

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BRYAN J. TURNER,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	No. 16-4476
	:	
CITY OF PHILADELPHIA,	:	
	:	
Defendant.	:	
	:	

**MEMORANDUM**

**ROBERT F. KELLY, Sr. J.**

**JULY 24, 2017**

Presently before the Court is Defendant City of Philadelphia’s (“the City”) Motion for Summary Judgment and Plaintiff Bryan J. Turner’s (“Turner”) Response to Defendant’s Motion for Summary Judgment. For the reasons noted below, the City’s Motion is granted in part and denied in part.

**I. BACKGROUND<sup>1</sup>**

Plaintiff Bryan J. Turner is a black male who has been employed as a police officer by the City of Philadelphia since 2011. (Compl. ¶¶ 1, 8.) He was assigned to the 24th Police District once he graduated from the Police Academy in March 2012. (SOF ¶ 2.)

The problems relating to Turner’s Complaint have their origin in January 2015. In October or November 2014, Turner requested assignment to the “drop back shift,” where an officer works from 8:00 p.m. to 4:00 a.m. (Id. ¶ 3.) In January 2015, instead of being assigned to the drop back shift, he was assigned to the “last out shift,” where an officer works from 12:00

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<sup>1</sup> The City has filed a “Statement of Undisputed Facts” (“SOF”) in support of its Motion for Summary Judgment. Turner does not provide his own factual history in his Response to Defendant’s Motion for Summary Judgment. Accordingly, we will rely on Defendant’s Statement of Undisputed Facts for our factual background, utilizing other parts of the record when appropriate.

a.m. to 8:00 a.m. (Id. ¶ 4.) When Turner realized he was placed on the last out shift instead of the drop back shift, he raised his concerns with Lieutenant Steven Arch (“Lt. Arch”) and Sergeant Bebe (“Sgt. Bebe”), who said the situation would be rectified within a few weeks. (Id. ¶¶ 5, 6.) As requested, Turner was transferred to the drop back shift in early February 2015. (Id. ¶ 7.)

In February 2015, Sgt. Bebe recommended that Turner receive a commendation as a result of a large narcotics seizure. (Id. ¶ 9.) Lt. Arch, however, denied the recommendation for the commendation because you “don’t get commendations for doing your job.” (Id. ¶ 10; see also Ex. A (Deposition of Turner (“Turner Dep.”) at 26.)) In the same month, Turner and another officer thwarted an armed robbery, but failed to apprehend the suspect. (Id. ¶ 13.) The next day, he and Officer Eliezer Morales (“Morales”) observed the suspect and apprehended him. (Id. ¶ 14.) During the pursuit, the suspect was able to throw narcotics into a nearby sewer, which Turner was able to eventually retrieve. (Id. ¶¶ 15, 16.) Turner claims that Lt. Arch yelled at him about the arrest because Turner failed to retrieve a gun from the sewer, leading to the accusation that Turner was going to return for the gun and use it “for his own reasons.” (Id. ¶ 17.) Lt. Arch then banned Turner from working with Morales until Turner regained Lt. Arch’s trust. (Id. ¶ 19.)

Shortly after his meeting with Lt. Arch, Turner overheard Lt. Arch say to a different individual that unqualified African Americans are being put in positions of power because of affirmative action, not because those individuals deserve to be there. (Id. ¶ 20.) On March 9, 2015, Turner drafted a memorandum to Captain O’Connor (“Capt. O’Connor”) regarding his interactions with Lt. Arch and the racially-insensitive comment he overheard Lt. Arch make. (Id.

¶ 21.) Turner claims he filed copies of the memorandum with Corporal Guridy (“Cpl. Guridy”), Sgt. Bebe, and Lt. Arch. (Id.)

On March 28, 2015, Turner requested to be transferred from drop back shift to “Two Squad,” which is a group of officers that work alternating day and night shifts. (Id. ¶ 27.) Capt. O’Connor initially refused Turner’s request due to lack of personnel, but later approved the transfer request effective June 8, 2015. (Id. ¶ 28.) Turner claims that once he was transferred to Two Squad he was warned by Corporal Roscoe to “dot your I’s and cross your T’s” because his supervisors just had a meeting about him and they were looking “for anything they can [to] jam [him] up on.” (Turner Dep. at 124; see also SOF ¶ 70.)

On April 8, 2015, Turner had a sit-down meeting with Capt. O’Connor about his memorandum, and Cpt. O’Connor gave him a copy of the City’s EEO Policy and an internal EEO Complaint form. (SOF ¶¶ 22, 23.) Approximately one hour after the meeting with Cpt. O’Connor, Turner claims he was called back into the district office and told he has “72 hours to get representation,” as he was being brought up on disciplinary charges for missing two days of court in March 2015. (Turner Dep. at 56-57.) On April 15, 2015, he had his formal interview regarding missing court, where he explained that on one of the days he had prior obligations with the National Guard, and the other day he was sick. (SOF ¶ 25.) Turner was not disciplined for missing court. (Id. ¶ 36.)

On April 14, 2015, Turner filed a formal EEO Complaint with the Philadelphia Police Department Equal Employment Opportunity Unit, which culminated in the City interviewing twenty-four police officers and a detailed list of findings. (Id. ¶ 41.)

After giving his statement to Capt. O’Connor, Police Officer Phillip Lang (“Lang”) conveyed to Turner that Lt. Arch had a roll call with Turner’s squad and had said to be careful

around Turner because Turner was “throwing everybody under the bus.” (Id. ¶ 36; see also Turner Dep. 85-87.) As a result of Lt. Arch’s comments, Turner claims that none of the officers in his squad wanted to work with him or back him up while he was on patrol. (Id. ¶¶ 37-39.) After the meeting with Capt. O’Connor, Lt. Arch also refused to assign Turner to “Patrol Service Area 2,” which is a high-crime area that generated assets. (Id. ¶¶ 51, 54.) However, once Turner transferred to Two Squad on June 8, 2015, his supervisor, Lieutenant Perez (“Lt. Perez”) also did not assign him to Patrol Service Area 2. (Id. ¶ 52.) Similarly, Lt. Perez’s replacement, Lieutenant McGlinn, did not assign him to Patrol Service Area 2. (Id. ¶ 53.)

On June 6, 2015, Cpl. Guridy gave Turner a parking ticket for parking in a spot marked “Corporal Only.” (Id. ¶ 56.) Turner testified that Cpl. Guridy called him while he was on a domestic incident to say that his car was in a “Corporal Only” spot and that it needed to be moved. (Turner Dep. at 100-01.) Turner said he would move it as soon as he got back from the domestic incident. (Id. at 101.) About fifteen or twenty minutes later, Turner went to move his car and found a parking ticket on it. (Id.) He looked around the parking lot and saw numerous cars parked in spots marked for lieutenants, sergeants, judges, and handicapped individuals, but none of those cars had tickets on them. (Id. at 102.) He started taking pictures of the cars and their license plates, and while doing so, Sergeant Marisol came out and watched him. (Id.) Sergeant Marisol then went inside the office and came back out with Lt. Arch, who both stood there talking among themselves for about a minute. (Id.) They both went back inside the office and “[e]verybody comes [out] and starts moving their cars.” (Id.) Turner testified that all of the cars were moved within five minutes of him taking the pictures. (Id.) The record also indicates that on August 25, 2015, Cpl. Guridy gave Police Officer Lang, a white male, a parking ticket for parking in a “Corporal Only” spot. (SOF ¶ 57.)

Turner testified that Cpl. Guridy refused to pay him overtime on two occasions when he had to work past the end of his shift. (Id. ¶ 58.) He was eventually paid in both instances after Capt. O'Connor intervened on his behalf. (Id. ¶ 59.)

Turner also claims that Capt. O'Connor refused to transfer him away from the 24th Police District when Corporal Pawlowski ("Cpl. Pawlowski") was moved there. (Id. ¶ 60.) Turner claims Cpl. Pawlowski once made a racially-charged statement to him at an off-duty Fraternal Order of Police Christmas party. (Id. ¶ 61.) However, Cpl. Pawlowski did not supervise Turner once he was transferred to the 24th Police District, and Capt. O'Connor asked Turner's then-supervisor, Lieutenant McGlenn, to check with Turner weekly to make sure that Cpl. Pawlowski was not harassing him. (Id. ¶ 62.)

On September 4, 2015, Lt. Perez questioned Turner about why he used sick leave on September 3, 2015. (Id. ¶ 63.) Lt. Perez told Turner that his pattern of calling out of court was what the Federal Bureau of Investigations looked for when investigating corrupt officers. (Id.) Turner then sent Capt. O'Connor a memorandum detailing his concerns with Lt. Perez's comments. (Id. ¶ 64.)

In November 2015, Turner was assigned to bicycle patrol and was told to borrow a bike from the 25th Police District, which was a "fair" bicycle. (Id. ¶ 65; see also Turner Dep. at 116.) Turner claims that his police district received new bikes, but he was not given one. (Id. ¶ 67.)

At some unknown time, but before Turner was transferred from drop back shift to Two Squad, he was docked thirty minutes of vacation time because he was fifteen minutes late for his shift. (Id. ¶¶ 29, 30.) He also claims that Lt. Arch threatened to dock him for attending college courses that occurred during his shift, although Lt. Arch did not actually dock him any time for attending school. (Id. ¶¶ 33, 35.)

Turner's EEO Complaint was not the only EEO Complaint filed against Lt. Arch. After Turner filed his EEO Complaint, Police Officers Payeski, Timothy Coleman ("Coleman"), Lang, Daniel Mitchell ("Mitchell"), and Michael Hanuscin ("Hanuscin") filed complaints against Lt. Arch, which included inappropriate comments, physical abuse, attempting to unilaterally change an officer's squad assignment, sending officers on dangerous foot beats, and giving a parking ticket to an officer for parking in a "Corporal Only" spot. (*Id.* ¶¶ 45(a)-(d).)

On August 15, 2015, Turner filed his formal charge of race discrimination and retaliation with the United States Equal Employment Opportunity Commission ("EEOC") and dual filed the charge with the Pennsylvania Human Relations Commission. (Compl. ¶ 6.) On May 18, 2016, the EEOC issued a dismissal notice and notice of rights. (*Id.* ¶ 7.) On August 16, 2016, Turner filed a Complaint in this Court alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and the Pennsylvania Human Relations Act ("PHRA"), 43 P.S. § 951 *et seq.* Based on the aforementioned conduct, Turner claims the City has "racially discriminated against and/or retaliated against [him] for opposing and objecting to discriminatory conduct, and has created both a racially hostile environment and a retaliatory hostile environment." (*Id.* ¶ 25.) On April 28, 2017, the City filed the instant Motion for Summary Judgment, seeking dismissal of Turner's claim of hostile work environment based on race and his claim of retaliation.

## **II. LEGAL STANDARD**

Federal Rule of Civil Procedure 56(a) states that summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); Shelton v. Bledsoe, 775 F.3d 554, 559 (3d Cir. 2015). The Court asks "whether the evidence presents a sufficient disagreement to

require submission to the jury or whether . . . one party must prevail as a matter of law.”

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). “A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be ‘genuine,’ i.e., the evidence must be such ‘that a reasonable jury could return a verdict in favor of the non-moving party.’” Compton v. Nat’l League of Prof’l Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D. Pa. 1998).

Summary judgment must be granted “against a party who 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, 477 U.S. at 322. Once the moving party has produced evidence in support of summary judgment, the non-moving party must go beyond the allegations set forth in its pleadings and counter with evidence that presents specific facts showing that there is a genuine issue for trial. See Big Apple BMW, Inc. v. BMW of N. Am. Inc., 974 F.2d 1358, 1362-63 (3d Cir. 1992). “More than a mere scintilla of evidence in its favor” must be presented by the non-moving party in order to overcome a summary judgment motion. Tziatzios v. United States, 164 F.R.D. 410, 411-12 (E.D. Pa. 1996). If the court determines that there are no genuine issues of material fact, then summary judgment will be granted. Celotex, 477 U.S. at 322.

### **III. DISCUSSION**

#### **A. Racial Hostile Work Environment**

As noted above, the City seeks dismissal of Turner's claim of racial hostile work environment under Title VII and PHRA.<sup>2</sup> The City argues that the claim of racial hostile work environment fails because Turner cannot provide evidence that he suffered intentional discrimination due to his race, and that, even if he could, the conduct at issue is not severe or pervasive enough to constitute a Title VII violation. (Def.'s Mem. Support Mot. for Summ. J. at 5.) We agree.

Under Title VII, "it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). To establish a claim of hostile work environment, "a plaintiff must show that '1) the employee suffered intentional discrimination because of his/her [race], 2) the discrimination was severe or pervasive, 3) the discrimination detrimentally affected the plaintiff, 4) the discrimination would detrimentally affect a reasonable person in like circumstances, and 5) the existence of respondeat superior liability [meaning the employer is responsible].'" Castleberry v. STI Grp., No. 16-3131, ---F.3d---, 2017 WL 2990160, at \*2 (3d Cir. July 14, 2017) (quoting Mandel v. M & Q Packaging Corp., 706 F.3d 157, 167 (3d Cir. 2013)) (alterations in original).

The City details a laundry list of conduct that it claims cannot constitute a hostile work environment on the basis of Turner's race. Such conduct includes: (1) placing Turner on the last out shift instead of the drop back shift for three weeks in January and February 2015; (2) Lt.

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<sup>2</sup> "'Pennsylvania courts generally interpret the PHRA in accord with its federal counterparts.'" Cacciola v. Work N Gear, 23 F. Supp. 3d 518, 527 n.8 (E.D. Pa. 2014) (quoting Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 382 (3d Cir. 2002)). Accordingly, we will analyze the statutes together and refer only to Title VII for simplicity.

Arch denying him a commendation because “you don’t get commendations for doing your job”;

(3) Lt. Arch mistakenly verbally chastising Turner over an arrest Turner made; (4) Lt. Arch banning Turner from working with Officer Morales until Turner regained Lt. Arch’s trust; (5) Sgt. Bebe interviewing Turner regarding his missed court appearances; (6) Capt. O’Connor refusing to transfer Turner from drop back shift to Two Squad after Turner complained about Lt. Arch’s behavior; (7) Lt. Arch docking thirty minutes of Turner’s vacation time because he was late to work; (8) Lt. Arch threatening to dock Turner’s vacation time for attending classes, although not following through with it; (9) Lt. Arch telling Turner’s squad to be careful around Turner because he was “throwing everybody under the bus”; (10) certain officers not wanting to work with Turner or provide him with any backup due to the “drama” associated with him; (11) Turner’s supervisors refusing to assign him to Patrol Service Area 2, a desirable assignment, which caused his arrest numbers to go “down a bit”; (12) Cpl. Guridy giving Turner a parking ticket for parking in a “Corporal Only” parking spot; (13) Cpl. Guridy refusing to pay Turner overtime twice; (14) Capt. O’Connor refusing to reassign Turner so that he would not have contact with Cpl. Pawlowski, who had made a racially charged statement to Turner at an off-duty Christmas party; (15) Lt. Perez telling Turner that his pattern of sick leave was suspicious; (16) Turner not being assigned a new bicycle; and (17) supervisors discussing Turner at a meeting, and one supervisor warning him to “dot his I’s and cross his T’s.” (Def.’s Mem. Support Mot. for Summ. J. at 8-9.) In addition to the above conduct, Turner also adds that his “buddy swap” with Police Officer Yeager completely fell through. (Pl.’s Mem. in Opp. to Def.’s Mot. for Summ. J. at 8-9.)

The City contends that none of the above conduct indicates any intentional discrimination due to Turner’s race. (Def.’s Mem. Support Mot. for Summ. J. at 5-6.) Turner responds by

stating that Lt. Arch's racially charged comment regarding underqualified African Americans being put in positions of power solely because of affirmative action creates a genuine dispute of material fact that he harbors a racial animus against African Americans. (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J. at 3-4.)

The first prong of a *prima facie* case of hostile work environment considers "whether a reasonable factfinder could view the evidence as showing that [the plaintiff's] treatment was attributable to [his or her race]." Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 277 (3d Cir. 2001). A plaintiff need not directly demonstrate that the harasser's intent was to create a discriminatory environment; such intent can be inferred. Id. (citing Andrews v. City of Phila., 895 F.2d 1469, 1482 n.3 (3d Cir. 1990)). "In evaluating a hostile work environment claim under . . . Title VII . . . we are mindful that 'offhanded comments, and isolated incidents (unless extremely serious)' are not sufficient to sustain a hostile work environment claim. Rather, the 'conduct must be extreme to amount to a change in the terms and conditions of employment.'" Caver v. City of Trenton, 420 F.3d 243, 262 (3d Cir. 2005) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).

In this case, there is no doubt that Lt. Arch made a racially charged remark in the presence of Turner. However, Lt. Arch's comment was not directed to Turner, and is the type of "offhand[] comment[] and isolated incident[]" that is not severe or pervasive enough to constitute a hostile work environment. Id. at 263 (citing Faragher, 524 U.S. at 788). With that being said, "[a]lthough the racist comment[] involved in this case cannot alone be the basis of a hostile work environment claim, evidence of [that] comment[] may be considered in determining whether facially neutral conduct on the part of [Lt. Arch] was actually based on [Turner's] race." Id. at 264.

We begin with conduct pertaining to Lt. Arch, as he is the individual who Turner contends is the “prime mover of the hostile environment” and who “may be a racist.” (Pl.’s Mem. in Opp. Def.’s Mot. for Summ. J. at 4.) The allegations pertaining to Lt. Arch consist of: (1) Lt. Arch denying Turner a commendation; (2) Lt. Arch mistakenly verbally chastising Turner over an arrest Turner made; (3) Lt. Arch banning Turner from working with Officer Morales until Turner regained Lt. Arch’s trust; (4) Lt. Arch docking thirty minutes of Turner’s vacation time because he was late to work; (5) Lt. Arch threatening to dock Turner’s vacation time for attending classes, although not following through with it; and (6) Lt. Arch telling Turner’s squad to be careful around Turner because he was “throwing everybody under the bus.” (Def.’s Mem. Support Mot. for Summ. J. at 8-9.)

We fail to see any discriminatory intent in the above-mentioned conduct. There is ample evidence in the record that Lt. Arch treated officers of all races harshly in the performance of their jobs. For example, Police Officers Payeski, Coleman, Lang, Mitchell, and Hanuscin were all white males who filed formal EEO Complaints against Lt. Arch, whose complaints included inappropriate comments, physical abuse, attempting to unilaterally change an officer’s squad assignment, sending officers on dangerous foot beats, and giving a parking ticket to an officer for parking in a “Corporal Only” spot. (SOF ¶¶ 45(a)-(d).) Indeed, even Turner himself admits that Lt. Arch “was a jerk to everybody” and “was nasty to everybody.” (Turner Dep. at 139.) We must keep in mind that the “standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a ‘general civility code.’” Faragher, 524 U.S. at 788 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)). “[T]he relevant question is not whether a plaintiff was subjected to an abusive or unpleasant work environment generally—it is whether the plaintiff’s workplace was ‘*discriminatorily* hostile or abusive.’” Davis v. Solid

Waste Servs., Inc., 20 F. Supp. 3d 519, 534 (E.D. Pa. 2014), aff'd, 625 F. App'x 104 (3d Cir. 2015) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)) (emphasis in original).

Accordingly, Turner has failed to present any evidence to lead a reasonable juror to conclude that Lt. Arch's conduct was motivated by his race.

Turner also claims that numerous acts of conduct by individuals other than Lt. Arch create a genuine dispute of material fact of whether he has been subjected to a hostile work environment on account of his race. With regard to the previous discussion on Lt. Arch's comment, Turner was able to at least argue that facially neutral conduct by Lt. Arch was intentional discrimination due to the racially insensitive remark Lt. Arch made. However, all of the other actors involved in this case, such as Capt. O'Connor, Sgt. Bebe, Cpl. Guridy, and Sgt. Perez, have made no such remark. Thus, there is absolutely no basis to conclude that their conduct in this case was motivated by Turner's race. Accordingly, there is no evidence to lead a reasonable juror to conclude that other City supervisors and personnel discriminated against Turner on the basis of his race. Therefore, Turner has failed to meet the first prong of a claim of racial hostile work environment.

However, even if we were to conclude that Lt. Arch's conduct amounts to intentional discrimination, we find that such conduct was not severe or pervasive to amount to a hostile work environment. The second prong of a *prima facie* case of hostile work environment is that the discrimination is "severe or pervasive." See Castleberry, No. 16-3131, ---F.3d---, 2017 WL 2990160, at \*3. In examining the second prong, the Court looks at the totality of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. (quoting Harris, 510 U.S. at 23). In

Castleberry, the United States Court of Appeals for the Third Circuit (“Third Circuit”) clarified the disjunctive nature of the second prong. Id. Severity and pervasiveness are ““alternative possibilities”” in that ““some harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive.”” Id. (quoting Jensen v. Potter, 435 F.3d 444, 449 n.3 (3d Cir. 2006)).

With regard to the second prong, we address only conduct pertaining to Lt. Arch, as we concluded above that there was no evidence in the record to show that the other City employees intentionally discriminated against Turner. Again, Turner claims Lt. Arch created a hostile work environment by the following: making a racially insensitive remark to another individual in his presence; denying Turner a commendation; mistakenly verbally chastising Turner over an arrest Turner made; banning Turner from working with Officer Morales until Turner regained Lt. Arch’s trust; docking thirty minutes of Turner’s vacation time because he was late to work; threatening to dock Turner’s vacation time for attending classes, although not following through with it; and telling Turner’s squad to be careful around Turner because he was “throwing everybody under the bus.” After reviewing the totality of Lt. Arch’s conduct, we do not believe it is particularly severe or pervasive to constitute a hostile work environment. “The work environment must have been so permeated with discriminatory conduct that it objectively altered Plaintiff’s conditions of employment and created an ‘abusive working environment.’” Bumbarger v. New Enter. Stone and Lime Co., 170 F. Supp. 3d 801, 828 (W.D. Pa. 2016) (quoting Greer v. Mondelez Glob., Inc., 590 F. App’x 170, 173 (3d Cir. 2014)). Even assuming Lt. Arch’s conduct was intentionally discriminatory, there is no degree of severity or pervasiveness such that it altered Turner’s terms and conditions of employment. Accordingly, he does not meet the second prong of a hostile work environment claim.

There is no evidence in the record that Lt. Arch or any other of Turner's supervisors intentionally discriminated against him on the basis of his race. Further, even assuming that Lt. Arch did engage in discriminatory conduct, there is not sufficient severity or pervasiveness to constitute a hostile work environment claim based on the record. Therefore, the City is entitled to summary judgment on Turner's racial hostile work environment claim.

## **B. Retaliation**

The City also moves to dismiss Turner's claim of retaliation. Prior to addressing any of the merits of the City's argument, however, we note an inconsistency between the City's Motion and Turner's response. The City has moved to dismiss Turner's Title VII retaliation claim. (Def.'s Mem. Support Mot. for Summ. J. at 15.) ("Plaintiff claims that the City of Philadelphia retaliated against him in violation of Title VII because Plaintiff opposed and objected to discrimination.") Turner responds to the City's argument by stating "Defendant has also moved for dismissal of Plaintiff's *retaliatory hostile [work] environment claim*." (Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J. at 15.) (emphasis added). A pure retaliation claim and a claim of retaliatory hostile work environment are technically two separate claims. See, e.g., Byrd v. Elwyn, No. 16-2275, 2016 WL 5661713, at \*6-7 (E.D. Pa. Sept. 30, 2016) (separately discussing the plaintiff's claim of retaliation and retaliatory hostile work environment claim); Petruccio v. Teleflex Inc., No. 12-7187, 2014 WL 5697309, at \*10 (E.D. Pa. Nov. 5, 2014) ("A retaliatory hostile work environment claim is analytically distinct from a retaliation claim."); see also Gowski v. Peake, 682 F.3d 1299, 1311 (11th Cir. 2012) (noting that every circuit has recognized that retaliatory hostile work environment is a cognizable claim); Jensen, 435 F.3d at 449 (stating that the normal hostile work environment framework applies equally to retaliatory harassment). To make matters even more confusing, Turner states that his "retaliation claims should be

submitted to trial by jury,” and further proceeds to comingle the law on claims of pure retaliation and retaliatory hostile work environment. We note that the City has specifically moved to dismiss the claim of pure retaliation, not the claim of retaliatory hostile work environment.<sup>3</sup>

Therefore, we will limit our analysis and discussion accordingly.

Under Title VII,

[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3. “To establish a *prima facie* case of retaliation under Title VII, a plaintiff must tender evidence that: ‘(1) [he] engaged in activity protected by Title VII; (2) the employer took an adverse employment action against [him]; and (3) there was a causal connection between [his] participation in the protected activity and the adverse employment action.’” Moore v. City of Phila., 461 F.3d 331, 340-41 (3d Cir. 2006), as amended (Sept. 13, 2006) (quoting Nelson v. Upsala Coll., 51 F.3d 383, 386 (3d Cir. 1995)). “If the employee establishes this *prima facie* case of retaliation, the familiar McDonnell Douglas approach applies in which ‘the burden shifts to the employer to advance a legitimate, non-retaliatory reason’ for its conduct and, if it does so, ‘the plaintiff must be able to convince the factfinder both that the employer’s proffered explanation was false, and that retaliation was the real reason for the adverse employment action.’” Id. (quoting Krouse v. Am. Sterilizer Co., 126 F.3d 494, 500-01 (3d Cir. 1997)). “To survive a motion for summary judgment in the employer’s favor, a plaintiff must produce some

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<sup>3</sup> Turner’s Complaint states, “Defendant has racially discriminated against and/or *retaliated* against Plaintiff for *opposing and objecting to discriminatory conduct*, and has created both a *racially hostile work environment* and a *retaliatory hostile environment* against Plaintiff.” (Compl. ¶ 25.) (emphasis added).

evidence from which a jury could reasonably reach these conclusions.”<sup>4</sup> Id. (citing Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)).

The City contends that some of its actions are not “materially adverse,” while others bear no causal connection between the protected activity and the adverse action. (Def.’s Mem. Support Mot. for Summ. J. at 15.) The City further argues that even if Turner makes out a *prima facie* case of retaliation, it is entitled to the Faragher-Ellerth defense because it exercised reasonable care to avoid Title VII violations by staffing an EEO Unit with the ability to recommend discipline for EEO violations, and Turner unreasonably failed to avail himself to that process. (Id. at 21.)

With respect to the second prong, the Supreme Court of the United States (“Supreme Court”) has held that “a plaintiff claiming retaliation under Title VII must show that a reasonable employee would have found the alleged retaliatory actions ‘materially adverse’ in that they ‘well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” Moore, 461 F.3d at 341 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)). The third element “identif[ies] what [materially adverse actions] . . . a reasonable jury could link to a retaliatory animus.” Id. at 346 (quoting Jensen, 435 F.3d at 449-50). “The ultimate question in any retaliation case is an intent to retaliate *vel non*.” Id. (quoting Jensen, 435 F.3d at 449 n.2).

We need not go through all of the City’s explanations regarding how each individual action is either not materially adverse or somehow not causally connected to the protected activity, as we find that one fact in this case demonstrates a genuine dispute of material fact that precludes summary judgment. The City concedes that Turner engaged in protected activity on

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<sup>4</sup> We note that both the City and Turner recite the *prima facie* case of retaliation, but completely fail to mention the burden-shifting framework of *McDonnell Douglas*.

March 9, 2015, when he wrote the memorandum to Capt. O'Connor about his interactions with Lt. Arch and the affirmative action comment he overheard Lt. Arch make. (Def.'s Mem. Support Mot. for Summ. J. at 16.) ("Plaintiff first opposed Lt. Arch's alleged discrimination in his March 9, 2015 memorandum to Captain O'Connor."). Turner testified that shortly after he made his statement to Capt. O'Connor, Lt. Arch had a roll call with his squad telling them to be careful around Turner because Turner was "throwing everybody under the bus."<sup>5</sup> (Turner Dep. at 85.) As a result, Turner testified that none of the officers wanted to work with him and that, on one occasion, no officer from his district backed him up when he was involved in a situation where an individual had a gun. (Id. at 86-87.) Lt. Arch made the comment to Turner's fellow officers shortly after Turner engaged in Title VII protected activity. While we are mindful that "it is important to separate significant from trivial harms' because '[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience,'" Moore, 461 F.3d at 346 (quoting Burlington N. & Sante Fe Ry. Co., 548 U.S. at 68), we believe a reasonable juror could conclude that a lieutenant, who makes such a comment in front of an employee's fellow officers, would have dissuaded a reasonable worker from making or supporting a charge of discrimination. Due to the temporal proximity between Turner's protected activity and Lt. Arch's comment, we also believe a reasonable juror could link Lt. Arch's comment to a retaliatory animus. Finally, the City offers no legitimate, non-retaliatory reason for Lt. Arch's comment. Accordingly, Turner has made out a *prima facie* case of retaliation.

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<sup>5</sup> Specifically, Turner testified as follows:

- Q. You also said that other officers refused to work with you because of Arch?  
A. Yes. Right after I made the – I went up to IB and gave the statement, Arch had a roll call. Officer Phil Lang pulled me aside and told me that he went back and he's telling everybody just be careful what you do around me, because I'm throwing everybody under the bus.

(Turner Dep. at 85.)

Even if Turner establishes a claim of retaliation, the City argues that the claim should be dismissed because of the Faragher-Ellerth defense. The Faragher-Ellerth defense “applies when the employer ‘exercised reasonable care to avoid harassment and to eliminate it when it might occur’ and the complaining employee ‘failed to act with like reasonable care to take advantage of the employer’s safeguards and otherwise to prevent harm that could have been avoided.’” Jones v. Se. Pa. Transp. Auth., 796 F.3d 323, 328 (3d Cir. 2015) (quoting Faragher, 524 U.S. at 805).

Although Turner makes substantive arguments as to why his claim of retaliation does not fail based on the Faragher-Ellerth defense, we do not believe the defense applies to claims of pure retaliation. In Jones, the Third Circuit noted that, in a pair of companion cases, the Supreme Court “elaborated on when an employer can be held vicariously liable under Title VII for *harassment* of an employee by [his or her] supervisor.” Id. (citing Faragher, 524 U.S. at 755; Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998)) (emphasis added). In outlining the defense, which would become known as the Faragher-Ellerth defense, the Supreme Court stated that “[a]n employer is subject to vicarious liability to a victimized employee for an *actionable hostile environment* created by a supervisor with immediate (or successively higher) authority over the employee” but that “[w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.” Faragher, 524 U.S. at 807 (emphasis added); accord Ellerth, 524 U.S. at 765.

The entire defense was articulated in the context of a hostile work environment claim without mention of retaliation. We have been unable to find any authority where a court applied the defense to a pure retaliation claim; all authority leads us to believe it applies only to claims of hostile work environment. See Pa. State Police v. Suders, 524 U.S. 129, 137 (2004) (“Both

[Faragher and Ellerth] hold that an employer is strictly liable for supervisor *harassment* that culminates in a tangible employment action.” (internal quotation marks omitted) (emphasis added)); Donaldson v. Ronald Lensbouer and Somerset Cnty., No. 15-0063, 2017 WL 2199006, at \*9 (W.D. Pa. May 18, 2017) (stating that the Faragher-Ellerth affirmative defense applies in cases involving harassment by supervisors); Moody v. Atl. City Board of Educ., No. 14-4912, 2016 WL 7217594, at \*6 (D.N.J. Dec. 13, 2016) (“Under the Ellerth/Faragher analysis, the employer in a hostile work environment sexual harassment case may assert as an affirmative defense to vicarious liability. . . .”); see also Clegg v. Falcon Plastics, Inc., 174 F. App’x 18, 24-28 (3d Cir. 2006) (discussing Faragher-Ellerth defense in context of a hostile work environment claim, but failing to mention it in the discussion of the retaliation claim); Abramson, 260 F.3d at 280-81, 286-89 (same); Vollmar v. SPS Techs., LLC, No. 15-2087, 2016 WL 7034696, at \*8-9 (E.D. Pa. Dec. 2, 2016) (same). Indeed, other courts have questioned whether the defense is applicable to claims of retaliation. See Broussard v. Wells Bloomfield, No. 05-0532, 2007 WL 1726571, at \*7 (D. Nev. June 13, 2007) (“Ellerth explicitly contemplates sexual harassment claims, not retaliation claims.”); Strutz v. Total Transit, Inc., No. 06-2370, 2007 WL 772534, at \*3 (D. Ariz. Mar. 9, 2007) (“The Ellerth/Faragher affirmative defense was developed in the context of Title VII sexual harassment law, and it is unclear whether it applies to claims of retaliation based on Title VII religious discrimination.” (internal citation omitted)).

The foregoing demonstrates that the Faragher-Ellerth affirmative defense has its origins in, and has been consistently applied to, hostile work environment claims due to the harassment by a supervisor such that the employer may be vicariously liable. We will not expand the scope

of the defense in the absence of Supreme Court or Third Circuit precedent. Accordingly, we find that the Faragher-Ellerth defense is inapplicable to Turner's Title VII claim of pure retaliation.<sup>6</sup>

As noted above, there is a genuine dispute of material fact as to whether the City retaliated against Turner for his protected activity. The City has provided no legitimate, non-retaliatory reason in response. Accordingly, the City is not entitled to summary judgment on Turner's claim of retaliation.<sup>7</sup>

#### **IV. CONCLUSION**

Turner alleges numerous actions and conduct that form the basis of his racial hostile work environment and retaliation claims. As it pertains to racial hostile work environment, we find no evidence of intentional discrimination or the necessary severity or pervasiveness that is required to support such a claim. Therefore, the City is entitled to summary judgment on Turner's racial hostile work environment claim. However, Turner raises a genuine dispute of material fact as to whether the City retaliated against him once he engaged in protected activity, and the City offers no legitimate, non-retaliatory reason for its actions. Accordingly, the City is not entitled to summary judgment on Turner's claim of retaliation.

An appropriate Order follows.

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<sup>6</sup> In doing so, we make no opinion about whether the defense is available to a retaliatory hostile work environment claim.

<sup>7</sup> Because the City has not moved for dismissal of Turner's claim of retaliatory hostile work environment, we make no opinion of the merits of it.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BRYAN J. TURNER,	:	
	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No. 16-4476
	:	
CITY OF PHILADELPHIA,	:	
	:	
Defendant.	:	
	:	

**ORDER**

**AND NOW**, this 24th day of July, 2017, upon consideration of the Motion for Summary Judgment filed by Defendant City of Philadelphia (Doc. No. 12) and the Response in Opposition filed by Plaintiff Bryan J. Turner, it is hereby **ORDERED** that the Motion is **GRANTED IN PART** and **DENIED IN PART**. It is further **ORDERED** that the Motion is:

1. **GRANTED** as to Plaintiff's claim of racial hostile work environment; and
2. **DENIED** as to Plaintiff's claim of retaliation.

BY THE COURT:

/s/ Robert F. Kelly  
ROBERT F. KELLY  
SENIOR JUDGE