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

GARY WISTROM,

Plaintiff,

v.

KENNETH BLACK,

Defendant.

OPINION AND ORDER

11-cv-515-wmc

This is the second of three lawsuits in this court brought by employees (current, prospective or former) of the Wisconsin Department of Veteran Affairs against defendant Kenneth Black, its former Secretary, in his individual capacity. In this civil action, plaintiff Gary Wistrom alleges that Black discriminated against him on the basis of Wistrom's race (white) and sex (male) and retaliated against him for filing an affidavit in support of another former employee's discrimination complaint pending before the Wisconsin Equal Rights Division. Black has moved for summary judgment on several bases, arguing that (1) Wistrom's 42 U.S.C. § 1981 claims are foreclosed against Black as a state actor pursuant to *Jett v. Dallas Independent School District*, 490 U.S. 701 (1989); (2) Wistrom's reassignment was not a materially adverse action, and specifically, that Wistrom was not constructively discharged; (3) Wistrom cannot demonstrate discriminatory animus on the part of Black; and (4) Wistrom cannot demonstrate a causal link between any protected activity and the decision to reassign him in support of his retaliation claim. For the reasons that follow, the court will grant summary judgment to defendant on Wistrom's discrimination claim but deny it as to his claim of retaliation.

UNDISPUTED FACTS[1]

The court adopts the undisputed facts material to Wistrom's claims already set forth in its summary judgment opinion in *Nitschke v. Black*, No. 11-cv-215. In addition to those facts, the court further finds:

A. The Plaintiff

Plaintiff Gary Wistrom is a 63-year-old white male. He retired as Colonel from the United States Air Force in 2001 after a decorated 30-year Air Force career. Wistrom was hired on a limited term by the Department on November 19, 2001, as a "Veterans Benefit Specialist" and "Human Resources Director." Wistrom worked out of the Department's Union Grove office. In 2002, Wistrom was hired into a permanent position under the "veterans' preference" standard, which means he enjoyed a hiring preference based on his status as a veteran with service-related disability. In 2002, Wistrom was appointed to the position of Veterans Benefits Specialist 2; in 2004, he elected a voluntary transfer to the position of Institution Human Resources Director of the Wisconsin Veterans Home at Union Grove. In 2006, Wistrom was promoted to the position of Assistant Administrator of Veterans Homes at Union Grove, a position in which he remained until his reassignment to a new position in the Department's central office in Madison.[2]

---

[1] The court finds the following facts taken from the parties' proposed findings of fact to be material and undisputed.

[2] In 2008, Wistrom was also directed by Scocos to assume some of the responsibilities of Commandant of Union Grove on a temporary basis.

Since 1998, Wistrom has lived in Kenosha, Wisconsin, approximately 20 minutes from Union Grove. Communications from the Department have been sent to this residence since the start of his employment in 2001.

B. Wistrom's Affidavit

Randall Nitschke filed a discrimination complaint against the Department with the Wisconsin Equal Rights Division. Wistrom provided an affidavit dated September 27, 2010, in support of Nitschke's complaint, in which he described Black's statements in a listening session held on March 4, 2010 at Union Grove, about the Department's Milwaukee claims office having "too many 58-60/62 year old white males who are lazy and don't want to work anymore" and that the VA system needed to change "because it was set up to serve white male veterans from World War II and the Korean War era." (Affidavit of Gary Wistrom ("Wistrom Aff."), Ex. A (dkt. #20-1) ¶¶ 13-14.)

Patrick Shaughnessy also provided an affidavit in support of Nitschke's ERD complaint, in which he averred that Ken Black stated in a March 4, 2010 meeting that "there are too many 50-year-old white guys waiting for retirement" in the Department. (Affidavit of Patrick Shaughnessy ("Shaughnessy Aff."), Ex. A (dkt. #22-1) ¶ 6.) Shaughnessy contends that he was subjected to excessive and unwarranted scrutiny after submitting his affidavit, which Shaughnessy believed was directed by Black in order to create a reason to terminate him. In late November or early December 2010, a Department attorney requested that Shaughnessy sign an affidavit indicating that he did not hear Black make derogatory statements about old white men. Shaughnessy refused.

A week later, the same Department attorney requested that Shaughnessy sign an affidavit indicating that he did not tell Marshall, Williams or Black that Wistrom had been contacted by Nitschke's attorney to provide an affidavit in support of Nitschke's ERD complaint. Shaughnessy also refused to sign this affidavit.

Marie Maguire also provided an affidavit in support of Nitschke's case, stating that Black made a statement on March 4, 2010, that there were a "number of old white men riding the bus to retirement at the Department." (Affidavit of Marie Maguire ("Maguire Aff.") ¶ 5.) Maguire was later demoted from Director of Nursing at Union Grove to a floor nurse position. Michael Plautz also provided an affidavit in support of Nitschke's case, stating his recollection of Black's statement that "there's too many 50 year old white guys in the system." (Affidavit of Michael Plautz ("Plautz Aff.") ¶ 6.) Plautz was later demoted from Custodial Services Program Supervisor and initially offered a part-time position in the Union Grove Kitchen Department.

C. Reorganization of the Department

Sometime after Black became Secretary in November 2009 -- the parties dispute the exact timeframe -- Black directed meetings be held with senior management within the Department to discuss the creation and implementation of a departmental reorganization plan that would establish a common and shared operation across the Veterans Homes. The reorganization team consisted of Brian Marshall, Colleen Holtan, Amy Franke, James Bond, Mike Telzrow and Black. Black now avers that the team members worked in a collaborative manner, but at his deposition he testified that "[t]he

final decision for the plan rested with me." (Pl.'s Resp. to Def.'s PFOFs (dkt. #18) ¶ 11.) Marshall was appointed the Administrator of the Division of Homes in June 2010. He was involved in the reorganization plan that related to Veterans Homes, though he testified at his deposition, consistent with Black, that Black was the "ultimate decision maker." (*Id.*)

While not included in the written plan, Black also claims that the reorganization plan called for three or four positions located at the Department's central office in Madison, designed to temporarily support the development and implementation of the reorganization plan. Black believed that the transition would be difficult, and that these positions would assist Marshall in implementing the process. Plaintiff disputes Black's position that these positions were critical given that the Department never hired anyone to fill the position Wistrom was to fill.[3]

D. Wistrom's Reassignment to Position in Madison

In collaboration with the reorganization team (of which Black was a member), Black claims that in October 2010, Wistrom was selected by Marshall for one of these positions and was temporarily reassigned to the position of Director, Policy and Program Compliance for the Division of Veterans Homes. Black further claims that he was unaware of Wistrom's particular skills and relied on Marshall's explanation for choosing Wistrom to fill this position.

[3] Plaintiff also points to the Department's one-month delay in posting the position, and specifically highlights the fact that the posting occurred after the Department was aware of Wistrom's ERD complaint (described below).

Marshall, on the other hand, claims that he did not know Wistrom's qualifications, other than what he was told by the senior management team (of which Black was also a member). Moreover, Wistrom contends that of the senior management team, Black knew Wistrom's qualifications the best.[4] Black also testified at his deposition that he knew Wistrom and admitted to telling Nitschke, when he was hired as the Commandant of Union Grove, to "[b]e careful of Mr. Wistrom and Mr. Shaughnessy." (Pl.'s Resp. to Def.'s PFOFs (dkt. #18) ¶ 17.)[5]

In a letter dated October 6, 2010, Deputy Secretary Donna Williams confirmed Wistrom's reassignment to the position of Director, Policy and Program Compliance. That same day, Wistrom sent an email to staff at Union Grove to inform them of this reassignment, which was subsequently forwarded from Marshall to Black. (Affidavit of Peter Fox ("Fox Aff."), Ex. FF (dkt. #38).) That same day, Wistrom also sent emails to Marshall in which he stated that this reassignment came as a "surprise" but that he looked "forward to the challenges of the new position," and sought additional

[4] The plaintiff also disputes Black's portrayal of his limited role in the reassignment based on Black's and Marshall's deposition testimony indicating that Black was the ultimate decision maker on the reorganization plan.

[5] In his reply to plaintiff's response to this proposed finding of fact, as well as many others, defendant states: "Plaintiff's cited evidence does not dispute the proposed finding. There is no material dispute. Plaintiff's response is argumentative and irrelevant. DPFOF [fill in the blank] is undisputed and may be adopted." (*See, e.g.*, Def.'s Reply to PFOFs (dkt. #61) ¶ 17.) Not only is such a boiler-plate reply not helpful to the court in discerning the undisputed facts, it is actually counter-productive to defendant's purpose. If anything, attempts to brush aside an apparent factual dispute by simply stating that there are no disputes (without explanation), or that the disputes are immaterial (without explanation), or that plaintiff's response is "argumentative" (whatever that means) only *highlights* the factual disputes between the parties.

information about the position, including a request for moving expenses in light of the 108 mile drive each way from his residence.[6] (*Id.*, Ex. EE (dkt. #37).) The following day, in an email dated October 7, 2010, Wistrom stated that "[w]hile I hate to leave Union Grove, the new job is in an area I've worked in before and enjoyed. Plus, with our son in Madison at the University, and Madison being a location we've always thought we wanted to live, we're looking forward to this opportunity." (Affidavit of John Sweeney ("Sweeney Aff."), Ex. B (dkt. #17-2) 13.)

On October 11, 2010, Wistrom sent another email to Marshall, in which he reiterated that he was surprised by the reassignment and specifically expressed concern about how it was communicated: "The way in which I was told, i.e., called into your office at 11:00 A.M., handed the letter and simply told to 'read this' without any discussion or explanation hardly seems how one expects a manager to treat someone who has loyally served the organization for many years." (Fox Aff., Ex. HH (dkt. #40 1.) Wistrom also questioned why the move needed to be effective immediately and requested delaying his transition to the central office in Madison until November 22, 2010, in part to provide his wife's post-surgery care and to allow time for Wistrom to make "adjustments that will be needed due to [his] own disabilities." (*Id.* at 2.) Wistrom further stated that "[c]ommuting the 216 miles per day, due to my service connected health condition, is not a viable option." (*Id.*) Wistrom closed the email with,

[6] Wistrom's emails were forwarded to other individuals within the Department, including the Department's Director of Human Resources, Amy Franke, who called them "silly inquiries," and wrote to Marshall that "I have no intention of responding to this." (Fox Aff., Ex. GG (dkt. #39) 1, 3.)

"I hope that you will allow me to delay reporting to Central Office until November 22nd vs. forcing me into a situation where, due to the health issues both my wife and I are experiencing, I have no other option [but] to resign." (*Id.*)

Wistrom sent another email to Marshall on October 13th, describing his plan for reporting to the central office on Tuesday, October 19th, and seeking any information in response to his earlier emails. (Wistrom Aff., Ex. II (dkt. #41).) On Sunday, October 17, 2010, Wistrom sent an open records request to Anthony Carpozzo with the Department requesting information as to his reassignment to this new position; Carpozzo forwarded Wistrom's request to Donna Williams, Brian Marshall, Amy Franke, and Ken Black. (*Id.*, Ex. JJ. (dkt. #42).)

On Monday, October 18, 2012, Marshall sent a letter to Wistrom's home address in which he stated that (1) there was no budget available for any reassignments; (2) Wistrom could request an FMLA leave to care for his spouse or to maintain his own health; (3) Wistrom's new position description or revised organization chart was not yet available; and (4) the Department was willing to extend "some flexibility" regarding Wistrom's work schedule over the next four months. (*Id.*, Ex. JJ (dkt. #43).) Wistrom responded to Marshall's letter on October 20, 2010 and again asked Marshall for details about where to report and what supplies he needed to bring when he reports on October 25, 2010. (*Id.*, Ex. LL (dkt. #44).) Having received no response, Wistrom sent Marshall another email on October 21, 2010, requesting additional information about his new position, and implying at least that the Department, from his perspective, was unwilling to "allow[] me to work out of Union Grove for the next few weeks so I can sort out the

issue of how to ensure continuity of care for my service connected disabilities." (*Id.*, Ex. MM (dkt. #46).)

On Monday, October 25, 2010, having still received no response from Marshall, Wistrom drove to the Department of Employee Trust Fund ("ETF") in Madison, after which he was to start his new position at the Department of Veteran Affairs' central office. While at ETF, Wistrom became ill. After his attempts to contact Marshall were unsuccessful, Wistrom decided to return to Kenosha to see his physician. He left a message with Marshall requesting that he call him at his home phone.

After deciding he could not safely make a daily commute to Madison of 216 miles, even for the short term before he could sell his home and relocate to Madison, Wistrom emailed a resignation letter to Marshall on October 26, 2010, effective at the close of business that same day. Marshall emailed Wistrom the afternoon of October 25, 2010, but Wistrom contends that he did not receive that email until October 26, 2010, after he had sent his resignation letter. Wistrom responded to Marshall's email, stating

> Unfortunately, I had to make an incredibly tough decision based on the information, or lack thereof, you provided me between October 6th and October 22nd. Other than the letter which you sent to me via e-mail on October 18th, and our last verbal communication which was on October 9th, I have not been successful in contacting you in any way, shape or form. Considering the apparent urgency of the immediate move to Madison, and the multiple concerns, questions and issues I have repeatedly raised to you, I remain surprised by your lack of follow up or willingness on your part to try to communicate with me[.]

(Fox Aff., Ex. OO (dkt. #47).)

E. Wistrom's ERD Complaint

On November 12, 2010, Wistrom filed a complaint with the Wisconsin Equal Rights Division ("ERD"), alleging that his reassignment was motivated by his race, sex, age, disability, and in retaliation for his providing an affidavit in support of Nitschke's ERD case that described Black's discriminatory statements about "old white men." (Fox Aff., Ex. QQ (dkt. #49).) On March 22, 2011, the ERD determined that there was probable cause to believe that Wistrom was the victim of unlawful discrimination and retaliation on eleven different counts, including his termination and discharge were motivated by his race and sex, and the fact that he opposed discrimination.

F. Black's Knowledge

The parties dispute whether Black personally was aware that Wistrom resided in Kenosha, Wisconsin, approximately 106 miles from the Department's central office in Madison. Black, however, was aware that as a result of Wistrom's reassignment to the central office, Wistrom would have a two-hour commute and further knew that Wistrom "was not happy" about it. (Pl.'s Resp. to Def.'s PFOFs (dkt. #18) ¶ 26 (citing Black Dep. (dkt. #55) 98-110).)[7]

The parties also dispute whether Black was aware of Wistrom's service-related disability before the decision to reassign him to the new position in the central office was made. Plaintiff has submitted significant evidence that the Department was aware of his

[7] From Black's deposition testimony, it is clear that he acquired this knowledge after the decision to reassign Wistrom was made; it is unclear if he was aware of the commute or Wistrom's disabilities before that decision was made.

disability going back to 2002. (Pl.'s Resp. to Def.'s PFOFs (dkt. #18) ¶ 28.) On Disability Self-Identification forms submitted in 2002 and 2004, Wistrom claimed he was a person with a severe disability, but did not indicate that he needed any accommodations to perform the functions of his job. (Sweeney Aff., Ex. B (dkt. #17-2) 9, 11.) Wistrom also made members of the Department, though not Black specifically, aware that his disability made it exceptionally difficult to drive long distances. Wistrom advised the Department's personnel of this condition when he first started working for the Department and periodically reminded his supervisors of the particular problems associated with driving great distances. On at least one occasion in 2003, his supervisor accommodated Wistrom's request to take him off an assignment which required significant driving. More recently, Wistrom points to a January 2009 letter from the Department indicating that Wistrom was "totally and permanently disabled due to [his] service connected disability." (Affidavit of Peter Fox ("Fox Aff."), Ex. I (dkt. #27-9).) Based on this, Wistrom believes that it was well known within the Department that he was disabled and that he could only work at locations located within a short commute from Kenosha.

For support of Black's specific knowledge, Wistrom identifies his request in February 2009 for intermittent FMLA leave from the Department in order to deal with his health condition. (*Id.*, Ex. K (dkt. #27-11).) In the request, Wistrom noted "an inability to concentrate on specific tasks including but not limited to driving." (*Id.*) Wistrom's request for FMLA was denied by the Department. Wistrom submitted a complaint to the Department of Labor ("DOL"). When DOL did not pursue this

complaint, the Department's Chief Legal Counsel sent an email to Black and others advising them of the dismissal of Wistrom's complaint and congratulating them for a "[g]reat job on every level." (*Id.*, Ex. N (dkt. #27-14).)

Lastly, the parties dispute whether Black was aware of Wistrom's sworn statements that Black believed the Department employed too many old white men or that he did not want the Department to become a retirement home. (Black also disputes making these statements.) After being contacted by Nitschke's attorney on August 23, 2010, to discuss Wistrom's recollection of the meeting with Black at Union Grove on March 4, 2010, Wistrom informed Marshall of that contact by email. Marshall, in turn forwarded the email to the Department's office of legal counsel, who then forwarded it to the Deputy Secretary. Plaintiff contends that based on this email chain, Black "would have received news of this." Shaughnessy also informed Black's supervisory staff about his and Wistrom's affidavits.

OPINION

Wistrom alleges that Black intentionally discriminated based on race and sex in reassigning him to a new position in the Department's central office in Madison and that this reassignment constructively discharged him. Wistrom further alleges that Black took this action in retaliation for Wistrom filing an affidavit in support of Nitschke's ERD complaint. Wistrom brings both his discrimination and retaliation claims pursuant to 28 U.S.C. § 1981 (race) and equal protection violations pursuant to 42 U.S.C. § 1983 (race

and sex). The court adopts its discussion of the general law applicable to Wistrom's claims as set forth in its summary judgment opinion in *Nitschke*.

I. § 1981 Claim

As in *Nitschke*, defendant 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. For all the reasons stated in the court's opinion in *Nitschke*, the court also rejects defendant's § 1981 argument here.

II. Discrimination Claims

A. Materially Adverse Material Actions

To succeed on his discrimination claim, Wistrom must demonstrate that he suffered a materially adverse employment action. From the briefs, Wistrom appears to allege two related, but separate adverse actions. First, Wistrom alleges that Black's decision to reassign him to the central office in Madison was a materially adverse employment action. Second, Wistrom alleges that his decision to resign from the Department constituted a constructive discharge, which was also a materially adverse action. Taking them out of turn, the court will first analyze whether Wistrom has put forth sufficient evidence to support a jury finding that he was constructively discharged.

1. Constructive Discharge

"A constructive discharge occurs when working conditions become so unbearable that an employee is forced to resign." *Smith v. Bray*, 681 F.3d 888, 908 (7th Cir. 2012). This inquiry is made from the perspective of a reasonable employee. *Chapin v. Fort-Rohr Motors, Inc.* , 621 F.3d 673, 679 (7th Cir. 2010). Moreover, "[a] constructive discharge constitutes an adverse employment action." *Id.* (citing *Pa. State Police v. Suders*, 542 U.S. 129, 147 (2004)).

Black contends that Wistrom cannot demonstrate that his working conditions were "unbearable" because he never actually reported to work for his new position. The court declines to adopt such a bright line rule. As a general rule, however, "unless conditions are beyond 'ordinary' discrimination, a complaining employee is expected to remain on the job while seeking redress." *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir. 1997).

Wistrom contends that the conditions of his reassignment to the central office falls within the exception because the required 106 mile commute was unbearable in light of his and his wife's health condition. The undisputed facts, however, demonstrate that the Department was willing to provide Wistrom with certain accommodations -- namely a flexible work schedule while he transitioned to Madison and a period of time to relocate. Wistrom was clearly frustrated by Marshall's delayed response to his inquiries, and anxious to learn the specifics of a transition plan. Still, the Department's initial response demonstrated a willingness to work with Wistrom to figure out a workable plan, including suggesting that he explore FMLA in the interim if his and his wife's health

conditions warranted such a request. "An employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged." *Grube v. Lau Indus., Inc.*, 257 F.3d 723, 728 (7th Cir. 2001) (quoting *Ulichny v. Merton Comm. Sch. Dist.*, 249 F.3d 686, 704 n.16 (7th Cir. 2001)).

Based on the undisputed facts, the court finds that a reasonable jury could not find that a reasonable employee in Wistrom's situation would have found the situation so unbearable as to force his resignation. A reasonable employee in Wistrom's shoes would have at least explored FMLA prior to resigning. To the extent Wistrom is claiming that his reassignment to this position in Madison was a step towards termination, this, too, is insufficient to deem his resignation a constructive discharge. *See Chapin*, 621 F.3d at 679 (noting that a working condition does not become intolerable or unbearable merely because a "prospect of discharge lurks in the background" (quoting *Cigan v. Chippewa Falls Sch. Dist.*, 388 F.3d 331, 333 (7th Cir. 2004)).

2. Reassignment

While the court finds that Wistrom cannot demonstrate that he was constructively discharged, the question remains whether the reassignment itself was a materially adverse employment action. A reassignment that does not involve a change in an employee's grade and pay is usually not an adverse employment action. *O'Neal v. City of Chi.*, 392 F.2d 909, 911-13 (7th Cir. 2004) (holding that lateral transfers are generally insufficient to constitute a materially adverse employment action). Wistrom does not contend that the new position constituted a demotion or otherwise reduced his

responsibilities or opportunities for further advancement -- indeed, Black describes the reassignment as a promotion. Rather, Wistrom takes issue with the 108-mile commute or relocation requirement.

Other courts considering whether a commute or a relocation requirement in and of itself can constitute a materially adverse employment action have found that they cannot. *See, e.g.*, *Griffin v. Potter*, 356 F.3d 824, 829 (7th Cir. 2004) (finding that employee had failed to demonstrate a materially adverse action based on employer's decision to transfer her to another facility which required her to commute) (citing *Stutler v. Ill. Dep't of Corrections*, 263 F.3d 698, 703 (7th Cir. 2001); *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883, 886 (7th Cir. 1989) (finding further travel time to work insufficient to constitute a materially adverse action); *Medina v. Henderson*, No. 98-5471, 1999 WL 325497, at *1 (D.C. Cir. Apr. 30, 1999) (unpublished) (finding decision to relocate the employee from Denver to Washington, D.C. did not constitute an adverse employment action absent some other material negative change); *Elsik v. Regency Nursing Center Partners of Kingsville, Ltd.*, No. V-06-41, 2007 WL 2428288, at *6 (S.D. Tex. Aug. 22, 2007) ("Elsik's preference for staying at the Kingsville facility to avoid relocating does not change the fact that the position offered to her in Yoakum was a purely lateral transfer."). The court finds the reasoning of these other courts persuasive: absent some other material negative change, a lateral transfer requiring a commute or relocation does not constitute a materially adverse action.

The sole arguably "material" change lurking in this case might be the Department's and particularly Marshall's, failure to respond timely to Wistrom's

repeated and seemingly reasonable requests for temporary accommodations and guidance as he attempted to transition to Madison. Even assuming the record supported a finding that Marshall acted at Black's direction or implicit approval, however, this inaction is to attenuated and remote from the limited evidence of Black's discriminatory animus to support a claim for discrimination.

B. Discriminatory Intent

While the court found sufficient circumstantial evidence for a jury to infer discriminatory animus in *Nitschke*, the court cannot reach the same conclusion based on the record in this case. Black's alleged comments about the Department employing too many old, white men occurred over seven months before Wistom's reassignment. Such a lapse in time stretches the temporal link past the point of supporting an inference of intent. *See Geier v. Medtronic, Inc.*, 99 F.3d 238, 242 (7th Cir. 1996) ("To be probative of discrimination, isolated comments must be contemporaneous with the discharge or causally related to the discharge decision making process."). This, coupled with Black's more limited role in Wistrom's reassignment as compared to Nitschke's demotion and termination, further strains any connection between Black's earlier statements about the Department having too many old, white men and the decision to reassign Wistrom.

Moreover, unlike the actions against Nitschke that at least fell among an arguable pattern of initial hiring and other employment decisions by Black intended to increase the Department's diversity as to sex, race or both at the expense of "old, white men," this "pattern" seems to had dissipated by the time Wistrom was reassigned to the position in

Madison. If anything, this time lapse between these other actions and Wistrom's reassignment not only undermines a finding of intent based on an alleged pattern of discriminatory actions, it actually runs counter to the argument in *Nitschke* that Black was no longer actively discriminating on this basis to deter any scrutiny of his earlier actions.

The court, therefore, concludes that Wistrom has failed to put forth sufficient evidence from which a reasonable jury could conclude that Black acted with discriminatory animus, either on the basis of Wistrom's sex, race or both, in deciding to reassign him to the position in the central office. Accordingly, the court will grant summary judgment to Black on Wistrom's discrimination claims pursuant to 42 U.S.C. § 1981 and the Equal Protection clause of the Fourteenth Amendment.

III.Retaliation Claim

The United States Supreme Court held in *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 451 (2008), that the prohibitions against racial discrimination in making and enforcing contracts found in 42 U.S.C. § 1981 encompass retaliation claims.[8] A retaliation claim under § 1981 shares the same elements of proof as one brought under Title VII, 42 U.S.C. § 2000e. *Stephens v. Erickson*, 569 F.3d 779, 786 (7th Cir. 2009).

A plaintiff may establish a retaliation claim using either the direct or indirect method of proof. *Stephens*, 569 F.3d at 786. Wistrom appears to proceed under the

[8] The same cannot be said of the Equal Protection clause. *See Boyd v. Ill. State Police*, 384 F.3d 888, 898 (7th Cir. 2004) ("[T]he right to be free from retaliation may be vindicated under the First Amendment or Title VII, but not the equal protection clause.) (citing multiple cases in support). As such, while not raised by either party, the court will analyze plaintiff's retaliation claim solely through the lens of § 1981.

former method in his claim for retaliation against Black. Under this method, Wistrom must demonstrate: "(1) he engaged in a statutorily protected activity; (2) he suffered a materially adverse action by his employer; and (3) a causal connection exists between the two." *Id.*; *see also Argyropoulos v. City of Alton*, 539 F.3d 724, 733 (7th Cir. 2008); *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 404 (7th Cir. 2007), *aff'd* 553 U.S. 442 (2008). Though limited both in time and any arguable damage, Wistrom has done so with respect to Black's allegedly orchestrated, precipitous and unaccommodating insistence that Wistrom promptly begin work at the Department's central office in Madison.

1. Statutorily Protected Activity

At this stage, defendant does not appear to dispute that Wistrom engaged in protected activity by submitting an affidavit in support of Nitschke's ERD complaint, and for good reason. Submission of an affidavit in support of a discrimination claim is routinely viewed as protected activity. *See, e.g.*, *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) (finding protected activity where plaintiff failed to prevent "others from filing complaints, rather than for filing his own complaint"); *Barber v. CSX Distribution Servs.*, 68 F.3d 694, 702 (3d Cir. 1995) (finding "expressing support of co-workers who have filed formal charges" as protected activity) (quoting *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990)); *see generally O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 631 (7th Cir. 2011) (holding that plaintiff "must show that he took some step in opposition to a form of discrimination that the statute prohibits").

2. Materially Adverse Action

Unlike in the discrimination context, retaliation claims are "not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington N. & Santa Fe Ry. Co v. White*, 548 U.S. 53, 64 (2006). "In a retaliation case, an adverse action is 'one that a reasonable employee would find to be materially adverse such that the employee would be dissuaded from engaging in the protected activity.'" *Silverman v. Bd. of Educ. of City of Chicago*, 637 F.3d 729, 740 (7th Cir. 2011) (quoting *Roney v. Ill. Dep't of Transp.*, 474 F.3d 455, 461 (7th Cir. 2007)). While the court determined that reassigning Wistrom which required him to commute (at least in the short-term) and ultimately relocated to Madison did not constitute a materially adverse employment action, the question still remains whether a reasonable jury could find the circumstances surrounding Wistrom's reassignment constitutes a materially adverse action to support his retaliation claim.

"Context matters." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006). As this court noted in *Blue v. Int'l Broth. of Elec. Workers-Local 159*, 726 F. Supp. 2d 1009, 1016 (W.D. Wis. 2010), and as the Seventh Circuit has repeatedly cautioned, "an act that would be immaterial in some situations is material in others." *Washington v. Ill. Dep't of Revenue,* 420 F.3d 658, 661 (7th Cir. 2005). This leaves open the possibility of "a cognizable claim of retaliation based on acts which, although seemingly appropriate and nondiscriminatory in isolation, bespeak retaliation when considered together." *McKenzie v. Ill. Dep't of Transp.,* 92 F.3d 473, 483 n.7 (7th Cir. 1996).

In light of Wistrom's sudden, unceremonious reassignment just two weeks after he filed an affidavit in support of Nitschke's ERD complaint and the arguable unjustifiable inflexibility, or at least indifference, to Wistrom's seemingly-reasonable requests to slowly transition into his new position, a reasonable employee might view the circumstances of his reassignment to the Department's central office to be so materially adverse as to be dissuaded from engaging in further support of others' complaints of discrimination, or at least a reasonable jury could so find. Accordingly, the court finds that Wistrom has met his burden of proof to allow a jury to decide whether Wistrom suffered a materially adverse action in the context of his retaliation claim.

3. Causation

The last element of Wistrom's retaliation claim requires him to demonstrate a causal connection between his protected activity and his reassignment. Despite the lack of *direct* evidence of Black's involvement, the court finds that Wistrom has also submitted sufficient circumstantial evidence to allow a reasonable jury to infer causation.

Even though the reorganization plan had been in the works for several months, the three or four positions located at the Department's central office in Madison were not in the written plan, and there is nothing in the record to suggest that Wistrom had even been under consideration, much less assigned, to one of these positions before his affidavit was filed. Indeed, Black submits that Wistrom was selected in October 2010, and his affidavit was dated September 27, 2010. Nevertheless, less than two weeks after the ERD complaint was filed, Wistrom was suddenly reassigned to this central office

position. The short time between Black's alleged knowledge of Wistrom's affidavit and the decision to reassign him to the Madison office likely occurred "so close on the heels of a protected act that an inference of causation is sensible.'" *Benuzzi v. Bd. of Educ. of City of Chicago*, 647 F.3d 652, 654 (7th Cir. 2011) (quoting *Loudermilk v. Best Pallet Co., LLC*, 636 F.3d 312, 315 (7th Cir. 2011)); *see also Magyar v. St. Joseph Reg'l Med. Ctr.*, 544 F.3d 766, 772 (7th Cir. 2008) ("This court has found a month short enough to reinforce an inference of retaliation.").

While defendant contends that Black had no knowledge of Wistrom's affidavit, thereby foreclosing a finding of causation, the evidence raises a genuine issue of material fact as to whether Black was aware. First, Wistrom emailed Marshall about his contact with Nitschke's attorney. Marshall, in turn, forwarded the email to the Department's office of legal counsel, who then forwarded it to Donna Williams, the Deputy Secretary at that time. Shaughnessy also informed unidentified supervisory staff about Wistrom's and his affidavits. From this, a reasonable jury might still not be able to infer that Black was made aware of the affidavit, except that it is from a *current* employee, submitted in support of a discrimination complaint brought by a *former* employee, *and* avers that *Black* himself made certain statements about the Department having too many old, white men. Under these circumstances, it is reasonable to infer that the Secretary was likely apprised of the filing by one or more of these individuals.[9]

[9] This finding on summary judgment does not preclude this court from directing a verdict should all the evidence at trial show that inference as to *Black* is unreasonable.

In addition to the temporal link between Wistrom's protected activity and his reassignment, Wistrom also points to (1) the odd manner in which he was informed of the reassignment, (2) alleged repercussions of other employees who similarly supported Nitschke's ERD complaint, and (3) repeated failures to respond to his requests for accommodation of the timing of his start date. All of this in combination is sufficient for a reasonable jury to find a causal link between Wistrom's protected activity and the decision to reassign him to a position in the central office. *See Coleman v. Donahoe*, 667 F.3d 835, 860 (7th Cir. 2012) ("When temporal proximity is one among several tiles in an evidentiary mosaic depicting retaliatory motive, however, '[s]uspicious timing . . . can sometimes raise an inference of a causal connection.'" (quoting *Magyar*, 544 F.3d at 772)); *see also Scaife v. Cook County*, 446 F.3d 735, 742 (7th Cir. 2006) ("Close temporal proximity provides evidence of causation and may permit a plaintiff to survive summary judgment provided that there is other evidence that supports the inference of a causal link."). "A jury, not a judge, should decide whether the inference is appropriate." *Loudermilk*, 636 F.3d at 315. Even so, plaintiff should keep in mind that he will have to show both that (1) Black was specifically aware of Wistrom's protected activity and (2) that Black himself made the decision to reassign Wistrom.

ORDER

IT IS ORDERED that defendant Kenneth B. Black's motion for summary judgment (dkt. #10) is GRANTED IN PART AND DENIED IN PART. The motion is granted with respect to plaintiff's discrimination claims, but denied with respect to his

retaliation claim. The court also dismisses Wistrom's claim for retaliation brought pursuant to the Equal Protection Clause of the Fourteenth Amendment.

Entered this 20th day of August, 2012.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge