IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Denise Foster,

Plaintiff,

v. Case No. 2:02-cv-931

Maureen O'Connor and the
State of Ohio, Department
of Public Safety,

Defendants.

OPINION AND ORDER

This is an employment discrimination action filed by plaintiff Denise Foster against her former employer, the State of Ohio, Department of Public Safety ("the department"), specifically, the Ohio Bureau of Motor Vehicles ("the BMV"), a division of that department, and Maureen O'Connor, former director of the department. In her amended complaint filed on June 5, 2003, plaintiff, an African-American female, alleged violations of the Equal Pay Act ("the EPA"), 29 U.S.C. §206 et seq., and race and gender discrimination and retaliatory termination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000 et seq. against the department. Plaintiff also asserted a claim under 42 U.S.C. §1983 against O'Connor in her official and individual capacities, alleging that O'Connor terminated plaintiff's employment due to her complaints about unequal pay and race and gender discrimination in violation of her First Amendment, equal protection and substantive due process rights.

I. Motion to Dismiss

Plaintiff has filed a motion to dismiss O'Connor as a party

insofar as she has been sued in her individual capacity. Defendants do not oppose this motion. Plaintiff's motion to dismiss O'Connor as a defendant in her individual capacity is granted. Plaintiff suggests that O'Connor should remain a party in her official capacity. However, O'Connor is no longer the director of the department, and is not in a position to grant any relief requested by plaintiff. Defendants have indicated that the current director, Kenneth L. Morckel, should be substituted as a party pursuant to Fed.R.Civ.P. 25(d)(1). Under Rule 25(d)(1), when a public officer named as a party ceases to hold office, the officer's successor is automatically substituted as a party. The court finds that substitution is appropriate in this case, and Kenneth L. Morckel, in his official capacity as director of the Ohio Department of Public Safety, is hereby substituted as a party for Maureen O'Connor.

II. Motion to Amend Complaint

Plaintiff has moved for leave to file a second amended complaint to add a claim of retaliation under the EPA, 29 U.S.C. §215(a)(3).

Under Fed.R.Civ.P. 15(a), leave to amend should be liberally given. Foman v. Davis, 371 U.S. 178, 182 (1962); Fisher v. Roberts, 125 F.3d 974, 977 (6th Cir. 1997). Leave to amend should be freely given in the absence of such factors as undue delay, bad faith or dilatory motive on the part of the plaintiff, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the opposing party. Davis, 371 U.S. at 182; Hahn v. Star Bank, 190 F.3d 708, 716 (6th Cir. 1999).

In this case, plaintiff has offered no explanation as to why

she did not previously include a claim under §215(a)(3) in her complaint. However, she did plead a retaliation claim under Title VII, including allegations that she was terminated in retaliation for complaining about her unequal pay. Her proposed EPA retaliation claim is based on the same facts alleged in her complaint to support the Title VII retaliation claim. The same legal analysis applies to both retaliation claims. See Hafford v. Seidner, 183 F.3d 506, 515 (6th Cir. 1999)(prima facie case for Title VII); Connor v. Schnuck Markets, Inc., 121 F.3d 1390, 1394 (10th Cir. 1997)(prima facie case for EPA retaliation). The court concludes that defendants will not be prejudiced by the addition of this theory of recovery, and the motion to amend is granted.

III. Motion for Summary Judgment

A. Standards

The defendants have filed a motion for summary judgment on plaintiff's claims. The procedure for granting summary judgment is found in Fed. R. Civ. P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). However, summary judgment is appropriate if the opposing party fails to make a

showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex and Matsushita effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v. J. C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). The court in Street identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. Id. at 1479. In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Id. (quoting Liberty Lobby, 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. Id. It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" Id. (quoting Matsushita, 475 U.S. at 586). Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." Id. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

B. Eleventh Amendment Immunity

Defendants have moved to for summary judgment on plaintiff's claims under §1983, asserting that those claims are barred by the Eleventh Amendment. It is well established that the Eleventh Amendment prevents a federal court from entertaining a suit brought by a citizen against his or her own state. Hans v. Louisiana, 134 U.S. 1 (1890). A state is immune from suits, regardless of whether the relief sought is legal or equitable, unless the state waives its immunity. Welch v. Texas Dept. of Highways & Public Transp., 483 U.S. 468 (1987); Thiokol Corp. v. Dept. of Treasury, State of Michigan, Revenue Div., 987 F.2d 376, 381 (6th Cir. 1993). The Eleventh Amendment also protects state agencies where the agency is an "arm or alter ego of the state." Hall v. Medical College of Ohio, 742 F.2d 299, 301 (6th Cir. 1984). The Eleventh Amendment also bars actions for damages against state officials sued in their official capacities. Kentucky v. Graham, 473 U.S. 159 (1985).

To the extent that plaintiff seeks money damages from the department and Morckel in his official capacity or equitable relief against the department, her claims are barred by the Eleventh Amendment. However, insofar as plaintiff seeks prospective injunctive relief under §1983 against defendant Morckel in his official capacity, such claims are not barred by the Eleventh Amendment. Ex Parte Young, 209 U.S. 123 (1908); Wilson-Jones v. Caviness, 99 F.3d 203 (6th Cir. 1996); Williams v. Commonwealth of Kentucky, 24 F.3d 1526 (6th Cir. 1994).

Defendants also argue that plaintiff's claims under the EPA are barred by the Eleventh Amendment, citing a case from the Seventh Circuit. However, the Sixth Circuit has held that the

Eleventh Amendment is not a bar to EPA claims. See Kovacevich v. Kent State University, 224 F.3d 806, 820-21 (6th Cir. 2000). Plaintiff's EPA claims are not subject to dismissal under the Eleventh Amendment.

C. Viability of §1983 Retaliation Claims

Defendants also argue that plaintiff may not assert, by way of §1983, her claims of retaliation in violation of the EPA and Title VII. Defendants are correct. The Sixth Circuit has held that Title VII provides the exclusive remedy for violations of the retaliation provisions of Title VII, 42 U.S.C. §2000e-3(a). See Morris v. Oldham County Fiscal Court, 201 F.3d 784, 795 (6th Cir. 2000). The reasoning in that case also applies to retaliation in violation of the EPA, 29 U.S.C. §215(a)(3). Thus, plaintiff's only remedies for violations of the retaliation provisions of Title VII and the EPA are the remedies provided by those provisions. The only retaliation claim which plaintiff may pursue under §1983 is her First Amendment retaliation claim.

D. Facts of the Case

Plaintiff is a former employee of the BMV, a division of the Ohio Department of Public Safety. The BMV is headed by the registrar of the BMV, who in turn reports to the director of the Department of Public Safety. The BMV is the state agency responsible for the registration of motor vehicles, the distribution of registration funds to local taxing districts, the licensing of drivers, the licensing and regulation of motor vehicle dealers, the maintenance of driver licensing records and vehicle registration records, the imposition of driver license suspensions and revocations, and the administration of other motor vehicle

laws. The BMV has over nine hundred employees.

Plaintiff was a BMV employee for approximately seventeen years. Plaintiff began her employment as an administrative officer, and was eventually promoted in 1997 to the position of assistant registrar by then Director Mitchell Brown. At the time, there was only one assistant registrar position at the BMV. Plaintiff reported directly to Franklin Caltrider, the registrar of the BMV.

The position of assistant registrar is the second-highest position in the BMV. It is an unclassified, exempt position, and persons in that position are appointed and serve at the pleasure of the director. The position is designated at the level of Deputy Director 5 on the pay scale. Persons promoted to that position from within state government receive a pay increase in the amount of a set percentage of their current salary. When plaintiff was promoted to the position, she received the maximum percentage increase permitted. When a person who is not a state employee is hired for a position, the appointing authority, in this case the director, can choose any starting salary within the pay range for that position.

In January of 1999, Maureen O'Connor assumed office as Lieutenant Governor of Ohio, and she was also appointed to be the director of the Department of Public Safety. O'Connor was concerned about implementing improvements at the BMV, particularly in the area of customer service. She decided to create a second assistant registrar position. She offered this position to Terrell Metcalf. Mr. Metcalf had previously occupied the position of chief administrator for the Child Support Enforcement Agency in Summit

County under O'Connor, who at the time was the prosecuting attorney for Summit County. Metcalf's previous job experience included managing and operating telecommunications centers, and O'Connor felt that he could improve the BMV's service to the public. O'Connor set his starting salary at $75,000, a figure within the pay range for a Deputy Director 5. She was unaware of plaintiff's salary when she made this decision. When Metcalf assumed the new assistant registrar position, plaintiff's duties were split between plaintiff and Metcalf, roughly divided according to internal and external operations.

Plaintiff was responsible for managing the external operations of the BMV. Her duties included managing the Dealer Licensing Section, the Investigations Section, and the Deputy Registrar Services Section. Metcalf was responsible for internal operations, including the Help Services Section, the deputy registrar selection process, and management responsibility for approximately two-thirds of the BMV employees. Metcalf was also assigned the new task of training regional managers for the newly proposed BMV customer service centers.

In November of 2000, plaintiff learned that Metcalf was receiving a salary higher than hers. Plaintiff complained to Caltrider about this discrepancy on November 27, 2000, and Caltrider informed O'Connor about plaintiff's complaint. O'Connor asked Gary Joseph, the assistant director for the Department of Public Safety, to look into the matter. In discussing the matter with Joseph and O'Connor, plaintiff never used the words "discrimination" or "harassment."

Joseph concluded that the pay disparity was due to plaintiff's

previous employment history with the BMV. Plaintiff had begun her employment with the BMV after being hired by a previous administration, and received a starting salary commensurate with the position she then occupied. Any raises plaintiff received after her initial hire, including annual and merit raises and raises upon promotion, were governed by mandatory percentage limits. In contrast, Joseph found that Metcalf's initial starting salary as a new hire was permissibly chosen by O'Connor from the applicable pay range for the position. O'Connor concluded that there was nothing she could do under the rules applicable to pay increases to raise plaintiff's salary so that it would be equal to Metcalf's salary. In June of 2001, Joseph informed plaintiff that O'Connor would not adjust her salary.

In October of 2000, plaintiff complained to O'Connor that Metcalf and Caltrider often had lunch or coffee together in the cafeteria and did not invite her to join them. She did not specifically complain that she felt she was being excluded from business activities on the basis of her race or sex. She did not use the words "discrimination" or "harassment" when talking to O'Connor. Plaintiff admitted that she had no way of knowing whether these meetings over coffee were business related. She told O'Connor that as a woman, O'Connor may have experienced problems interacting with men. O'Connor concluded that plaintiff was concerned that Caltrider and Metcalf were "tight" and that plaintiff was feeling like an outsider. She told plaintiff that Metcalf and Caltrider were friends, and that the get-togethers in the cafeteria did not require a formal invitation. O'Connor also told plaintiff that she thought that Caltrider and Metcalf

genuinely liked each other. Although O'Connor felt that plaintiff's concerns were baseless, inappropriate, and paranoid, she was concerned about plaintiff's feelings, and agreed to mention them to Caltrider. Caltrider stated in response to plaintiff's complaints that he was free to spend his personal time as he liked. According to Caltrider, Metcalf was not there by his invitation, but simply sat at the same table, and they did not discuss business during that time.

Caltrider worked with plaintiff for a number of years and felt that she was a qualified employee. He had recommended plaintiff for the position of assistant registrar upon his own promotion to the position of registrar. However, beginning in March of 1999, Caltrider began to lose confidence in plaintiff's judgment and ability to supervise, and he became less comfortable working with plaintiff. Caltrider gave as an example the fact that, upon plaintiff's promotion, plaintiff represented that her secretary, who would serve as backup to Caltrider's assistant, was a satisfactory employee. Caltrider had heard that plaintiff's secretary engaged in nonwork-related activities and gave her work to others, and plaintiff assured him that this was not true. He relied on plaintiff's advice, but he later learned from personal observation that the reports were true, and also discovered that plaintiff's secretary did not get along with his assistant. He was forced to transfer plaintiff's secretary to another position. After this experience, he had less confidence in plaintiff's judgment.

Caltrider also stated that plaintiff would confront him in an adversarial way about his management style. Plaintiff complained

about him speaking directly with the employees under her supervision even when he felt that the questions being asked were about trivial matters.

Carolyn Williams, deputy administrator for Owner/Operator Services, worked under plaintiff's supervision prior to the creation of the new position filled by Metcalf. Williams complained to Caltrider that plaintiff engaged in micro-management and called her ten to fifteen times a day about minor things. Williams was also upset because plaintiff would call the employees working under Williams into her office for meetings, but would not include Williams in these meetings. Williams was concerned that plaintiff was intentionally withholding information from her which she needed to do her job. When Metcalf joined the BMV, the section managed by Williams was transferred to his supervision.

Caltrider was also upset by plaintiff's conduct relating to a reorganization of the BMV. In the spring of 2001, Metcalf approached Caltrider with the idea of reorganizing the BMV. Caltrider refused to discuss Metcalf's oral proposals, and told Metcalf that he preferred that any suggestions be in writing. He told Metcalf that if he wanted to submit a written proposal, he would consider it. At that point, Caltrider did not have any plans for reorganizing the BMV, and he had not had any discussions with O'Connor about reorganization.

Plaintiff learned from John Demaree, the human resources administrator, that a reorganization was being considered. Plaintiff complained to Caltrider about the fact that she had not been consulted about the proposed reorganization. She asked Caltrider what had been proposed. Since this conversation with

plaintiff occurred prior to Caltrider's receipt of Metcalf's written proposal, he stated that he had no idea. He explained to plaintiff that he was not contemplating a reorganization, but that when Metcalf asked if he would consider a reorganization plan, Caltrider told him that anyone was free to suggest improvements. Caltrider told plaintiff that she was also free to make her own proposal. Plaintiff agreed in her deposition testimony that Caltrider had told her that Metcalf mentioned a reorganization proposal, but that he wasn't interested in talking to Metcalf and told him to submit in writing. Plaintiff also acknowledged that Caltrider had told her she could submit her own proposal.

Upon leaving Caltrider's office after this discussion, plaintiff told Rebecca Wharton, a BMV employee, that Caltrider had lied to her about not knowing anything about the reorganization. Wharton reported this statement to Caltrider's secretary and to Caltrider. According to Caltrider, when he called plaintiff back to his office, she neither affirmed or denied making the statement. Rather, she demanded that he call in the employee who had made the accusation. Caltrider refused to do this, and plaintiff left the office. In her deposition, plaintiff denied referring to Caltrider as a liar. Caltrider denied that he lied to plaintiff, and he felt that it was inappropriate and disloyal for plaintiff to make such a statement about her supervisor to a subordinate employee.

Metcalf and plaintiff submitted written reorganization proposals at a meeting with Caltrider on July 30, 2001. Caltrider reviewed these proposals, and he approved of a reorganization plan which basically mirrored the proposal submitted by Metcalf. Caltrider forwarded his proposal to O'Connor on August 7, 2001.

O'Connor approved the reorganization.

Under the reorganization plan, the section supervised by Williams would fall under plaintiff's supervision. Williams told Metcalf that she did not want to have to work under plaintiff, and that if she was reassigned to plaintiff's supervision, she would leave the BMV. Metcalf told her to report her concerns to Caltrider, and she did so. Caltrider told Williams that it would be a loss to the Bureau if she did not remain in the driver's license field, and Williams agreed to do whatever he asked. Another deputy administrator, Jim Chisman, also objected to working under plaintiff.

After the reorganization was announced, Wharton, whose cubicle was located across the hall from plaintiff's office, overheard plaintiff talking on the phone. According to Wharton, plaintiff stated that Carolyn Williams, who is African-American, was "acting like a monkey." Plaintiff agreed in her deposition that she may have said this, meaning that Williams was acting in an unprofessional manner about the reorganization. A few days later, Wharton allegedly heard plaintiff state that Williams was "acting like a fool, just a total black bitch." Plaintiff denied in her deposition that she had said this. Wharton informed Caltrider about these statements.

Caltrider reported these incidents to O'Connor. He indicated that he had lost trust in plaintiff and recommended that she be terminated. After several discussions with Caltrider, O'Connor approved plaintiff's termination. On August 30, 2001, plaintiff was given her termination letter.

E. Equal Pay Claims under the EPA and Title VII

The "EPA's target is intentional, gender-based wage discrimination." Kovacevich, 224 F.3d at 819. "[T]he language of the statute targets intentional discrimination, stating that no employer 'shall discriminate ... between employees on the basis of sex by paying wages to employees ... at a rate less than the rate at which he pays wages to employees of the opposite sex.' 29 U.S.C. §206(d)(1)." Id.

Under the EPA, plaintiff bears the burden of proving that the defendant employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions[.]" Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974); 29 U.S.C. §206(d). To establish a prima facie case for an EPA claim, the plaintiff must show that the employer paid different wages to an employee of the opposite sex for substantially equal work. Kovacevich, 224 F.3d at 826. "Equal work" does not require that the jobs be identical, but only that there exist substantial equality of skill, effort, responsibility and working conditions. Buntin v. Breathitt County Bd. of Educ., 134 F.3d 796, 799 (6th Cir. 1998). To determine if the work is substantially equal, a court must make an overall comparison of the work, not its individual segments. Id.

Once the plaintiff establishes a prima facie case, the defendant must prove by a preponderance of the evidence that the wage differential is justified under one of the four affirmative defenses set forth in the EPA: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any other factor other than sex. Kovacevich,

224 F.3d at 826; 29 U.S.C. §206(d)(1). The burden of proving that a factor other than sex is the basis for a wage differential is a heavy one. Buntin, 134 F.3d at 799. However, if a defense is proven, the employer is absolved of liability. Timmer v. Michigan Dept. of Commerce, 104 F.3d 833, 843 (6th Cir. 1997).

Plaintiff also asserts a claim of wage discrimination under Title VII. Title VII incorporates the EPA's affirmative defenses into a Title VII wage discrimination claim. Id. A Title VII wage discrimination claim differs somewhat from an EPA claim because a plaintiff may bring a Title VII wage discrimination claim even though no member of the opposite sex holds an equal but higher paying job. County of Washington v. Gunther, 452 U.S. 161, 168 (1981); Kovacevich, 224 F.3d at 828. In addition, the framework of proof established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) is applied. Under this formula, the plaintiff bears the initial burden of establishing a prima facie case of discrimination by showing that: (1) she was a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment decision; and (4) she was treated differently than similarly situated male or Caucasian employees. Thurman v. Yellow Freight Systems, Inc., 90 F.3d 1160, 1168 (6th Cir. 1996). Once a prima facie case is established, the employer must articulate a legitimate, nondiscriminatory reason for the pay disparity. Meeks v. Computer Associates Int'l, 15 F.3d 1013, 1019 (11th Cir. 1994). When the employer advances its reasons, the plaintiff must demonstrate that the proffered justifications are actually a pretext for discrimination, that is, that a discriminatory reason more likely than not motivated the employer to pay her less, or

that the employer's explanation is not worthy of belief. Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1529 (11th Cir. 1992). See also Meeks, 15 F.3d at 1019 (plaintiff must demonstrate that the employer had a discriminatory intent by direct or circumstantial proof).

The Sixth Circuit "equates EPA liability for discrimination 'on the basis of sex' with liability under Title VII for intentional sex discrimination. Kovacevich, 224 F.3d at 820. Therefore, a finding of liability under the EPA requires a similar finding of liability under Title VII where both claims present the same conduct and evidence. Korte v. Diemer, 909 F.2d 954, 959 (6th Cir. 1990).

Upon review of the record, this court concludes that plaintiff has established the existence of genuine issues of material fact in regard to the elements of her prima facie case of pay disparity. There is no question that Metcalf, a male employee, was paid more than plaintiff, a female employee. Defendants argue that the two positions did not involve substantially equal work. However, the positions occupied by plaintiff and Metcalf had the same title and pay range. Prior to the creation of the new assistant registrar position, plaintiff performed all of the responsibilities of the position of assistant registrar. When Metcalf was appointed to the new position, these responsibilities were divided between plaintiff and Metcalf. Their job responsibilities were not identical, since plaintiff supervised external operations, while Metcalf supervised external operations. There is also evidence that Metcalf performed extra duties and worked on special projects. However, it is not clear how significant these additional responsibilities were. The

job responsibilities held by plaintiff and Metcalf were discussed only in general terms in the deposition testimony. Based on the current record, reasonable minds could reach different conclusions on whether the two positions involved equal skill, effort and responsibility. The court concludes that a genuine issue of fact has been raised as to whether there is a meaningful distinction between the jobs performed by plaintiff and Metcalf.

The defendants bear the burden of showing that the fact that Metcalf was paid a larger salary was due to a factor other than gender. Defendants argue that this was the case. They note that at the time O'Connor hired Metcalf, she was familiar with Metcalf's work and employment history because Metcalf had supervised the Child Support Enforcement Agency in Summit County under O'Connor. O'Connor, as the appointing authority, had the discretion to set Metcalf's salary anywhere within the range for the position. The assistant registrar position was classified for salary purposes as a Deputy Director 5, and the starting salary of $75,000 selected by O'Connor was within that range.

O'Connor stated that in choosing Metcalf's starting salary, she considered the minimum and maximum amounts allowable under the range ($49,941 to $80,538 per year), Metcalf's resume, his work history, job performance, and career path, and his success level in those previous positions. O'Connor Dep., p. 77. She was particularly interested in Metcalf due to his previous experience in the area of customer service, which she perceived to be a problem at the BMV. O'Connor Dep., p. 96. Metcalf's previous job experience included managing and operating telecommunications centers, and O'Connor felt that he could improve the BMV's service

to the public. O'Connor did not examine the salaries of other employees such as plaintiff prior to hiring Metcalf, and she denied that his salary was selected as the result of a conscious decision to pay Metcalf more than plaintiff. O'Connor Dep. p. 69. A salary decision based on factors such as training, education or experience is a factor other than sex recognized by the EPA. Hutchins v. International Broth. of Teamsters, 177 F.3d 1076, 1081 (8th Cir. 1999)

The defendants have also offered evidence that the discrepancy in salaries was due to the fact that different rules are applicable to the salaries of current state employees and the hiring of employees from outside state government. Plaintiff's salary was the result of her seventeen-year employment history with the state. Plaintiff's starting salary was within the range applicable to the lower administrative position for which she was originally hired many years ago. Over the years, she received annual or merit raises in accordance with an established schedule applicable to all employees. She also received set percentage raises upon her promotion to other positions. At the time in question, plaintiff's salary was within the range for the position of Deputy Director 5. However, Metcalf, as a new hire, was eligible for a higher salary within that range at the discretion of O'Connor as the appointing authority. Prior employment history may constitute a factor other than sex. See Covington v. Southern Illinois University, 816 F.2d 317 (7th Cir. 1987)(salary retention policy, whereby employee retained present salary upon transfer to another position, was a factor other than sex).

The instant case is similar in many respects to the situation

in E.E.O.C. v. Aetna Ins. Co., 616 F.2d 719 (4th Cir. 1980). In that case, the employer had different systems for setting the salaries of new employees and existing employees. The salaries for new employees were governed by the annual company policy statement, the regularly updated salary scale, and the individual's attributes and qualifications. The salaries of existing employees were determined by the employee's starting salary plus any merit and inflationary increases and any adjustments which were designed to assure that an employee's salary was at least at the minimum for his or her grade level.

The court in Aetna noted that under the dual system used by the employer, the salaries of new employees with a certain level of experience were not coordinated with the salaries of established employees with comparable experience, and that it was not uncommon for a new employee to be compensated more than an older employee, although the older employee was performing the identical job. Id. at 723. The court also noted that there was nothing in the record to indicate that female employees were treated in any way different from the treatment accorded male employees in the operation of this dual system. Id. The court concluded that the pay differential in that case "was attributable to the existence of two distinct salary programs, neither of which had sex discrimination as a purpose or as an effect." Id. at 726.

The court also rejected the argument that the establishment of the salary for the newly-hired male was suspect because it entailed a subjective component. The court noted that "[a]n element of subjectivity is essentially inevitable in employment decisions" and that the employer in that case was able to offer demonstrable

reasons for the decision unrelated to sex, including the qualifications of the new hire and the employer's need to hire an agent with those qualifications to serve its need to expand its business in the commercial casualty field. Id.

In Girdis v. EEOC, 688 F.Supp. 40 (D.Mass. 1987), the court held that no EPA violation occurred as a result of pay differentials due to the application of bona fide, gender-neutral federal personnel laws and policies. In that case, a male employee who was not already a federal employee was hired at a higher wage grade than female federal employees who were subject to time-in-grade restrictions. The court noted that because this male employee was not subject to the time-in-grade restrictions, the EEOC had the discretion to hire him at the highest rate for which he was qualified, but did not have the discretion to hire the female plaintiffs, who were already federal employees, at that level due to time-in-grade restrictions or related policies. Id. at 48. The court noted that the salaries of male employees in plaintiffs' position would also have been limited by the time-in-grade restrictions. Id.

Here, the record shows that the salary levels for unclassified BMV employees were controlled by two different sets of rules, one applicable to new hires, and one governing persons who were already state employees. The rules for salary increases for existing state employees serve the budgetary concerns of the state and help ensure that all current state employees are treated equitably in the matter of raises. The benefits of this system are illustrated, for example, by the fact that Carolyn Williams, a supervisor who worked under plaintiff, received a higher salary than plaintiff due to her

years of service with the state. In contrast, the rules for the hiring of persons outside the state government give the appointing authority the flexibility to take into account the particular skills or experience of the applicants, as well as the agency's need for a person with certain qualifications to fill a particular position or to serve a particular function within the agency, in setting a salary which will attract such applicants. There is no evidence that these rules are applied in a discriminatory fashion based on gender or race.

Plaintiff contends that O'Connor was not precluded from changing her pay to match Metcalf's salary. She notes a situation involving a male employee, Lawrence Kobi, whose salary was adjusted. However, in order to prove a claim of disparate treatment, plaintiff must show that she and the comparable person were similarly situated in all respects. Mitchell v. Toledo Hospital, 964 F.2d 577, 583 (6th Cir. 1992). The evidence reveals that Kobi's salary problem was not comparable to plaintiff's. Kobi had retired from the Ohio State Highway Patrol, another branch of the Department of Public Safety, and applied for a job with the BMV. John Demaree, the BMV human resources administrator, selected Kobi's starting salary under the mistaken belief that an employee who retired from one state agency could not transfer to another state agency and be placed into an advanced step. Demaree Dep., p. 133. In fact, the law had changed three months before Kobi's placement, and he was eligible to be put in Step 3. Id., p. 132. When Demaree realized his error, he recommended that Kobi be placed in the appropriate advance step. Id., p. 133. Thus, Kobi's original salary was the product of an administrative error, and the

higher salary he later received was authorized under the applicable salary rules. In addition, Kobi was apparently a classified employee, because the evidence shows that only classified positions have steps within the pay range. Unclassified positions such as that occupied by plaintiff do not have steps within the range. Joseph Dep., p. 75.

Plaintiff has produced no evidence that her salary was improperly determined or calculated over the years under the rules governing salaries for unclassified state employees. Rather, she contends only that Metcalf should not have received a higher salary, or that her salary should have been raised to match Metcalf's salary. Plaintiff's salary was not the product of an administrative error. The defendants have presented evidence that the rules applicable to employee salary levels and raises permitted O'Connor to determine where to place Metcalf as a newly hired employee within the salary range, but did not did not permit O'Connor to raise plaintiff's salary. Kobi was not a similarly situated individual, and the fact that the BMV was able to rectify the administrative error in his case does not establish that plaintiff was the victim of disparate treatment by reason O'Connor's refusal to adjust her salary.

Plaintiff points to the fact that on occasion, the BMV was authorized to grant merit raises in an amount from zero to five percent. See, e.g., Demaree Dep., Ex. 4 (memo dated June, 1999, authorizing merit raises in the amount of zero to five percent). Plaintiff suggests that her salary could have been raised to the level of Metcalf's salary by giving her a higher percentage merit raise and Metcalf a lower percentage merit raise. However, this

proposed solution would violate the EPA. Under 29 U.S.C. §206(d)(1), it is unlawful for an employer to reduce the wage rate of any employee in order to comply with the EPA. E.E.O.C. v. Romeo Community Schools, 976 F.2d 985, 988 (6th Cir. 1992). Giving Metcalf a lower merit raise than he otherwise would have been entitled to receive in order to achieve parity with plaintiff's salary would have violated this provision.

Plaintiff also notes the deposition testimony of John Demaree concerning O'Connor's authority to select a salary depending on whether the money was available and whether the governor's office was willing to approve the hire. However, the testimony cited by plaintiff concerned O'Connor's authority to establish the new assistant registrar position and to hire Metcalf as a new hire. Demaree was not talking about O'Connor's authority to adjust pay ranges for current employees. Plaintiff points to no authority which would have authorized O'Connor to adjust her salary as a current employee.

The evidence shows that O'Connor was unaware of plaintiff's salary when she set Metcalf's salary. There is no evidence that O'Connor acted with the intent to discriminate against plaintiff on the basis of her sex or race in choosing Metcalf's salary. Plaintiff argues that O'Connor's failure to first ascertain what salary plaintiff was making shows that defendants' stated reasons for the disparity are pretextual. However, the state rules for new hires do not quire the appointing official to examine the salaries of current employees before selecting a salary within the range for a new hire. There is no evidence that O'Connor acted improperly in failing to first learn plaintiff's salary, and this failure does

not undermine the fact that O'Connor based Metcalf's salary on factors other than sex.

The court finds that defendants have sustained their burden under the EPA of showing that they can prove that the decision to award Metcalf a starting salary which exceeded plaintiff's salary was based on factors other than sex. No genuine issue of material fact has been shown to exist in regard to that defense.

The court further finds that the defendants have submitted evidence of legitimate, nondiscriminatory reasons for their decision in response to plaintiff's allegations of Title VII discrimination in pay based on race. Plaintiff has failed to produce evidence sufficient to raise a genuine issue of material fact on the question of whether these reasons were pretextual. There is no evidence in the record which would support a reasonable inference of discrimination in pay based on sex or race. Defendants are entitled to summary judgment on plaintiff's unequal pay claim under the EPA and on plaintiff's wage discrimination claim under Title VII.

F. Discrimination Based on Gender and Race in Matters Other Than Pay

1. Standards

Plaintiff alleges that she was treated differently than male or non-minority employees, and that she was terminated from her employment based on her gender and race. In order to prove a claim of disparate treatment under Title VII, plaintiff may establish a prima facie case under McDonnell Douglas by showing: (1) that she is a member of a protected class; (2) that she was qualified for the job; (3) that she suffered an adverse employment decision; and

(4) that she was replaced by someone outside the protected class or that similarly situated non-minority employees were treated more favorably. Clayton v. Meijer, Inc., 281 F.3d 605, 610 (6th Cir. 2002).

Once plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the discharge or other employment decision. Braithwaite v. Timken Co., 258 F.3d 488, 493. Plaintiff then must demonstrate that the defendant's explanation for the employment decision is a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993)("[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times on the plaintiff.") A plaintiff can demonstrate pretext by showing that the proffered reason: (1) had no basis in fact; (2) did not actually motivate the defendant's challenged conduct; or (3) was insufficient to warrant the challenged conduct. Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1084 (6th Cir. 1994).

The court notes that plaintiff did not respond to defendants' motion for summary judgment on these claims in her memorandum contra. Therefore, these claims are deemed to be waived. However, the court will also address the merits of defendants' motion for summary judgment on these claims.

2. Alleged Disparate Treatment

a. Failure to Include Plaintiff at Lunch or at Meetings

Plaintiff alleges that she was subjected to disparate treatment because she was not invited by Caltrider to certain meetings in his office, or to join him for lunch. Plaintiff

claims that Caltrider and some of the other men in the office went out to lunch with Metcalf on his first day of work, and that she was not invited. Plaintiff's Dep., p. 146. When plaintiff asked Caltrider why she had not been invited, he stated that they were not talking about anything important. She also stated that she didn't know if Caltrider intentionally excluded her. Plaintiff's Dep., p. 147. Plaintiff also contended that she was not included in meetings with Metcalf and other employees in Caltrider's office. She alleged that Caltrider had meetings over coffee and at lunch in the cafeteria, and that she was not invited to these meetings. Plaintiff's Dep., pp.143-44.

Plaintiff complained to O'Connor about the fact that Caltrider and Metcalf were excluding her from having coffee or lunch with them. O'Connor Dep., p. 48. O'Connor told her that the two men were friends. O'Connor Dep., p. 48. O'Connor also told plaintiff that the meetings in the cafeteria were not scheduled mandatory events, and that plaintiff could have gone down to get coffee with them. O'Connor Dep., p. 49. She got the impression that plaintiff was not concerned about being excluded from business conversations, just that they were spending a lot of time together. O'Connor Dep. p. 50. It was her impression that plaintiff was concerned that Caltrider and Metcalf were "tight" and that plaintiff was an outsider. O'Connor Dep., p. 51. O'Connor felt that plaintiff's concerns were "baseless, inappropriate and paranoid." O'Connor Dep., p. 52. When O'Connor informed Caltrider about plaintiff's comments, he responded that it was his personal time and he resented being questioned about it. O'Connor Dep., p. 53.

Title VII prohibits discrimination against any individual

"with respect to his compensation, terms, conditions, or privileges of employment" on the basis of race or gender. 42 U.S.C. §2000e-2(a)(1). Plaintiff has cited no authority for the proposition that being invited to have lunch or to otherwise socialize with a superior on his own personal time is a term and condition of employment.

There is no evidence that plaintiff's job performance was ever hampered because she did not join Caltrider's table at lunch. Plaintiff has admitted that it is pure speculation on her part that business matters were discussed during the lunch hour. She stated that she had no way of knowing whether these meetings were business related, and that she did not know what was being discussed at the morning coffee meetings. Plaintiff's Dep., pp. 143, 146. Plaintiff has produced no evidence that business was discussed when Metcalf and Caltrider sat at the same table for lunch.

In contrast, Metcalf testified in his deposition that he occasionally saw Caltrider in the mornings in the cafeteria or chatted with him in his office, but that they did not talk business on these occasions. Metcalf Dep., pp. 122-24. Metcalf stated that while having morning coffee, business was not discussed. Metcalf Dep., p. 123. Caltrider stated that he did not discuss business during that time, and that even when O'Connor sat with them, they were usually just socializing. Caltrider Dep., pp. 251, 253. He thought that plaintiff's complaint about him spending personal time with his friends was "absurd." Caltrider Dep., p. 249.

The evidence also fails to establish that Metcalf or Caltrider in some way created a hostile work environment in the employee cafeteria by failing to invite plaintiff to join them at the table.

There is no evidence that plaintiff ever attempted to join Caltrider's table. There is no evidence that plaintiff was ever discouraged or rebuffed in any way from sitting with Caltrider and Metcalf. Metcalf stated, "It wasn't by invitation, anybody could sit there [at Caltrider's table]. Metcalf Dep., p. 238. He stated that O'Connor joined them on a few occasions, and that another woman, Holly Mitchell, sat with them on several occasions. Metcalf Dep., pp. 139, 239. Caltrider stated in his deposition that Metcalf did not sit with him at lunch by invitation, but simply gravitated to the same table. Caltrider Dep., p. 248. As O'Connor told plaintiff, the meetings in the cafeteria were not scheduled mandatory events, and plaintiff was free to go down to get coffee with them. O'Connor Dep., p. 49. There is no evidence that plaintiff's failure to do so was the result of anything other than her own self-imposed inhibitions.

Plaintiff has also failed to produce evidence, other than conclusory, nonspecific allegations in her affidavit, that she was excluded from any other business meetings which had any impact on her own job responsibilities. Metcalf indicated that he occasionally went to Caltrider's office just to socialize briefly. However, even assuming that they did discuss business on some occasions, this would not have necessarily affected plaintiff's job, since she and Metcalf had responsibility over different operations of the BMV. Plaintiff also complained about the fact that Caltrider met with her employees on occasion. However, Caltrider stated in his deposition that he believed that his conversations with plaintiff's staff were about trivial matters, such as whether a particular automobile license plate was

available. In addition, there is no evidence that Caltrider treated Metcalf any differently by not speaking directly with the employees supervised by Metcalf.

The court concludes that plaintiff has failed to establish a prima facie case because plaintiff has failed to show that she was treated differently in the terms and conditions of her employment by reason of the failure of Caltrider to invite her to his table. No one was invited to join the table; anyone who wanted to sit there simply sat down. Plaintiff has produced no evidence that any of the men sitting at the table received an invitation from Caltrider to do so. Defendants have produced evidence that plaintiff would have been free to join them. The evidence does not support a reasonable inference of disparate treatment motivated by race or gender discrimination on that issue.

b. Failure to Include Plaintiff in Trip to Virginia

Plaintiff notes that she was not invited to go on a trip to the BMV counterpart agency in Virginia, whereas Melcalf was permitted to go on this trip. O'Connor stated that she went to Virginia with Metcalf, Joseph and Caltrider to the agency in Virginia because that agency had a reputation for being state of the art in customer service. O'Connor Dep., p. 100. Metcalf was hired in part to improve the customer service provided by the BMV, and he was also doing work on the proposed customer service centers. Therefore, it was logical for him to go on this trip. O'Connor stated that plaintiff did not go on that trip because she had been permitted to go to Virginia on a previous occasion. O'Connor Dep. p. 99. Plaintiff admitted in her deposition that she went to Virginia to view that state's operations when Mitchell

Brown was registrar, and that she was told that she was not going on the second trip because she had been to Virginia before. Plaintiff's Dep., pp. 100, 110.

The evidence fails to establish that plaintiff was subjected to disparate treatment in this regard. The evidence indicates that she was not invited to go on the second trip to Virginia because she had already been there on a prior occasion. Thus, she has not shown that she was treated differently than Metcalf in that regard. Further, the evidence reveals a legitimate reason for why Metcalf was selected to go on the trip. Metcalf was a new employee who had not previously been to Virginia, and who was assigned to work on matters dealing with customer service, the purpose of the trip. No genuine issue of material fact has been shown to exist in regard to this claim.

c. Disparate Treatment in Manner of Termination

Plaintiff also contends that she was subjected to disparate treatment by the manner in which her termination was handled. Plaintiff claims in her affidavit that the BMV had the same disciplinary system for unclassified employees as for classified employees. Aside from the fact that plaintiff has produced no written documentation to support this claim, it is inconsistent with her deposition testimony, in which she stated that an unclassified employee serves at the pleasure of the appointing authority and can be dismissed without having to go through the disciplinary cycle. Plaintiff's Dep., p. 66. Plaintiff cannot avoid summary judgment through an affidavit which contradicts her prior sworn deposition testimony. United States ex rel. Compton v. Midwest Specialties, Inc., 142 F.3d 296, 303 (6th Cir. 1998).

O'Connor testified that in the case of an unclassified employee such as plaintiff, there was no obligation to take a continuum of steps to address plaintiff's performance issues. O'Connor Dep., p. 38.

Plaintiff also provides a list of employees in her affidavit who were allegedly disciplined only following an investigation and consideration of the charges by various levels of supervisors. However, she includes both classified and unclassified employees in this group, without identifying which were classified and which were not. In addition, both African-American and female employees are also included on this list of employees who were disciplined allegedly in accordance with the alleged BMV procedure. Therefore, this list does not establish that only Caucasian males have received the benefit of this alleged disciplinary scheme, so as to permit an inference that plaintiff was treated differently due to her race or gender. Plaintiff has presented no evidence that any of the employees on her list held positions of rank or degree of trust and responsibility comparable to her own. She has produced no evidence that any nonminority employee holding a position comparable to her own was treated differently in the manner of their termination for similar reasons.

In addition, the evidence does not show that plaintiff was fired without the benefit of careful consideration of her situation by her superiors. Caltrider's recommendation to terminate plaintiff's employment was the result of a series of events and complaints occurring over a period of time. Caltrider considered reports from employees, such as Rebecca Wharton and Carolyn Williams, whom he considered to be reliable, as well as his own

observations of plaintiff's conduct and interaction with others. He talked with O'Connor several times before she was persuaded that it was necessary to terminate plaintiff's employment. O'Connor noted that she received information about plaintiff being a micro-manager from people who observed and talked to her and from her subordinates. "I was given these reports by people whose veracity I had grown to respect and trust[.]" O'Connor Dep., p. 42. O'Connor stated that she also considered moving plaintiff to a different position, but she concluded after looking at the reorganization chart that the only solution was to terminate her. O'Connor Dep., p. 40. Plaintiff has not shown the existence of a genuine issue of material fact on the issue of disparate treatment in discipline.

d. Conclusion

The court concludes that no genuine issue of fact has been shown to exist in regard to plaintiff's claims of disparate treatment under Title VII, and defendants are entitled to summary judgment on those claims.

3. Alleged Discrimination in Termination

Plaintiff alleges that her termination was motivated by gender and race discrimination. Defendants argue that plaintiff has failed to establish a prima facie case of race or gender discrimination in her termination because she was replaced by Carolyn Williams, an African-American female. The fact that plaintiff has failed to show that she was replaced by a person of another race and gender is not necessarily sufficient in itself to warrant summary judgment in favor of the defendants. See Jackson v. Richards Medical Co., 961 F.2d 575, 587 n. 12 (6th Cir. 1992).

Plaintiff can also avoid summary judgment by otherwise showing facts which create an inference of discrimination. Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246, 253 (6th Cir. 1998). However, the fact that plaintiff was replaced by an employee of the same race and gender "strongly discredits the plaintiff's Title VII claim." Jackson, 961 F.2d at 587. Summary judgment is warranted where the plaintiff fails to show a prima facie case under McDonnell Douglas, and also otherwise fails to produce evidence sufficient to raise an inference of discrimination. Abeita, 159 F.3d at 253-54. Here, plaintiff has failed to satisfy the elements of her prima facie case under McDonnell Douglas.

Even assuming that plaintiff has met her burden of producing evidence sufficient to establish a prima facie case, defendants have articulated nondiscriminatory reasons for plaintiff's termination. Caltrider noted in his affidavit that the positions of assistant registrar were "high level fiduciary positions requir[ing] more than technical competency to be performed adequately. There must be a high degree of trust and confidence in any individual serving as Assistant Registrar[]." Caltrider Dep., Ex. 13. He further stated in his affidavit:

> Between March 1999 until her termination in August 2001, Ms. Foster began to engage in unprofessional conduct. Ms. Foster demonstrated difficulties communicating with both myself and her peers. This failure to communicate from a person who held one of the two second-highest ranking positions within the Bureau was disconcerting. the position of Assistant Registrar[], by its very nature, requires the ability to develop and effectively communicate and implement the policies and goals of the Bureau. The ability to communicate effectively with superiors, peers, and subordinates as well as the ability to establish and maintain an efficient work environment is tantamount for a position of this stature. Moreover, as an Assistant Registrar, she maintained the full

> authority, in my absence, to act on my behalf. Ms. Foster's failure to communicate as well as what I deem unprofessional conduct lowered my confidence in her loyalty and reliability. As a result, I recommended to Director O'Connor that Ms. Foster's employment as Assistant Registrar be terminated.

Caltrider Dep., Ex. 13.

In his deposition, Caltrider stated that he first lost confidence in plaintiff's judgment when she assured him, upon taking the position of assistant registrar, that her secretary, who served as backup for his secretary, was a good worker. Caltrider later discovered that the reports he had heard about plaintiff's secretary engaging in non-work-related activities were true, and he eventually had to arrange to have her transferred to another position. Caltrider Dep., pp. 130-132. Plaintiff has offered no evidence to refute Caltrider's views on this matter.

Caltrider also stated that plaintiff began to confront him in an adversarial way about his management style. Caltrider Dep., p. 145. Plaintiff felt that Caltrider was inappropriately speaking with her employees outside her presence. Plaintiff summarily alleges in her affidavit that her credibility suffered as a result. Plaintiff's Aff., ¶ 2. However, she gives no specific examples of such instances. Caltrider stated in his deposition that he believed that his conversations with plaintiff's staff were about trivial matters, such as whether a particular automobile license plate was available. He did not like the adversarial and accusatory manner in which plaintiff approached him about these matters. Caltrider Dep., p. 147.

Caltrider also stated that he began hearing complaints about plaintiff's managerial style from plaintiff's employees, such as

Carolyn Williams. Williams complained to Caltrider about plaintiff's micro-management style. Williams Dep., p. 32. Williams stated that on at least three occasions, plaintiff had staff meetings with the employees under Williams's supervision and did not include her in the meetings. Williams Dep., pp. 53-54. Williams told Caltrider that plaintiff circumvented her authority by going directly to her employees and calling them into meetings for long periods of time, and that she never received any feedback about these meetings. Caltrider Dep., p. 169-171. Metcalf also noted that plaintiff was a micro-manager. Metcalf Dep., p. 169. Plaintiff does not dispute this characterization of her management style. Although she may take issue with whether her style of management was inappropriate, her subjective opinions as to whether this approach was best serving the needs of her employer are not relevant. It is the opinion of plaintiff's employer that is relevant. Caltrider perceived, based on the reports of other employees and on his own observations, that plaintiff's management style was creating problems amongst the BMV employees.

Caltrider also lost confidence in plaintiff due to the report from another employee, Rebecca Wharton, that plaintiff had called him a liar, after a meeting in which plaintiff confronted Caltrider concerning Metcalf's proposals for the reorganization of the BMV. Wharton confirmed in her deposition that she heard plaintiff call Caltrider a liar because he denied knowing anything about the reorganization. Wharton Dep., pp. 10-11. Caltrider claims that he was not lying when he told plaintiff that he knew nothing about Metcalf's reorganization proposals. Caltrider Dep., p. 263. However, it is irrelevant whether Caltrider was lying, or whether

plaintiff reasonably believed he was. Rather, Caltrider was upset that plaintiff would make such a statement to a subordinate employee, regardless of its truth. Caltrider Dep., p. 159. Caltrider also stated that he would expect plaintiff to believe him, as her superior, over other sources, and that he thought it was disloyal for plaintiff to tell someone he was a liar. Caltrider Dep., pp. 260, 265. O'Connor stated that she also viewed calling a superior a liar as insubordination. O'Connor Dep., p. 25.

Plaintiff claims in paragraph 14 of her affidavit that she denied to Caltrider that she had accused him of being a liar. Plaintiff argues that any claimed reliance by Caltrider on this statement as a basis for her termination is therefore pretext. However, the plaintiff's statement in her affidavit is inconsistent with her earlier deposition testimony, p. 233, where, instead of stating that she had denied the accusation when confronted by Caltrider, she avoided answering the question:

> Q. And did you deny that you had?
>
> A. I asked him what was it concerning? And he told me that it was concerning the discussion we had had regarding the reorganization.

Caltrider claimed that when he confronted plaintiff about whether she had made this statement, plaintiff neither confirmed or denied it. Caltrider Dep., p. 160.

However, even assuming that plaintiff did deny making the statement, that does not mean that Caltrider was obligated to believe her denial. To establish pretext, the plaintiff must allege more than the existence of a dispute over the facts upon which her discharge was based. Braithwaite, 258 F.3d at 493-94.

Under the "honest belief" rule, as long as an employer has an honest belief in its proffered nondiscriminatory reason for discharging an employee, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect. Majewski v. Automatic Data Processing, Inc., 274 F.3d 1106, 1117 (6th Cir. 2001)(citing Smith v. Chrysler Corp., 155 F.3d 799, 806-07 (6th Cir. 1998)). An employer has an honest belief in its reason for discharging an employee where the employer reasonably relied on the particularized facts that were before it at the time the decision was made. Majewski, 274 F.3d at 1117; Braithwaite, 258 F.3d at 393.

Caltrider heard the report that plaintiff had called him a liar from Rebecca Wharton. Wharton stated that she thought it was unprofessional for plaintiff to make this statement. Caltrider Dep., p. 159. Caltrider stated that he believed Wharton's report, noting that she first went to Caltrider's secretary and appeared very uncomfortable about having to tell him about it. Caltrider Dep., p. 163. He also stated that Wharton had come to the BMV from the attorney general's office, and that she prided herself on being professional. Caltrider Dep., p. 164. O'Connor also noted that she had always found Wharton to be conscientious, reliable and professional. O'Connor Dep., p. 11.

Caltrider called plaintiff into his office and gave her the opportunity to explain her conduct, but plaintiff, in his view, never affirmed or denied the comment, and she did not apologize. Caltrider Dep., pp. 160, 165. Thus, Caltrider conducted a reasonable inquiry into the matter, and the evidence reveals that he had reason to hold a good faith belief that plaintiff had

engaged in the alleged conduct. Plaintiff's denial that she called Caltrider a liar is insufficient to call into question Caltrider's honest belief that she did engage in that conduct, and is insufficient to raise a genuine issue of material fact as to whether the reasons for the discharge were pretextual. Majewski, 274 F.3d at 1117. See also Pugh v. City of Attica, Indiana, 259 F.3d 619, 627 (7th Cir. 2001)(employee's denial that he misappropriated funds not sufficient to cast doubt on honesty of employer's belief that he had engaged in such conduct); Green v. National Steel Corp., Midwest Div., 197 F.3d 894, 898-99 (7th Cir. 1999)(plaintiff's bald assertions that she did not engage in misbehavior insufficient to create a material dispute; plaintiff can only prevail if she demonstrates that employer did not in good faith believe the reasons for discharge).

Caltrider also received reports from Wharton that she had overheard plaintiff tell someone during a phone conversation that Carolyn Williams was "acting like a monkey" over the reorganization. Wharton Dep., pp. 13-14. Plaintiff acknowledged in her deposition that she may have made this statement, and that by this statement, she meant to state that Williams was not acting professionally. Plaintiff's Dep., p. 235. Wharton also reported to Caltrider that she overheard plaintiff referring to Williams as "black bitch." Wharton Dep., p. 16; Caltrider Dep., p. 185. In her deposition, plaintiff denied making this statement. However, plaintiff has not shown why it was unreasonable for Caltrider to believe that she had made this statement, since he had reason to trust Wharton. Caltrider reported these statements to O'Connor as another example of how he had lost trust in plaintiff and her

ability to work with other employees, and as an additional reason for his recommendation that plaintiff's employment be terminated. Caltrider Dep., p. 187, 198.

Caltrider also relied on Williams's statements that she was not happy about working under plaintiff under the reorganization plan. Caltrider Dep., p. 168. O'Connor heard that Williams had stated that she would leave the BMV if she had to work for plaintiff, and O'Connor was concerned about losing Williams because she was a valuable employee. O'Connor Dep., p. 35. Williams made complaints about plaintiff's management style to Caltrider. Caltrider Dep., pp. 169-71. Caltrider indicated in his deposition that he could not think of an instance where Williams had given him bad advice or made bad judgments. Caltrider Dep., p. 171. Caltrider stated that he trusted William's judgment, and concluded that plaintiff's relationship with her employees was not conducive to the operations of the BMV. Caltrider Dep., p. 174.

Plaintiff seeks to impeach Williams's credibility by noting that in 1998, Williams had received a three-day suspension for making racial remarks to another employee. Most of the information offered by plaintiff in paragraph 18 of her affidavit is inadmissible hearsay. Williams gave a different version of this incident during her deposition, stating that the suspension was for not doing anything to stop racial remarks made by employees under her supervision, and that the suspension was imposed by her previous supervisor, Ray Yingling. Williams Dep., p. 21. She did not claim that the suspension was unwarranted, nor is there any evidence that she harbored any ill will toward plaintiff as a result of this suspension. There is nothing about this evidence

which raises a question as to whether it was reasonable for Caltrider to accept as credible Williams's complaints about plaintiff's management style which were corroborated by complaints of other employees and by his own observations.

Caltrider also indicated that he received complaints from another employee, Jim Chisman, who objected to working under plaintiff. Caltrider Dep., p. 175. He informed O'Connor about Chisman's comments because he thought they reflected on plaintiff's performance. Caltrider Dep., p. 176. Plaintiff stated in her affidavit that Chisman had performance problems of his own, and offers the opinion that any of his complaints should have been viewed with suspicion. However, Caltrider stated that he did not pay much attention to Chisman's complaints because Chisman would not fall under plaintiff's supervision under the reorganization plan. Caltrider Dep., p. 176. Therefore, there is no evidence that Chisman's complaints had any significant impact on Caltrider's decision to recommend plaintiff's termination.

Plaintiff alleges that the BMV followed certain procedures for disciplinary action or termination of employment, and argues that the failure to follow such procedures in her case indicate that the reasons given were pretextual. The court has addressed this argument in the disparate treatment section above. There is no evidence that any particular disciplinary system was required in plaintiff's case. In addition, as noted above, plaintiff's termination was the result of information and observations gathered over a period of time which eventually culminated in her termination. No inference of pretext may be drawn in this case from the failure to follow additional procedures prior to

plaintiff's termination.

Plaintiff also contends that the reasons advanced by defendants for her termination must be pretextual because her supervisors had not found fault with her performance in the past. However, this in itself is insufficient to support a finding of pretext. Manzer, 29 F.3d at 1084-85. The fact that plaintiff's performance of the technical aspects of her job was found to be satisfactory in the past does not refute the specific reasons offered by the defendants for plaintiff's discharge, that being plaintiff's increasing difficulty getting along with her coworkers, complaints from coworkers and supervisors concerning her management style, inappropriate comments reportedly made shortly before her termination, and a growing lack of confidence in her on the part of the registrar. Poor attitude on the part of an employee and problems getting along with coworkers may constitute legitimate reasons for an employment decision. See Crabbs v. Copperweld Tubing Products Co., 114 F.3d 85, 89 (6th Cir. 1997); Brooks v. Ashtabula County Welfare Dept., 717 F.2d 263, 266 (6th Cir. 1983).

Defendants rely on the fact that Caltrider, who recommended plaintiff's termination, had earlier recommended plaintiff for the assistant registrar position. The same actor inference applies when the same individual hires and fires the plaintiff. Buhrmaster v. Overnite Trans. Co., 61 F.3d 461, 463 (6th Cir. 1995). The same actor inference does not mandate summary judgment in favor of the employer where there is other evidence sufficient to raise a genuine issue of material fact. Wexler v. White's Furniture, 317 F.3d 564, 573-74 (6th Cir. 2003). However, in cases where the same person makes the decision to hire and fire the plaintiff, "a strong

inference exists that discrimination was not a determining factor for adverse action taken by the employer." Buhrmaster, 61 F.3d at 463.

The same actor inference technically applies only where the same person hires and fires the employee. See Zambetti v. Cuyahoga Community College, 314 F.3d 249, 261 (6th Cir. 2002). In this case, Caltrider was not responsible for the final decisions to hire the plaintiff or to terminate plaintiff's employment, since those decisions were ultimately made by the director of the department. However, plaintiff is invoking the rule that any motivation on the part of Caltrider should be imputed to O'Connor in analyzing her decision to terminate plaintiff. See Wells v. New Cherokee Corp., 58 F.3d 233, 238 (6th Cir. 1995)("[C]ourts must consider as probative evidence any statements made by those individuals who are in fact meaningfully involved in the decision to terminate an employee.") If Caltrider's actions at the time of plaintiff's termination are to be considered relevant to the issue of whether her termination was race or gender motivated, even in the absence of any evidence of discriminatory motive on O'Connor's part, then the fact that Caltrider also recommended plaintiff for the position of assistant registrar four years prior to her termination is also evidence relevant to his state of mind which may be considered along with all of the other evidence in determining whether summary judgment is warranted.

The court finds that defendants have advanced evidence of legitimate, nondiscriminatory reasons for plaintiff's termination, and that the evidence is insufficient to raise a genuine issue of fact as to whether those reasons were pretextual. The record

contains no evidence from which a trier of fact could reasonably draw an inference that plaintiff's termination was motivated by her race or gender. Defendants are entitled to summary judgment on plaintiff's claim that her termination was the result of race and gender discrimination.

G. Retaliation under Title VII and the EPA

Plaintiff claims that her termination was in retaliation for making complaints to her supervisors. Specifically, plaintiff notes: (1) her complaints to Caltrider beginning in October of 1999 that Caltrider was excluding her from his meetings with Metcalf; 2) (2) her complaints to Caltrider about his meeting with her subordinates outside her presence; (3) her complaint to O'Connor in November of 2000 about the fact that Caltrider was excluding her from the cafeteria meetings; (4) her complaints, beginning on November 27, 2000, to Caltrider, Demaree, and Joseph concerning her unequal pay.

Title VII, 42 U.S.C. §2000e-3(a) forbids discrimination against employees for attempting to protest or correct allegedly discriminatory conditions of employment. McDonnell Douglas, 411 U.S. at 796. The EPA, 29 U.S.C. §215(a)(3), forbids an employer from discharging an employee because that employee has filed any complaint related to the Fair Labor Standards Act, including the EPA.

The same legal analysis applies to both retaliation claims. See Hafford v. Seidner, 183 F.3d 506, 515 (6th Cir. 1999)(prima facie case for Title VII); Connor v. Schnuck Markets, Inc., 121 F.3d 1390, 1394 (10th Cir. 1997)(prima facie case for EPA retaliation). To make a prima facie case of retaliation, plaintiff

must prove: (1) she engaged in activity protected by Title VII or the EPA; (2) this exercise of protected rights was known to the defendants; (3) the defendants thereafter took an adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. Ford v. General Motors Corp., 305 F.3d 545, 552-53 (6th Cir. 2002); Connor, 121 F.3d at 1394. Once the plaintiff has established a prima facie case, the burden of production of evidence shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. Ford at 553. The plaintiff, who bears the burden of persuasion throughout the entire process, must then demonstrate that the defendants' proffered reason was false. Id.

Defendants argue that plaintiff has not shown that she engaged in protected activity. It is not necessary for the employee to file a formal complaint in order to trigger the retaliation provisions. For example, the Sixth Circuit in E.E.O.C. v. Romeo Community Schools, 976 F.2d 985, 989-90 (6th Cir. 1992) held that the employee's complaint that the employer was "breaking some sort of law" by paying her lower wages was sufficient to constitute protected conduct under the EPA. However, complaints of unfair treatment in general which do not specifically address discrimination are generally insufficient to constitute protected activity. See Barber v. CSX Distribution Servs., 68 F.3d 694, 701 (3d Cir. 1995)(complaint about unfair treatment which did not mention age discrimination not protected conduct); Lambert v. Genesee Hospital, 10 F.3d 46, 55 (2d Cir. 1993)(complaint that it was not fair that employee did not receive same salary as male

charge person, without stating that sex was the reason for the disparity, insufficient to constitute protected conduct under the EPA).

There is no evidence that plaintiff ever complained to Caltrider that he was meeting with her employees without her being present because of plaintiff's gender or race. The first time plaintiff mentions anything about complaining directly to Caltrider about excluding her from his meetings with Metcalf is in paragraph 2 of her affidavit. It is not clear whether she is referring to the meetings in the cafeteria or to other meetings, and she does not elaborate when these meetings occurred. However, even in her affidavit, plaintiff does not state that she complained to Caltrider that he was discriminating against her on the basis of gender or race when he met with Metcalf. She stated that when she complained to O'Connor about Caltrider's lunch meetings, she said something along the lines that O'Connor, as a woman, may have experienced problems interacting with men or with exclusion, and that O'Connor chuckled. Plaintiff's Dep., p. 253. However, plaintiff never mentioned the words "discrimination" or "harassment." Plaintiff's Dep., p. 152. She also stated in her affidavit that she "did not explicitly state my belief that the motivation for Caltrider's disparate treatment was my sex or race because I believed that was clearly implied by the nature of my complaints and that I am a black female." Plaintiff's Aff., ¶ 5. There is also no evidence that plaintiff ever stated that she believed that the pay disparity was due to race or gender discrimination. She stated that she did not use the words "discrimination" or "harassment" when discussing the pay issue with

Joseph. Plaintiff's Dep., p. 174. When asked if she had complained about the pay discrepancy being based on race or gender, she replied, "I'm sure I implied that." Plaintiff's Dep., p. 253.

In essence, plaintiff's argument is that any complaint she made should have been construed as a complaint about race and gender discrimination simply because she is an African-American female. However, complaints regarding matters as significant as race and gender discrimination should not be left to speculation or raised in the form of vague innuendo, much less the mere circumstance of the race or gender of the complainant. O'Connor understood plaintiff's complaints about the alleged lunch meetings as meaning that plaintiff felt somehow threatened or insecure because Metcalf was "tight" with the boss, thereby, in plaintiff's view, enhancing the power of his position or influence, whereas plaintiff was an "outsider" who was not specifically invited to join the lunch table. Complaining about feeling uncomfortable interacting socially with men in the cafeteria over coffee or lunch does not amount to a complaint of sex discrimination, and does not begin to approach an allegation of race discrimination. Likewise, plaintiff's complaints to Caltrider about him talking directly with her subordinates and about excluding her from meetings with Metcalf raise only matters of management style, and do not in any way refer to race or gender discrimination merely because the participants in the conversation are of a different race and gender. Plaintiff's complaint about the unequal pay issue comes closest to constituting a complaint about gender discrimination, but her complaint could just as easily be construed as being a complaint about Metcalf receiving a higher salary as a new hire than plaintiff, who had

more seniority with the BMV.

Even assuming that plaintiff has produced sufficient evidence that she engaged in protected conduct, she must also produce sufficient evidence from which a jury could reasonably infer a causal connection between the protected conduct and her termination. To establish a causal connection, the plaintiff must produce sufficient evidence from which an inference can be drawn that the adverse action would not have been taken had the plaintiff not engaged in the protected conduct. E.E.O.C. v. Avery Dennison Corp., 104 F.3d 858, 861 (6th Cir. 1997). A causal connection between complaints of discrimination and an adverse employment action may be shown by direct evidence or by evidence of the employer's knowledge of the complaints coupled with a closeness in time sufficient to create an inference of causation. Wrenn v. Gould, 808 F.2d 493, 501 (6th Cir. 1987). However, mere temporal proximity between the protected conduct and the adverse employment decision is ordinarily not sufficient to establish causation in the absence of additional evidence to support a finding that the protected activity and the adverse action were connected. See Hafford, 183 F.3d at 515 (no inference of causation where disciplinary actions occurred two to five months after filing of charges); Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir. 1986)(mere fact that discharge occurred four months after filing of discrimination claim insufficient to support inference of retaliation).

Here, plaintiff has presented no direct evidence of retaliatory motive. There is no direct evidence that plaintiff's complaints about her salary played any part in the decision made by

O'Connor to terminate her employment or in Caltrider's decision to recommend plaintiff's removal. Although there is evidence that Caltrider was upset about the fact that plaintiff would complain about how he spent his lunch hour or personal time, Caltrider testified that plaintiff's complaints about the fact that he had lunch with Metcalf was not a factor in his decision to recommend her removal. Caltrider Dep., p. 254.

An inference of causation due to temporal proximity is also not appropriate in this case. Although plaintiff received the final decision on the salary matter from Joseph on June 6, 2001, she first began complaining about the salary discrepancy on November 27, 2000, over nine months prior to her termination. She was not terminated until August 30, 2001. This is insufficient to raise an issue of causation.

Even assuming that plaintiff has presented a prima facie case of retaliation, defendants have produced evidence of nonretaliatory reasons for her termination. As indicated previously in connection with plaintiff's Title VII claims, plaintiff has not produced evidence sufficient to show the existence of a genuine issue of fact in regard to these reasons, or to raise a genuine issue of fact as to whether these reasons were pretextual.

No genuine issue of fact has been raised in connection with plaintiff's claims of retaliation under the EPA and Title VII, and defendants are entitled to summary judgment on these claims.

H. Retaliation for Exercise of First Amendment Rights under §1983

Plaintiff advances a claim under 42 U.S.C. §1983 in Count I of her complaint, alleging that O'Connor retaliated against her for engaging in public speech protected by the First Amendment, and

deprived her "of her equal rights to protection of the laws and substantive due process rights by firing her for her complaints of race and sex discrimination and pay inequity."

The First Amendment protects against retaliation by public officials for the exercise of First Amendment rights. Zilich v. Longo, 34 F.3d 359 (6th Cir. 1994). To maintain a claim under §1983 for First Amendment retaliation, plaintiff must show: (1) that she engaged in protected conduct; (2) that an adverse action was taken against her that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) that the adverse action was motivated, at least in part, as a response to the exercise of the plaintiff's constitutional rights. Farmer v. Cleveland Public Power, 295 F.3d 593, 599 (6th Cir. 2002).

In the context of government employment, speech is protected when it addresses a matter of public concern, and the employee's interest in making such statements outweighs the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. Bailey v. Floyd County Bd. of Educ., 106 F.3d 135, 144 (6th Cir. 1997)(quoting Pickering v. Board of Education, 391 U.S. 563, 568 (1968)). A public concern is one relating to "any matter of political, social, or other concern to the community." Connick v. Myers, 461 U.S. 138, 146 (1983).

Whether a plaintiff's speech addresses a matter of public concern is a question of law. Rahn v. Drake Center, Inc., 31 F.3d 407, 411 (6th Cir. 1994). The determination of whether a statement addresses a matter of public concern must be based on the content, form, and context of the statement. Connick, 461 U.S. at 146-148.

The fact that the statement was made in private does not necessarily establish that the statement did not address a matter of public concern. Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979). Where a public employee speaks not as a citizen upon matters of public concern, but as an employee upon matters of only personal interest, First Amendment rights are normally not implicated. Connick, 461 U.S. at 147. Where the speech involves a matter of public concern, the governmental entity must show why the restriction on speech is justified. Rankin v. McPherson, 483 U.S. 378, 388 (1987).

Defendants argue that the Sixth Circuit in the past has been inclined to hold that complaints concerning the employee's own treatment are less likely to be matters of public interest than complaints of widespread discrimination made on behalf of all employees. However, in Perry v. McGinnis, 209 F.3d 597, 608 (6th Cir. 2000), the court held that race discrimination is inherently a matter of public concern, and in Strouss v. Michigan Dept. of Corrections, 250 F.3d 336, 346 n.5 (6th Cir. 2001), the court noted that the same may be true for gender discrimination.

The issue in this case is whether plaintiff's complaints arise to the level of complaints about race or gender discrimination. As noted previously, plaintiff never phrased her complaints in terms of race or gender discrimination; rather, she maintains that the nature of her complaint was obvious or implied based on the fact that she was a female African-American. Her complaints addressed matters concerning her own employment situation and her treatment by her superiors. She made her complaints to her superiors, not to the public. She did not complain about discrimination against

other employees at the BMV. The circumstances as a whole do not establish that plaintiff was speaking as a citizen on matters of public concern as opposed to speaking as an employee on matters of concern only to her.

Even assuming that plaintiff's complaints are sufficient to qualify as speech on matters of public concern, plaintiff must also prove that her termination by O'Connor was at least in part motivated by her complaints. The defendants' position is that plaintiff's complaints were not a factor at all in the decision to terminate her employment. In other words, defendants completely deny any retaliatory motive. As previously noted, defendants have produced evidence of legitimate, nonretaliatory reasons for plaintiff's termination. Plaintiff has failed to demonstrate the existence of a genuine issue of fact sufficient to raise a jury question on the issue of whether those reasons were false or pretextual. The evidence, viewed as a whole, fails to raise an inference of retaliation based on protected conduct.

Plaintiff has alleged that her termination by O'Connor in retaliation for her complaints violated her equal protection rights. As noted previously, plaintiff did not complain about discrimination, and the evidence is insufficient to raise a genuine issue of fact on her retaliation claims. Plaintiff has also produced no evidence that similarly-situated male or Caucasian employees were not terminated by O'Connor or the BMV after making complaints similar to those made by plaintiff. Therefore, plaintiff has failed to demonstrate the existence of a genuine issue of fact on her equal protection claim.

In regard to plaintiff's substantive due process claim,

termination of public employment does not constitute a denial of substantive due process absent the infringement of some fundamental right. Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339, 1351 (6th Cir. 1992). Since plaintiff has failed to present sufficient evidence to raise a jury question on the issue of whether she was deprived of a fundamental right, her substantive due process claim also fails.

Defendants are entitled to summary judgment on plaintiff's §1983 claim.

IV. Conclusion

In accordance with the foregoing, plaintiff's motion to dismiss defendant O'Connor as a defendant in her individual capacity (Doc. # 42) is granted. Kenneth L. Morckel, the current director of the Ohio Department of Public Safety, is substituted for defendant O'Connor as a party in his official capacity. Plaintiff's motion to amend her complaint (Doc. # 45) is granted. Defendants' motion for summary judgment (Doc. # 34) is granted. The clerk shall enter judgment in favor of the defendants and against plaintiff at plaintiff's costs.

s/ James L. Graham
James L. Graham
Chief United States District Judge

Date: June 30, 2004