showing on the current record.

The most important evidence supporting this conclusion is defendant Kluge's own testimony that he had already decided to deny plaintiff the promotion as of December 15, 2004, when he told plaintiff that she was a "credible" candidate. Of course, the initial problem with this testimony is that it essentially puts defendant Kluge in the position of

calling himself a liar. Kluge says now that he did not actually believe plaintiff was a viable candidate, which raises the question why he allowed plaintiff to compete for the promotion. Kluge's explanation is that he thought everyone could gain valuable experience by going through the process, even if that person was not qualified. This explanation is called into doubt, however, because Kluge did *not* allow everyone to participate in the process: he eliminated one candidate for failing to meet the qualifications of the position.

Although problematic for defendants, this self-contradiction would likely not require denial of defendants' motion for summary judgment if defendants had pointed to *some* basis in the record for defendant Kluge's judgment in December 2004 that plaintiff should not be promoted. Their failure to do so is decisive. As noted above, defendant Kluge gave plaintiff three reasons for denying her the promotion. As the record stands now, however, there is no basis for inferring that defendant Kluge was aware of any of those reasons as of December 2004. Kluge spoke to the leader of the Critical Incident Negotiations team in 2005. Although the record is not clear regarding when defendant Kluge spoke to plaintiff's evaluators and supervisors, both he and those he spoke with suggest that it was during the promotional process, if not later.

Thus, there is no evidence to suggest that, as of December 2004, defendant Kluge was independently aware of any of the problems he later identified in the March 2005 letter. In fact, defendants point to no evidence that Kluge had informed plaintiff of any deficiencies

barring potential advancement or that he even *knew* of any legitimate reason to reject plaintiff for the promotion as of December 2004. United States Equal Employment Opportunity Commission v. Target Corp., 460 F.3d 946, 957 (7th Cir. 2006) ("an employer must articulate reasonably specific facts that explain how it formed its opinion of the applicant"); Ajayi v. Aramark Business Services, Inc., 336 F.3d 520, 534 (7th Cir. 2003) (pretext shown by defendants' failure to inform plaintiff of problem later cited as basis for adverse action).

Kluge knew as of December 2004 that plaintiff was a woman over the age of 40. A reasonable jury could infer that defendant Kluge allowed plaintiff to proceed in December 2004, not because he thought she would gain valuable experience, but because he could not point to any ground for prohibiting her from advancing through the process and he hoped that he could find one somewhere down the road.

This version of events is further supported by defendant Kluge's significant delay in informing plaintiff of the reasons for denying her the promotion. It appears that, even in February 2005, when defendant Kluge told the board that he did not want to promote plaintiff, he did not have a clearly articulated reason for this decision. The facts show that Kluge did not provide the board with specific reasons for not wanting plaintiff to be promoted; he gave only a general opinion. It was not until more than one month later that Kluge produced reasons for his decisions. Cf. Paz, 464 F.3d at 665 (suspicious timing

supports finding of pretext).

Even if defendant Kluge did rely partially on legitimate reasons he discovered later, this would not necessarily absolve the city of liability, particularly with respect to plaintiff's Title VII claim. To establish liability under Title VII, plaintiff must prove only that her sex was a "motivating factor" in the decision. 42 U.S.C. § 2000e-2(m). See also Olson v. Northern FS, Inc., 387 F.3d 632, 635 (7th Cir. 2004) (stating that question under ADEA is whether age was "motivating factor" in adverse decision). Thus, if defendant Kluge's initial decision in December 2004 was influenced by a discriminatory motive, he might still be liable if nondiscriminatory reasons came into play by the time Kluge gave plaintiff the March 21 memo. Further, if plaintiff's sex was at least one of the reasons the city rejected plaintiff, she could obtain some forms of relief, even if the city could show that it would have made the same decision without regard to her sex. 42 U.S.C. § 2000e-5(g)(2)(B).

A potential finding of pretext is further supported by a number of troubling discrepancies in defendant Kluge's deposition testimony and his subsequently drafted affidavit. For example, when defendant Kluge was asked during his deposition whether he considered plaintiff's performance evaluations in making his decision, he said "probably not the document, but I would certainly have had that conversation with" the officers who had conducted the evaluations. Dep. of Dennis Kluge, attached to aff. of Ann Wirth, Exh. B, dkt. #19, at 62-63. When asked what those individuals told him, he provided the following

response:

> I'm certain that Lieutenant Sinden would have commented about issues with EVOC. Sergeant Dodge certainly would have been speaking to issues with performance on the shift, as I would anticipate Lieutenant Schauf and Captain Olsen would have. But those comments I usually get directly from them. But I don't really recall them verbally exactly.

Id. at 64. This is defendant Kluge's complete testimony regarding comments from plaintiff's evaluators.

However, in defendant Kluge's affidavit, dated just two weeks after his deposition, he avers, "I considered the following staff comments from previous evaluations in deciding not to recommend Officer Day for promotion to the sergeant's position." Aff. of Kluge, dkt. #18, at ¶10. What follows is an almost word-for-word recitation of nearly every negative written comment that plaintiff had received on her evaluations over the years.

Defendant Kluge conceded in his deposition that he "probably" had not looked at plaintiff's evaluations before making his decision. Further, he could not recall the specifics of anything plaintiff's evaluators had told him. Thus, it is not clear how defendant Kluge was able to recall only two weeks later nearly every specific criticism that had been written about plaintiff, unless of course he had subsequently reviewed plaintiff's written evaluations in order to retroactively "improve" his memory.

Similarly, when defendant Kluge was asked during his deposition why he chose to promote Brett Myers, he gave the following response: "Brett had considerable experience

and has a—is a motivated individual that as a shift leader carried those duties as you would want a—you know, expect a sergeant to be doing. He was a—again, he was a natural leader of sorts." Dep. of Kluge, at 52. That was Kluge's full answer, which he gave without any qualification that he could not remember the specifics or needed to refresh his recollection. The answer is consistent with the memorandum Kluge circulated after choosing Myers, in which Kluge wrote only that he believed Myers "is a worthy candidate for advancement to Patrol Sergeant." Aff. of Kluge, Exh. A, dkt. #21.

Again, however, in his later affidavit, Kluge provided great detail about all of the positive attributes he believed Myers possessed. He does not explain where or how he obtained this information or why he omitted all of it at his deposition. Although defendant Kluge's affidavit is not necessarily directly contrary to his deposition, his unexplained ability to augment his memory calls his position into doubt. Firestine v. Parkview Health System, Inc., 388 F.3d 229, 236 (7th Cir. 2004) (pretext may be shown by "an inconsistent story" during litigation).

Finally, plaintiff notes that defendant Kluge's general practice was to promote the candidate who passed the examination process. In fact, since defendant Kluge had become chief in 1972, he had never declined to appoint the highest scoring candidate. Plaintiff has not adduced evidence regarding the characteristics of previous candidates, so the probative value of this fact is limited. However, the court of appeals has held that a departure from

established policies and practices is evidence of pretext. Rudin v. Lincoln Land Community College, 420 F.3d 712, 727 (7th Cir. 2005); National Labor Relations Board v. Chelby Memorial Hospital Association, 1 F.3d 550, 562-63 (7th Cir. 1993). It does not help defendants' case that, in attempting to show a general practice of nondiscrimination, they point to a total of three current female police officers (none of whom are in supervisory positions) and one woman who formerly held a supervisory role for a few months in 2002. Sun v. Board of Trustees of the University of Illinois, No. 06-2438, – F.3d – , 2007 WL 93313 (7th Cir. Jan. 17, 2007) (pattern of promoting only white candidates evidence of discrimination against nonwhites).

The line separating an employer's explanation that is "not worthy of credence," David v. Caterpillar, Inc., 324 F.3d 851, 858 (7th Cir. 2003), from one that contains nothing more than "inconsistencies and idiosyncrasies," Walker v. Board of Regents of University of Wisconsin System, 410 F.3d 387, 397 (7th Cir. 2004), is not a clear one, as is evidenced by the numerous published appellate decisions addressing this issue every year. Although plaintiff's case is far from overwhelming, I conclude that she has adduced enough evidence to allow a reasonable jury to infer that the city's explanation for denying her the promotion is pretextual. Defendant Kluge's inability to explain why he initially believed plaintiff was not qualified (despite his statement to her that she was), his delay in informing her of the reasons for the denial, his difficulty in articulating the reasons for his actions in his

deposition (which was immediately followed by an extremely detailed affidavit) and his departure from his practice of hiring the highest scoring candidate suggest that his stated reasons for denying plaintiff the promotion may be pretexts for discrimination.

The city does not argue that this is one of the rare cases identified in Reeves in which a jury could not reasonably find discriminatory intent despite sufficient evidence for a finding of pretext. 530 U.S. at 148 (despite showing of pretext, employer entitled to judgment as matter of law if record "conclusively" shows another, nondiscriminatory reason for decision or if there was "abundant and uncontroverted independent evidence that no discrimination had occurred"). Accordingly, defendants' motion for summary judgment must be denied with respect to plaintiff's Title VII and ADEA claims against defendant City of Baraboo.

C. Section 1983 Claims

I conclude that plaintiff may proceed to trial on her claim against defendant Kluge for much the same reason that I have concluded that her Title VII and ADEA claims against the city survive. All of the evidence requiring denial of summary judgment with respect to the city relates to defendant Kluge. It was he who made the decision in December 2004 to reject plaintiff and he who convinced the board to approve his decision.

Although the other defendants were involved in the promotional process, the facts

show that each relied entirely on Kluge's assessment. Plaintiff adduced no evidence that any of them made an independent judgment or, more important, that they were aware of any discriminatory motive that defendant Kluge may have harbored. Without such knowledge or awareness, these defendants may not be held liable under § 1983, which requires the plaintiff to prove that each defendant *knew* about a constitutional violation and could have prevented it, but failed to do so. Fillmore v. Page, 358 F.3d 496, 505-06 (7th Cir. 2004). In other words, plaintiff must show that the board members "approved" or "condoned" the discriminatory treatment. In essence, plaintiff's argument is that the board members should be held liable simply because they were "there," but that is not enough. E.g., Hildebrandt v. Illinois Dept. of Natural Resources, 347 F.3d 1014, 1040 (7th Cir. 2003) (liability under § 1983 not established by "attend[ance] and activ[e] participat[ion]" at meeting during which decision was made not to change discriminatory pay). Defendants' motion for summary judgment will be granted with respect to plaintiff's claims under § 1983 against the board and its individual members.

ORDER

IT IS ORDERED that

1. Plaintiff Dawn Day's motion for summary judgment is DENIED.

2. The motion for summary judgment filed by defendants City of Baraboo, Dennis

Kluge, Baraboo Board of Police and Fire Commissioners, Diana Zick, Dale Floody, J. Henry Rathjen and Mary Deppe is DENIED with respect to plaintiff's claim that

(a) defendant City of Baraboo discriminated against her in violation of Title VII and the Age Discrimination in Employment Act; and

(b) defendant Kluge discriminated against her because of her age and sex in violation of the equal protection clause of the Fourteenth Amendment.

3. Defendants' motion for summary judgment is GRANTED with respect to plaintiff's claims that defendants Baraboo Board of Police and Fire Commissioners, Zick, Floody, Rathjen and Deppe discriminated against plaintiff in violation of the equal protection clause. These defendants are DISMISSED from the case.

Entered this 31st day of January, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge