Case No. 19-2373

United States Court of Appeals for the Sixth Circuit

JOHNNY STRICKLAND,

Plaintiff-Appellant,

v.

CITY OF DETROIT, JAMES CRAIG, MARK BLISS, RODNEY BALLINGER, STEVEN MURDOCK, CASEY SCHIMECK AND DEANNA WILSON

Defendants-Appellees.

On Appeal from the
United States District Court for the Eastern District of Michigan

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PLAINTIFF-APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-2373 Case Name: Johnny Strickland v. City of Detroit, MI

Name of counsel: Mark P. Fancher

Pursuant to 6th Cir. R. 26.1, Johnny Strickland
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on March 6, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Mark P. Fancher

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Sgt. Johnny Strickland is an African American police officer who has been one of many victims of a racially hostile environment maintained by his employer. Because many actions that create a toxic racial climate in the department appear to be race-neutral, actual racial conditions can be difficult to discern without knowing the context in which the discriminatory acts occur. Sgt. Strickland requests oral argument because there are important facts that were ignored, distorted or misunderstood by the District Court, and oral argument will provide an opportunity for this Court to request and receive any information necessary for a clear understanding of the context of matters complained of and how Sgt. Strickland's circumstances have implications for the racial climate of the entire police department that serves the City of Detroit.

JURISDICTIONAL STATEMENT

This suit alleges violations of Title VII of the Civil Rights Act of 1964, and the Fourth Amendment of the U.S. Constitution. Jurisdiction in the District Court was pursuant to 28 USC §1331. The District Court granted summary judgment in favor of Defendants as to all claims on November 5, 2019. (R. 42) Sgt. Strickland timely filed a Notice of Appeal to this Honorable Court on November 25, 2019. (R.43) This Court has jurisdiction over this appeal pursuant to 28 USC §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in granting summary judgment on Sgt. Strickland's claim that the Detroit Police Department has maintained a racially hostile employment environment by failing to give proper weight to employer admissions as well as consideration to the totality of the circumstances.

2. Whether the District Court erred in granting summary judgment on Sgt. Strickland's excessive force claim by improperly crediting to a defendant officer the actions of an officer who was not named as a defendant in this case, and who responded to Sgt. Strickland's request for relief from handcuffs that were applied too tightly and that caused him injury.

3. Whether the District Court erred in granting summary judgment on Sgt. Strickland's retaliation claim by improperly ignoring Sgt. Strickland's responses to his employer's purported non-retaliatory reasons for disciplinary action.

STATEMENT OF THE CASE

Sgt. Johnny Strickland

Sgt. Johnny Strickland is an African American police officer who has been employed by Defendant City of Detroit for more than a decade, and who complains in this case of racial employment discrimination that violates Title VII

of the Civil Rights Act. (R. 19)[1] For the entirety of Sgt. Strickland's employment with the police department, he has been forced to endure a racially hostile environment. (Strickland deposition, R. 36-3, Page ID.757 - 760)

In proceedings in the District Court, Sgt. Strickland cited as examples the following racial occurrences he either experienced or heard about:

- A friend and co-worker who was called "boy" by a white police officer (R. 36-3, Page ID.752)
- A social media post stating: "The only racists here are the piece of shit Black Lives Matter terrorists and their supporters." (R. 36-3, Page ID.757)
- A snapchat video mocking a black woman purposely stranded by white police officers that stated: "Celebrating Black History Month" and "What Black Girl Magic looks like." (news article R. 39-2, Page ID.1025)
- White officers who referred to African Americans as "Keishas" and "Homies." (R. 39-2, Page ID.1030)
- A snapchat post that stated: "Another night to Rangel up the zoo animals (sic)" (referring to residents of Detroit, a city that is predominantly African American) (news article R. 39-3)
- A mass media post that referred to Detroit residents as "garbage." (news articles R. 36-16, Page ID.947)

Although the District Court treated this collection of examples as a complete, exhaustive record of Sgt. Strickland's experiences with racial discrimination, there were other occurrences that he either did not recount, or he could not remember. (R. 36-3, Page ID.780-781) Sgt. Strickland was in fact party to a long series of negative experiences with white police officers over the course of a more than 10-year career. (*Id.*) During his tenure he had experienced racial

[1] Johnny Strickland was a patrol officer in August, 2018 at the time of the filing of the initial complaint in this matter. He was promoted to the rank of Sergeant in December, 2018.

discrimination in shift assignments. (*Id.* at Page ID.784) He was shunned by two white officers who were ultimately fired because of notorious racial acts. (*Id.* at Page ID.773) He personally observed white supervisors disrespect black officers over the entire course of his employment as a Detroit police officer. (R. 36-3, Page ID.780-781)

There were also recurring incidents of white command officers harassing black subordinates and discriminating against them in job assignments and training opportunities. (CORE report R. 39-4) Sgt. Strickland was one of the victims of discrimination in shift assignments. (R. 36-3, Page ID.784)

The CORE report

In or about 2016, Police Chief James Craig established the Committee on Racial Equality (CORE) to assess the racial climate as a response to complaints about racial problems. (R. 39-4) The CORE committee interviewed more than 300 officers and documented the racial conflicts and tension between white and black officers. (Bennett affidavit R. 39-5) Their report on this process states in part:

> Our research revealed numerous incidents which involved some direct or indirect involvement of Command staff members in discriminatory practices, which included intimidation and retaliatory behavior. The committee therefore determined that there were enough incidents to conclude that the department has a growing racial problem… African American officers reported retaliatory tactics aimed at those officers who saw bias in the process of appointments to the rank of Detective. A few white Command Officers were blatant in their attacks against black officers who voiced their dissatisfaction with the exam or sought

> redress through the collective bargaining process. (R. 39-4, Page ID.1048)

The conclusions were consistent with Sgt. Strickland's personal experiences. He had experienced racial discrimination in shift assignments, and over the entire course of his employment as a Detroit police officer he had personally observed white supervisors disrespect black officers. (R. 36-3, Page ID.780-781)

Chief Craig, however, publicly minimized the value of the report, describing it as based on rumor and innuendo. (news article R. 39-6)

Strickland is detained and humiliated by white officers

Ten days after Chief Craig's public comments about the CORE committee's report, white officers abused and humiliated Sgt. Strickland (who was at that time a patrol officer who had not yet been promoted to Sergeant). (R. 36-3, Page ID.763 - 771). In the early morning of January 22, 2017, then-Patrol Officer Strickland drove into a gas station lot, completely unaware that it was the scene of a police investigation of a suspected grenade, because the scene showed no evidence of a police investigation and was completely unsecured. (R. 36-3, Page ID.766)

At the time, Sgt. Rodney Ballinger, a white officer, was cloaked by dense fog and stationed at a location that was not on the gas station property. (R. 36-3, Page ID.765) Sgt. Ballinger shouted profanity and orders to Strickland, but Ballinger never identified himself as a police officer. (R. 36-3, Page ID.767) Sgt. Ballinger emerged suddenly from the fog, charged Strickland, and placed him in

handcuffs before providing an explanation to him and an opportunity for Strickland to identify himself. (R. 36-3, Page ID.765) Sgt. Ballinger then, along with other white police officers, began to berate and humiliate Strickland. (R. 36-3, Page ID.767- 768)

Strickland is injured by white officers

The handcuffs placed on Strickland were not properly secured or "double-locked" and they began to tighten and cause him injury. (R. 36-3, Page ID.749 and 751) Strickland complained but he was ignored by Officer Casey Schimeck, who had been directed to watch Strickland as she held the handcuffs' chain links in her grasp. (Schimeck deposition R. 36-5, Page ID.807) At one point she jerked the chain links upward causing Strickland more pain. (R. 36-3, Page ID.768-769) Officer Schimeck was directed to release her grasp on the chain links, and she walked away from Strickland. (R. 36-5, Page ID.809) The handcuffs were still too tight, and Strickland's requests for relief were ignored. (R. 36-3, Page ID.769) Ultimately Strickland was diagnosed as having suffered a bilateral contusion. (R. 36-12) Strickland did not receive any relief from his pain until the lone African American officer on the scene loosened the handcuffs. (R. 36-3, Page ID.770)

Strickland suffers retaliation for his racial discrimination complaint

When Mark Bliss, a supervisory officer, appeared on the scene, he threatened Strickland with retaliation if he made efforts to complain about his

treatment in the gas station parking lot. (R. 36-3, Page ID.782). Nevertheless, Strickland filed an internal police department "EEO" complaint that designated "race" as the basis for the complaint. (EEO complaint R. 36-14) Soon after Strickland filed his internal complaints, investigations were initiated by Deanna Wilson against Strickland that not only resulted in disciplinary action (Internal Affairs report R. 36-7, Page ID.891), but also included unauthorized surveillance. (Wilson deposition R. 36-19, Page ID.971).

One accusation made against Strickland was that he failed to comply with a police order. (R. 36-7, Page ID.889) The referenced order was made by Sgt. Ballinger while he was hidden by a dense fog. (R. 36-3, Page ID.765) Sgt. Ballinger also failed to identify himself as a police officer, providing Strickland with no way to know the order to leave was a law enforcement order. (R. 36-3, Page ID.767)

Internal Affairs complained that Strickland used his authority as a police officer to obtain a personal financial advantage or personal favor. (R. 36-7, Page ID.891) The allegation was that Strickland used his status as a police officer to obtain video surveillance records of his encounter with the officers who are parties to this case. (*Id.*) In fact, Strickland inquired of gas station employees about the availability of security surveillance recordings immediately after he was told he was free to leave. (R. 36-3, Page ID.782) He was dressed in civilian clothing at the

time of his inquiry and he did not communicate to gas station employees that he was a police officer. (*Id*.)

Strickland was also accused of withholding from police officials information bearing on crimes. (R. 36-7, Page ID.892) However, he testified that he was the appropriate person to possess the video evidence by virtue of his position as a union steward. (R. 36-3, Page ID.781)

A formal charge filed against Strickland concerned his failure to complete an incident report. (R. 36-7, Page ID.892) In proceedings in the District Court, Sgt. Strickland noted the disparity in treatment between himself and Officer Steven Murdock, who also did not complete a report, but was not disciplined for the infraction. (R. 36-3, Page ID.782)

The Sixth Precinct audit and the Bennett affidavit

By 2019, multiple media reports of serious racial misconduct by white Detroit police officers were followed by Chief Craig's call for an environmental audit of the Sixth Precinct. (R. 39-2) Investigators identified various incidents of extreme racial misconduct. (*Id*.) These incidents included, among other things: an officer referred to two black female arrestees and one male black arrestee as "Two Keisha's and one Homie to go." (R. 39-2, Page ID.1030) In another reported incident an officer struck a handcuffed black male who was seated in the backseat of a police vehicle. (R. 39-2, Page ID.1031; 1035) In still another reported

incident, a black motorist was made to walk home after her car was impounded. (R. 39-2, Page ID.1031) Officers followed and video recorded her as she walked, adding commentary that included "What black girl magic looks like" and "Celebrating Black History Month." (R. 39-2, Page ID.1025) The video was posted to social media. (*Id*.)

The primary bad actors were identified as Gary Steele and Michael Garrison. (R. 39-2, Page ID.1030) At one point in his career, Sgt. Strickland worked with both officers and was shunned by them notwithstanding his efforts to interact with them as colleagues. (R. 36-3, Page ID.773) Investigators conducting the environmental audit concluded: "Based on all of the information contained in this report, the Department concludes that the 6th Precinct is racially divided." (R. 39-2, Page ID.1030)

John Bennett, chair of the CORE committee, reviewed the report and stated in an affidavit: "The problems that Chief Craig is at long last addressing in the Sixth Precinct were observed in varying degrees throughout the police department by the Committee on Race and Equality (CORE) in 2016." (R. 39-5, Page ID.1057) Although the Bennett affidavit is a part of the record in this case, no reference was made to it in the District Court's opinion.

Procedural history

Sgt. Strickland filed his complaint in the United States District Court for the Eastern District of Michigan, Southern Division, on August 23, 2018. (R.1) The case was assigned to Hon. Nancy G. Edmunds and given case number 18-cv-12640. The complaint was amended on November 20, 2018. (R. 19) The Defendants filed a motion for summary judgment on July 1, 2019. (R. 35) The motion came before the court for a hearing on August 21, 2019. The court entered an order granting summary judgment to Defendants as to all issues on November 5, 2019. (R. 42) Sgt. Strickland filed a Notice of Appeal on November 25, 2019. (R. 43)

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of a motion for summary judgment. *FTC v. EMA Nationwide*, 767 F.3d 611, 629 (6th Cir. 2014); *Bentkowski v. Scene Magazine*, 637 F.3d 689, 693 (6th Cir. 2011); *Stansberry v. Air Wisconsin Airlines Corp.*, 651 F.3d 482, 486 (6th Cir. 2011)

SUMMARY OF ARGUMENT

Racially hostile employment environment

The Detroit Police Department maintains a racially hostile employment environment, and those with authority within the department have admitted such. It was error for the District Court to grant the City's motion for summary judgment

for the hostile environment claim for the following reasons:

a) The Detroit police department effectively stipulates to the existence of racial problems in its Sixth Precinct in an internal report that states in part: "Based on all of the information contained in this report, the Department concludes that the 6th Precinct is racially divided."

b) John Bennett, a law enforcement professional who is a witness in this case and who has observed conditions throughout the police department, avers in an affidavit that racial problems like those in the Sixth Precinct "were observed in varying degrees **throughout the police department** by the Committee on Race and Equality (CORE) [which Bennett co-chaired] in 2016" (emphasis added).

c) Sgt. Strickland had direct experience with the most notorious bad racial actors in the Sixth Precinct in addition to his experience with racial problems throughout the police department.

Sgt. Strickland experienced racial conditions that pervade the police department and that are complained of in this case. One particular incident was his encounter with white officers on a gas station lot, but that experience was only part of a succession of hostile encounters between white and black officers. Each individual incident that was investigated by the CORE committee and referenced in that group's report may not have involved acts or statements that were explicitly racial, but consideration of all those incidents together reveals a pattern of facially

race-neutral harassment inflicted consistently upon black officers by white supervisors. This all leads to the unavoidable conclusion, and certainly could lead a reasonable jury to conclude, that there is racial discrimination producing an institutional culture that not only condones but encourages routine disrespect for black officers. The District Court erred by considering individual incidents in isolation rather than considering the totality of the circumstances as required by Sixth Circuit law.

Excessive force

During the gas station encounter, the police officers who detained Sgt. Strickland placed him in handcuffs and caused him physical injury by tightening the cuffs unnecessarily and ignoring his pleas for relief. Although police officers can raise the defense of qualified immunity, they can be subject to liability if they violate a federal statutory or constitutional right, and it was "clearly established" at the time that their conduct was unlawful. At the time of the incident in this case, it was clearly established under governing law that when officers place someone in "unduly tight" handcuffs and purposely leave them in that condition, they violate the Fourth Amendment. It is undisputed that Sgt. Strickland complained about the tightness of the handcuffs, his complaints were ignored, and he suffered physical injury as a consequence.

Retaliation

Sgt. Strickland filed internal complaints against the officers in defiance of a warning against doing so by a superior officer. Sgt. Strickland then found himself the subject of Internal Affairs complaints. The District Court concluded that Sgt. Strickland made out a prima facie case of retaliation. Nevertheless, the District Court ultimately concluded that a "legitimate, non-retaliatory reason" for disciplining Sgt. Strickland was demonstrated, and the retaliation claim was dismissed on summary judgment.

The dismissal was improper because Sgt. Strickland, at the very least, raised a genuine dispute of material fact directly challenging the purported legitimate non-retaliatory reasons for disciplinary actions taken against him. As to allegations that he refused to obey an order by a police officer investigating a suspected hand grenade, he testified that he had no idea that he was at a crime scene and that police officers were yelling at him because the officers never identified themselves as such and he was unable to visually identify them as officers because of heavy fog.

Sgt. Strickland was also accused of "using authority or position for financial gain or for obtaining privileges or favors." Specifically, he was accused of using his status as a police officer to obtain a video surveillance recording at the gas station. However, Sgt. Strickland inquired of gas station employees about the

availability of security surveillance recordings immediately after he was told he was free to leave. He was dressed in civilian clothing at the time of his inquiry and he did not communicate to gas station employees that he was a police officer.

Sgt. Strickland was also accused of withholding information bearing on crimes, specifically security surveillance video recordings. However, he testified that he was the appropriate person to possess the video evidence by virtue of his position as a union steward.

Finally, an accusation of "neglect of duty" was related to Sgt. Strickland's failure to complete an activity log. However, the record reflects a disparity in treatment between Sgt. Strickland and Officer Steven Murdock, a white officer who also did not complete a report but was not disciplined for the infraction.

ARGUMENT

The District Court improperly granted summary judgment in favor of Defendants. Fed. R. Civ. P. 56(c) provides that summary judgment is proper only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." A fact is "material" and precludes a grant of summary judgment if "proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle[s]

of law to the rights and obligations of the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984). "In deciding upon a motion for summary judgment, we must view the factual evidence and draw all reasonable inferences in favor of the non-moving party." *Nat'l Enters., Inc. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997).

In this case, Sgt. Strickland's employer made admissions as to certain critical facts, and as to others, Sgt. Strickland asserted credible challenges to the employer's assertions. In the face of genuine contested issues of fact, the District Court improperly granted summary judgment rather than have these issues resolved by a jury.

I. By its own admission the Detroit Police Department has maintained a racially hostile employment environment, and the District Court erred by granting summary judgment on that claim by examining individual incidents in isolation rather than considering the totality of the circumstances.

Sgt. Strickland has not only endured a racially hostile employment environment that violates Title VII of the Civil Rights Act, but his employer has also effectively admitted that such conditions exist. Sgt. Strickland initiated and maintains this action against his employer and certain of its individual employees.

A. The elements of a racially hostile environment claim

This Court has set forth the elements of a claim asserting a racially hostile work environment as follows:

> A plaintiff must prove: (1) he belonged to a protected group, (2) he was subject to unwelcome harassment, (3) the harassment was based on race, (4) [the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment], and (5) the defendant knew or should have known about the harassment and failed to take action.

Moore v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073, 1078–79 (6th Cir. 1999).

This Court has made it clear that proper analysis of a hostile work environment claim is the requirement to consider the "totality of the circumstances." *See Jackson v. Quanex*, 191 F.3d 647, 659 (6th Cir. 1999).

> Under the totality of the circumstances approach, a district court should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode. . . To consider each offensive event in isolation would defeat the entire purpose of allowing claims based upon a "hostile work environment" theory . . . .

Id. at 660.

Thus, in determining whether harassment is based on race, there need not be a mechanical reference to a finite list of racial words or point-for-point side-by-side comparisons of individual employees. "Title VII has long afforded employees the right to work in an environment free from 'discriminatory intimidation, ridicule and insult' without limiting this concept to intimidation or ridicule *explicitly* racial in nature." *Id* at 661 (emphasis added). "Conduct that is not explicitly race-based may be illegally race-based and properly considered in a hostile-work-environment

analysis when it can be shown that but for the employee's race, [he] would not have been the object of harassment." *Clay v. U.P.S.*, 501 F.3d 695, 706 (6th Cir. 2007).

Consideration of the severity or pervasiveness of a purported hostile environment involves both an objective and subjective evaluation of the offensiveness of conditions complained of. *Newman v. Federal Express Corp*., 266 F.3d 401, 405 (6th Cir. 2001). More particularly, the question is "whether a reasonable person would find the environment hostile and abusive, and a subjective component that asks whether the individual plaintiff subjectively viewed that environment as abusive." *Armstrong v. Whirlpool*, 363 F. App'x 317, 324 (6th Cir. 2010). Although courts exclude from consideration conduct in the workplace of which the employee had no knowledge, the totality of the circumstances includes acts the plaintiff knows about but did not personally witness. *Id.* at 328.

B. The District Court failed to give proper consideration to the employer's admissions and wholly disregarded a key affidavit demonstrating the overall hostility of the work environment.

In this case, the District Court disregarded or minimized critical evidence and testimony that established a prima facie case for Sgt. Strickland and precluded summary judgment.

The District Court minimized the significance of an internal environmental audit report that states in part: "Based on all of the information contained in this

report, the Department concludes that the 6th Precinct is racially divided." (R. 39-2, Page ID.1030)

The District Court also ignored an affidavit by John Bennett, a law enforcement professional, that states in relevant part: "The problems that Chief Craig is at long last addressing in the Sixth Precinct were observed in varying degrees **throughout the police department** by the Committee on Race and Equality (CORE) [which Bennett co-chaired] in 2016." (R. 39-5, Page ID.1057) (emphasis added).

These statements alone make summary judgment improper because summary judgment is warranted only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984).

In this case the environmental audit and the Bennett affidavit in combination contradict any contention that there were no racially hostile conditions in the police department work environment that adversely affected Sgt. Strickland and violated his rights under Title VII. Nevertheless, much of the District Court's opinion rests on the premise that notwithstanding any racism that may have been present in the

Sixth Precinct or elsewhere, Sgt. Strickland has not been sufficiently and directly touched by racial hostility. This is factually incorrect.

The environmental audit of the Sixth Precinct devoted special attention to the egregious racial activities of Corporal Gary Steele and Officer Michael Garrison. During his deposition Sgt Strickland testified:

> I also actually worked in the same precinct as Gary Steele and Garrison. I would try to speak to these individuals. They wouldn't speak to me. They would just walk past me as if I never said anything to them. All these things is within the duration of my tenure as a police officer, so no matter what percentage you're telling me how many are white and black, these are my experiences as a police officer, as an African-American police officer.

(R. 36-3, Page ID.773)

To fully appreciate the implications of Bennett's conclusion that the entire police department was like the Sixth Precinct, and the fact that Sgt. Strickland has had to endure such workplace conditions wherever he was assigned, it is useful to know that the Sixth Precinct was a racial cesspool.

The environmental audit references an incident where an officer refers to two black female arrestees and one male black arrestee as "Two Keisha's and one Homie to go." (R. 39-2, Page ID.1030) In another reported incident an officer struck a handcuffed black male who was seated in the backseat of a police vehicle. (R. 39-2, Page ID.1031; 1035) In still another reported incident, a black motorist was made to walk home after her car was impounded. (R. 39-2, Page ID.1031)

Officers followed and video recorded her as she walked, adding commentary that included "What black girl magic looks like" and "Celebrating Black History Month." (R. 39-2, Page ID.1025) The video was posted to social media. The audit report's conclusion that the Sixth Precinct is racially divided was based on identified racial trends. Separately, the CORE committee headed by John Bennett found racial problems throughout the police department. (R. 39-5, Page ID.1057)

Bennett's affidavit explains that his CORE committee interviewed more than 300 officers and they concluded: "Our research revealed numerous incidents which involved some direct or indirect involvement of Command staff members in discriminatory practices, which included intimidation and retaliatory behavior. The committee therefore determined that there were enough incidents to conclude that the department has a growing racial problem…" (R. 39-4, Page ID.1048)

The conditions described by Bennett and the environmental audit report paint a vivid picture of a police department plagued by racial animus that is both severe and pervasive. The District Court apparently did not find the environmental audit report to carry sufficient weight, even though, at the summary-judgment stage, it was required to view the factual evidence and draw all reasonable inferences in favor of Sgt. Strickland. Likewise, the District Court did not find Bennett's affidavit worthy of any consideration at all, as the affidavit was not even mentioned in its opinion. In reaching these conclusions and granting the motion for

summary judgment, the District Court improperly usurped the role of a jury, played that role improperly, overlooked key evidence, and erred by granting the motion for summary judgment.

C. The District Court erred by compartmentalizing individual events rather than considering the totality of the circumstances.

It was never Sgt. Strickland's intent to suggest in this case that the harassment and excessive force he experienced in a gas station parking lot at the hands of white officers was an isolated, discrete occurrence that alone is proof of racial discrimination. No racial language or other telltale evidence of racial animus was observable during the incident. However, that does not mean the incident was not racial, because the same might be said about each individual incident that was investigated by the CORE committee and referenced in that group's report. Nevertheless, the consideration of all those incidents together led the CORE committee to conclude in its report:

> Our research revealed numerous incidents which involved some direct or indirect involvement of Command staff members in discriminatory practices, which involved intimidation and retaliatory behavior. The committee therefore determined that there were enough incidents to conclude that the department has a growing racial problem.

(R. 39-4, Page ID.1048)

In other words, a pattern of facially race-neutral harassment inflicted consistently upon black officers by white supervisors leads nevertheless to the conclusion that there is racial discrimination. It was in that context that Sgt.

Strickland experienced a racially hostile work environment. The racial element becomes apparent when his experience is considered along with the experiences of other African American officers. In the absence of explicit racial references these officers too were harassed or discriminated against by white officers. This pattern of conduct leads to the logical conclusion that the actions of the white officers were consistent with an institutional culture that not only condones but encourages routine disrespect for black officers.

The District Court was fully aware of how Sgt. Strickland framed his experience. The opinion states:

> Plaintiff does not allege that overt racial comments were made during the January 22, 2017 incident, nor is there evidence of the same. The overarching theory of Plaintiff's claim is that the Chief of Police created CORE, then the Chief denied there were any race issues in the department, thus sending "the message to all white supervisory officers" that disrespecting black officers was okay, resulting in Plaintiff being disrespected by white officers and his Constitutional rights violated. (Strickland Dep. 127.) Plaintiff alleges that the January 22, 2017 encounter in which he was yelled at by other police officers and ended up in handcuffs was the "manifestation of numerous incidents of discrimination, harassment and retaliation directed at African American officers that were known to Plaintiff and that constituted a racially hostile employment environment. These workplace conditions were exacerbated by racial comments, racial social media posts, and accounts of discriminatory treatment of African American officers by white supervisory officers."

(R.41, Page ID.1102)

Notwithstanding the District Court's understanding of Sgt. Strickland's

theory of the case, the court proceeded nevertheless to isolate his experience at the gas station and treat it as a lone event lacking any racial context and racial attributes. This was error. As one court in this Circuit has explained:

> A hostile environment claim "cannot be said to occur on any particular day." *Clay v. United Parcel Service, Inc.*, 501 F.3d 695, 708 (6th Cir. 2007) (internal citations omitted). Rather, a hostile work environment is comprised of "a succession of harassing acts, each of which 'may not be actionable on its own.'" *Id.* "[T]he actionable wrong is the environment, not the individual acts that, taken together, create the environment." *Id.* Therefore, the court "should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode." [*Jackson*], 191 F.3d at 660 (citations omitted).

Chancellor v. Coca Cola Enterprises, 675 F. Supp. 2d 771, 779 (S.D. Ohio 2009).

Similarly, the District Court's analytical approach is a flagrant departure from the "totality of the circumstances" approach employed by this Court in *Williams v. General Motors*, 187 F.3d 553, 562 (6th Cir. 1999). "[T]he issue is not whether each incident of harassment *standing alone* is sufficient to sustain the cause of action in a hostile environment case, but whether – taken together – the reported incidents make out such a case." *Id.*

In a separate case the Sixth Circuit explained:

> The phrase "totality of the circumstances," used above, means that: (1) offensive conduct need not be directed at the plaintiff, (2) the plaintiff need not be present at the time of the offensive conduct; instead, she or he can learn of the conduct second-hand, (3) or . . . animus can be inferred from conduct not overtly racial or sexual in nature when the context suggests it, and (4) blue collar work

> environments do not have more leeway when it comes to offensive conduct.

Ladd v. Grand Trunk W. R.R., 552 F.3d 495, 500 (6th Cir. 2009) (citations omitted).

Here, the record reflects, through the CORE report, the Sixth Precinct audit, and the Bennett affidavit, evidence of a pattern of hostile treatment by white officers toward black officers. The record further reflects that Sgt. Strickland, both through personal experience and his knowledge of incidents throughout the department, endured the severe and pervasive harassment documented above. A jury would be able, after considering the totality of the circumstances, to logically conclude that Sgt. Strickland was the victim of racial discrimination.

The District Court erred further in its analysis of specific incidents of racial conduct cited in Sgt. Strickland's complaint. These occurrences were cited in the complaint only as examples of how the racially hostile employment environment that Sgt. Strickland was made to endure manifested itself. They may have been the only incidents referenced, but they were not the only incidents he experienced. During his deposition he testified:

> As I stated before, back in I believe 2009, 2010, as I stated earlier in this, I had a co-worker by the name of Hodo who was disrespected by a white officer. He was called a boy. I heard about numerous issues by way of social media, the mass media, where you know, white officers are making these comments, racial comments on social media I also actually worked in the same precinct as Gary Steele and Garrison. I would try to speak to these individuals. They wouldn't speak to me.

> They would just walk past me as if I never said anything to them. All these things is within the duration of my tenure as a police officer…these are my experiences as a police officer, as an African-American police officer. I remember working Special Operations on a shift that was 7:00 p.m. to 3:00 a.m. which was not a very desired shift. I typically worked the 11:00 a.m. to7:00 p.m. shift, but I was denied multiple times which at the 8th Precinct was white officers. This is a desired shift and I couldn't get that opportunity to work these shifts.

(R.36-3, PageID.773)

In addition, Sgt. Strickland testified:

> Q. Was there ever a time at the 8th Precinct that you as a police officer, that you saw a supervisor showing disrespect based on their race a police officer?
>
> A. I've seen white supervisors disrespect black officers.
>
> Q. And when was this?
>
> A. Just throughout my entire tenure as a police officer.

(R.36-3, PageID.780-781)

This testimony demonstrates that Sgt. Strickland encountered racial problems of various kinds throughout his employment, and he has been able to provide poignant examples.

The absence of an encyclopedic, documented record of all of his painful experiences is neither surprising nor fatal to his claim. Persons experiencing racial trauma might, for their own emotional health, sometimes suppress such incidents

from their daily thoughts and long-term memory.[2] Consequently, it is error in a case like this one, where there is evidence of widespread racial discrimination from multiple sources, to presume a plaintiff's lack of traumatic racial experience. Nevertheless, the District Court treated the cited examples as not only isolated, discrete events, but also as the sum total of discriminatory occurrences in the police department.

The District Court's approach is problematic not only legally because of its disregard for the totality of the circumstances standard, but also for practical reasons. An environment of any kind is not defined by only one of its elements. Conceivably, a racially hostile environment can consist of a combination of elements that are individually benign, but in combination toxic. Sgt. Strickland provided a few memorable examples of the type of workplace harassment he observed and experienced. Although he merely wanted to provide the court with the flavor of his workplace environment, the District Court seized on those few examples to straight-jacket Sgt. Strickland into what it regarded as the complete and definitive list of racial incidents in the police department. Not only is this not true, it also disregards the fact that the tone of a workplace environment can be racially tainted even at times when there are no racially hostile occurrences

[2] See Jillian C. Shipherd and J. Gayle Beck, *The Role of Thought Suppression in Posttraumatic Stress Disorder*, 36 Behav. Therapy 277 (2005), *available at* https://www.memphis.edu/athena/pdfs/thoughtsuppressioninptsd.pdf.

currently in progress. The knowledge that such incidents have been tolerated in the past can have a considerable impact on an employee's current workplace experience.

> In [*Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)], the landmark case establishing a cause of action under Title VII for workplace harassment, the Court observed that employees are entitled to protection in "working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." 477 U.S. at 66, 106 S.Ct. 2399 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir.1971)).

Jackson v. Quanex, 191 F.3d at 660

D. The severity and pervasiveness of Sgt. Strickland's workplace conditions, viewed together rather than in isolation, rendered summary judgment improper, as the racially hostile acts complained of are both objectively and subjectively offensive.

The District Court concluded that none of the incidents referenced in the complaint when considered in isolation are sufficiently severe, and that because collectively they are few, they are not pervasive:

> The nature of the comments coupled with the relative infrequency of the comments, as well as the ambiguity as to when, where and how Plaintiff became aware of the comments allows this court to find as a matter of law that the conduct was not sufficiently severe or pervasive to reach a jury. While Plaintiff alleges that the January 22 incident has interfered with his work performance, there is no evidence on which a reasonable jury could find that the January 22 incident was based on race and/or tied to these comments. The additional comments and occurrences are not severe or pervasive enough to create a jury question on Plaintiff's hostile work environment claim.

(R.41, Page ID.1109-1110)

Again, the District Court's error lies in the fact that the incidents cited by Sgt. Strickland as examples are considered by the District Court as not only the full collection of his experiences, but also as distinct, unrelated occurrences. However, a single act that appears to be relatively inoffensive when viewed in isolation may be extremely harmful when it is placed in the context of other offensive events. This Court has explained how single occurrences should be analyzed:

> [A] "work environment viewed as a whole may satisfy the legal definition of an abusive work environment ... even though no single episode crosses the Title VII threshold." A negative performance review, the imposition of a performance improvement plan, or similar actions do not, on their own, show a hostile work environment. However, when "seen as a part of the 'constellation of surrounding circumstances,' including [ ] threatening language" and racially disparate treatment by a supervisor, this conduct "could well be viewed as work-sabotaging behavior that creates a hostile work environment."

Bradley v. Arwood, 705 Fed. App'x 411, 422 (6th Cir. 2017) (citations omitted).

Evaluation of the severity or pervasiveness of racial discrimination involves consideration of, among other things, whether the conduct is physically threatening or humiliating; whether it is a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance. **"The inquiry 'is particularly unsuited for summary judgment because it is quintessentially a question of fact.'"** *Tademy v. Union Pacific Corp.*, 614 F.3d 1132, 1144 (10th Cir.

2008) (quoting *Herrera v. Lufkin Indus. Inc*., 474 F.3d 675, 680 (10th Cir. 2007) (emphasis added).

In this case Sgt. Strickland's experiences touched all analytical bases. He was physically threatened, humiliated and abused on the gas station premises. He witnessed the use of racially offensive language. He was denied favorable shift assignments that were given to his white peers. He had still other experiences, but occurrences specified and unspecified were not considered collectively by the District Court. The incidents were instead treated as separate, discrete, disconnected and unrelated. Doing so was error because this Court has established that "a succession of harassing acts" should not be considered in isolation:

> Bradley [the plaintiff] has provided evidence to suggest that the race-based harassment she suffered included daily interactions, emails, and other communications, barriers to her use of leave, demands that she work while on medical leave, and unfounded negative reviews and counselling memos, all contributing to a "work-sabotaging" hostile work environment...Bradley does more than present a series of isolated offensive events. Rather, she describes "a succession of harassing acts," and though "each of [them] may not be actionable on its own," as a whole they are severe and pervasive enough to comprise a hostile work environment.

Bradley, 705 Fed. App'x at 422.

Accordingly, conditions Sgt. Strickland cites should be considered collectively rather than individually, which the District Court failed to do. Viewed in the proper light, the racial hostility of the workplace environment maintained by Sgt. Strickland's employer meets both the objective and subjective requirements

for a hostile environment claim. *See Newman v. Federal Express Corp*., 266 F.3d 401, 405 (6th Cir. 2001). More particularly, "a reasonable person would find the environment hostile and abusive," and "the individual plaintiff subjectively viewed that environment as abusive." *Armstrong v. Whirlpool*, 363 F. App'x 317, 324 (6th Cir. 2010).

Beginning with the objective component, the long succession of discriminatory and harassing acts that occurred in the Detroit Police Department, when considered as a package, are extremely offensive and easily satisfy the test for summary-judgment purposes. Any reasonable person would consider as hostile a workplace where there is racial favoritism in job assignments (R. 36-3, Page ID.784), abusive conduct toward communities of color (R. 39-2, Page ID.1031), racially offensive social media posts (R. 36-3, Page ID.757), use of offensive racial language (R. 36-3, Page ID.752), and racially targeted acts intended to humiliate. (R. 39-2, Page ID.1025)

While courts exclude from consideration conduct in the workplace of which the employee had no knowledge, **the objective analysis may include consideration of acts the plaintiff knows about but did not personally witness**:

> In *Hawkins v. Anheuser-Busch, Inc.* [517 F.3d 321, 335 (6th Cir. 2008)] this court reviewed Sixth Circuit case law addressing other-act evidence and held that the case law 'makes clear that we can consider evidence of other acts of harassment of which a plaintiff becomes aware during the period [of] his or her employment, even if the other

> acts were directed at others and occurred outside the plaintiff's presence.'"

Armstrong, 363 F. App'x at 328.

Sgt. Strickland was questioned during his deposition about his awareness of offensive acts that occurred outside of his presence, and he testified that while he was unable to recite specifics about dates and identities of speakers, he was aware of these racial events when they occurred. (R. 36-3, Page ID.757-758)

When questioned about other examples of racially offensive conduct referenced in the complaint, Sgt. Strickland similarly acknowledged his inability to recall specifics, but his clear recollection that he was aware of these acts or statements at or about the time they occurred. For example, when asked about racial comments made by Assistant Chief Steven Dolunt, Sgt. Strickland testified that the statements were made in 2015 and he heard about them "[a]round that time." (R. 36-3, Page ID.760)

Sgt. Strickland's gas station experience was not the only occasion when he was the direct victim of racial harassment or discrimination. He was one of the many black officers who had an experience of the type described by the CORE report. When asked to identify rights denied to him, he testified: "I was disrespected, wasn't in the past given certain shifts, allowed to go to certain trainings, disrespected by white supervisory officers and white officers." (R. 36-3, Page ID.784)

Consequently, the record establishes that whether Sgt. Strickland was the target of racially offensive acts, or he was only aware of them, requirements related to the objective element of the analysis are fully satisfied.

With respect to the subjective prong of the analysis, the District Court implied that an environment is subjectively harmful only if the plaintiff personally experiences the harmful conduct. As noted, Sgt. Strickland had personal experiences with racial discrimination other than the gas station event, but the District Court ignored those aspects of the record that indicate that Sgt. Strickland did in fact personally experience harmful conduct. As just one example, he testified:

> A. As I stated before, I attempted or tried to work in numerous job shifts, different assignments of the task force which I was denied and white officers were not.
>
> Q. And how did the Defendants act with malice?
>
> A. If I put in a transfer for a particular shift or assignment and I have all the qualifications for it and you fill that shift or assignment with someone who don't have the qualifications who is of a different race, that's malice.

(R. 36-3, Page ID.784-785)

Even if Sgt. Strickland had not been a direct victim of racial discrimination his knowledge of the experiences of others would have been sufficient. As it did with respect to the objective aspect of the analysis, this Court has rejected the

"extremely narrow view of workplace harassment" that the District Court employed:

> In essence, under this view, each minority employee would have to show that the employer had an intent specifically to harass her and could not proceed on a theory that the employer had a general intent to harass all employees of the minority group. Put another way, this definition of workplace harassment holds the fact that an employer discriminates against other members of the same minority group irrelevant to the question of whether a particular member of the minority group suffered racial harassment.

Jackson, 191 F.3d at 660.

This Court went on to conclude: "We find such a myopic view of harassment unacceptable, particularly in light of the directive in [*Harris v. Forklift Sys.*, 510 U.S. 17 (1993)] that courts are to consider 'all of the circumstances' in determining whether a hostile work environment exists." *Id.*

In many ways Sgt. Strickland made clear in his testimony that he was personally offended by the various racially hostile and discriminatory acts and statements tolerated and encouraged by his employer. For example, he testified:

> A. …There's times when I go to work and I see these individuals that I've dealt with. Sometimes I start crying. Often times I start sweating. I try to just avoid them by going the opposite way so it affects me when I'm working my shift.
>
> Q. Is it only with them or is it with all white officers?
>
> A. I can't trust anyone because again, the Chief has sent the message to these white officers and supervisors that they don't have to respect us, so I can't trust anybody. You talking about a job where a lot of times it's a life or death situations and I can't trust them

> with my life because of the message that they have from the Chief that you can disrespect officers and treat them any type of way and it's okay.

(R. 36-3, Page ID.786)

Sgt. Strickland's subjective experience combined with the objective offensiveness of these conditions satisfies the requirement that harassment be either severe or pervasive. At the very least, the record reflects that there are genuine issues of material fact on each element of Sgt. Strickland's hostile work environment claim. The District Court's grant of summary judgment on this claim should be reversed.

II. Complaints of injury caused by tight handcuffs were ignored by police officers, and the indifference to Sgt. Strickland's physical pain was unconstitutional excessive force under clearly established law precluding summary judgment.

The police officers who detained Sgt. Strickland placed him in handcuffs and not only caused him physical injury by tightening the cuffs unnecessarily, but also by ignoring his pleas for relief. These acts, as a matter of clearly established law, amount to excessive force in violation of the Fourth Amendment, so the District Court's entry of summary judgment on that claim was improper.

When police officers raise the defense of qualified immunity, they can be subject to liability if a) they violate a federal statutory or constitutional right, and b) it was "clearly established" at the time that their conduct was unlawful. *District*

of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018). Both requirements are satisfied here.

This Court has affirmed that it is clearly established that when officers place someone in "unduly tight" handcuffs and purposely leave them in that condition causing injury, they violate the Fourth Amendment. *Kostrzewa v. City of Troy*, 247 F.3d 633, 641 (6th Cir. 2001); *Burchett v. Kiefer*, 310 F.3d 937, 944-45 (6th Cir. 2002); *Rudolph v. Babinec*, 939 F.3d 742 (6th Cir. 2019). In *Rudolph*, this Court held:

> [The plaintiff] demonstrated the three elements needed to make out an excessive-handcuffing claim: (1) she complained that the handcuffs were too tight, (2) the officers ignored her complaints, and (3) she suffered "some physical injury" from the handcuffing. *Miller v. Sanilac County*, 606 F.3d 240, 252 (6th Cir. 2010) (citation omitted).

Id. at 750.

The same three elements are established by record evidence here. First, it is undisputed that Sgt. Strickland complained about the tightness of the handcuffs. During his deposition, Sgt. Strickland testified that Ballinger "put the handcuffs on me. They were extremely tight. He didn't double lock the handcuffs." During her deposition, Officer Schimeck testified:

> Q. Did he at any point, he being Officer Strickland, did he at any point express [or] state that he was in discomfort because of the handcuffs?
>
> A. Yes.

(R. 36-5, Page ID.808) Second, Sgt. Strickland testified that his complaints were ignored: "When I told [Officer Schimeck] the cuffs were too tight, there wasn't a response." (R. 36-3, Page ID.769) Third, police department physicians diagnosed Sgt. Strickland's injuries as "bilateral wrist contusions" and attributed them to the handcuffing incident. Thus, under *Miller* and *Rudolph*, summary judgment and qualified immunity must be denied.

The District Court nonetheless held that Sgt. Strickland failed to satisfy the second element – i.e. that officers ignored his complaints.

> While there is some question of fact as to how Defendant Schimeck responded to Plaintiff's complaint that the handcuffs hurt, the issue was ultimately addressed: Plaintiff's handcuffs were loosened and locked into place by Schimeck's partner, and they were ultimately removed upon Plaintiff giving notice to Bliss that they were too tight. (Strickland Dep. 129-31, 136, 137-38; ECF no 36-3.) Plaintiff's complaints were not ignored. (Strickland Dep. 138.) The Court finds that handcuffing Plaintiff in these circumstances did not violate his constitutional rights and that such handcuffing was excessive; Plaintiff has not demonstrated an excessive handcuffing claim. The officers did not violate his constitutional rights with respect to the handcuffing.

(R. 41, Page ID.1121)

The District Court erred by crediting to Officer Schimeck the actions of her partner, Officer Blackburn, who was not named as a defendant in this case. The fact that Officer Schimeck's partner honored Sgt. Strickland's request for relief does not excuse Officer Schimeck from liability. Her actions alone must be the subject of individualized evaluation.

In *Jones v. City of Elyria, Ohio,* No. 18-4157, __ F.3d __ (6th Cir. 2020), several officers who participated in the arrest of the plaintiff faced claims of excessive force. However, this Court declined to treat their actions as those of a collective unit. Instead, there was individualized analysis:

> Here again, Mitchell is differently situated than her fellow officers. When Mitchell arrived on the scene, Weber and Chalkley were already struggling with Jones. She did not witness the events that led to the unlawful pat-down, nor do we impute to her the knowledge of facts known only to the other officers. Jones alleges only that Mitchell took hold of his feet while Weber and Chalkley restrained him. Mitchell did not tase Jones or strike him, even on Jones's own version of the events. Additionally, because Mitchell did not witness the events leading up to the altercation, she could have fairly believed that Jones posed a threat to Weber and Chalkley. A reasonable officer in that circumstance would likewise have helped secure the scene. And that is precisely what Mitchell did. As Jones does not say otherwise, Mitchell's actions did not violate Jones's Fourth Amendment rights.

Id., slip op. at 14.

The case at bar presents another occasion when the actions of the officers must be considered on their own merits - Officer Schimeck's actions in particular. During her deposition, Officer Schimeck testified:

> Q. As far as you could tell, what was causing whatever pain [Sgt. Strickland] was complaining of? Was it your holding onto [the handcuffs] that was causing the pain?
>
> A. I don't recall -- I don't know what was causing him pain. I just know that my partner told me I can let go of the handcuffs, he's not going anywhere.
>
> Q. Did he complain after you let go?

A. I don't recall.

Q. Do you recall Officer Blackburn doing anything further with the handcuffs?

A. I don't recall Officer Blackburn doing anything.

Q. Was there any reason that you would have or should have, could have concluded that there was a need for any type of medical assistance for Officer Strickland as a result of the pain that he said he experienced while wearing the handcuffs?

A. I didn't have any more interaction with him. After I let go of his handcuffs I didn't talk to him.

Q. Were you still in the immediate vicinity?

A. I don't recall. After the fact people started arriving on scene so I was [kind] of walking around.

(R. 36-5, Page ID.809)

Without deposition testimony, the inference most readers likely draw from the District Court's opinion is that upon hearing Sgt. Strickland's complaints, Officer Schimeck observed her partner Officer Blackburn loosen the handcuffs, presumably satisfying her own concerns about his comfort. However, the following is clear from Officer Schimeck's testimony:

a) She had no plans to respond to Sgt. Strickland's complaints, and she removed her hand(s) from the handcuffs only after receiving instructions from Officer Blackburn to do so.

b) She was both ignorant and indifferent to the actual cause of Sgt. Strickland's pain (handcuff tightness).

c) She did not observe Officer Blackburn loosen the handcuffs.[3]

d) She was likely not present when Officer Blackburn loosened the handcuffs because she was "walking around."

Consequently, the record, particularly when viewed in the light most favorable to Sgt. Strickland as required at the summary-judgment stage, does not support the District Court's ruling. Regardless of her partner's actions, Officer Schimeck disregarded Sgt. Strickland's complaints, and he suffered injuries as a result.

An excessive force claim like this one is analyzed with the "objective reasonableness" standard established in *Graham v. Connor*, 490 U.S. 386, 392 (1989). "This objective test requires courts to judge the use of force from the perspective of a reasonable officer on the scene, 'in light of the facts and

[3] The record is unclear about the duration of Sgt. Strickland's confinement in the tight handcuffs, but it was presumably long enough for him to make complaints to Officer Schimeck, and then for her to absent herself from his presence. In any case, the time element is of no legal consequence. "Conduct, not time, is the measurement of a violation. To see why, imagine that someone was handcuffed so tightly that she was bleeding from her wrists and screaming in pain while an officer ignored the complaint. The law would not require us to ignore that excessive force claim because the bleeding went on for ten minutes instead of eleven. Rather than specific time limits, what matters in an excessive force claim is whether the *Miller* requirements—complaint, ignoring of complaint, and injury—are met, and whether the officers acted reasonably in the circumstances." *Rudolph v. Babinec*, 939 F.3d 742 (6th Cir. 2019)

circumstances confronting them, without regard to their underlying intent or motivation.'" *Reich v. Elizabethtown*, 945 F.3d 968, 978 (6th Cir. 2019) (citing *Graham*, 490 U.S. at 396).

Officer Schimeck's callous indifference to Sgt. Strickland's pain was not objectively reasonable. This was demonstrated by the responsiveness and concern of her partner whose actions were consistent with those of a reasonable officer. Accordingly, the District Court's grant of summary judgment to Officer Schimeck on Sgt. Strickland's excessive force claim must be reversed.

III. In granting summary judgment on the retaliation claim, the District Court improperly ignored Sgt. Strickland's responses to his employer's purported non-retaliatory reasons for disciplinary action.

The District Court's dismissal of Sgt. Strickland's retaliation claim was improper because the decision, in effect, usurped the function of the jury by disposing of sharply disputed factual issues at the summary-judgment stage when the record contains evidence from which a reasonable jury could find that Sgt. Strickland carries his burden of persuasion.

This Court affirmed that the *McDonnell Douglas* burden-shifting rules must be satisfied to establish a case of retaliation.

> If Plaintiff succeeds in making out the elements of a *prima facie* case, "the burden of production of evidence shifts to the employer to articulate some legitimate, non-discriminatory reason for its actions. If the defendant satisfies its burden of production, the burden shifts back" to Plaintiff to demonstrate that Defendants' proffered reason was not the true reason for the employment decision. *Dixon v.*

> *Gonzales*, 481 F.3d 324, 333 (6th Cir.2007) (quotation marks and citations omitted). "Although the burden of production shifts between the parties, the plaintiff bears the burden of persuasion through the process." *Id.* The elements of a retaliation claim are similar but distinct from those of a discrimination claim. To establish a *prima facie* case of retaliation under Title VII Plaintiff must demonstrate that: "(1) he engaged in activity protected by; Title VII (2) his exercise of such protected activity was known by the defendant; (3) thereafter, the defendant took an action that was "materially adverse" to the plaintiff; and (4) a causal connection existed between the protected activity and the materially adverse action."

Laster v. Kalamazoo, 746 F.3d 714, 731 (6th Cir. 2014)

The District Court concluded that Sgt. Strickland made out a prima facie case of retaliation.

> Slightly more persuasive is the level of investigation, including additional surveillance that was applied to Plaintiff during Defendant Sergeant Wilson's Internal Affairs Investigation, coupled with the temporal relationship between the initiation of the Internal Affairs Investigation, Plaintiff's charge one day later, and the resultant investigation, charges and recommendations (less than three months from beginning of investigation and Plaintiff's charge of discrimination to the final Internal Affairs memorandum), with a question of fact as to Defendant Wilson's knowledge. In drawing all inferences in the light most favorable to Plaintiff, the Court finds that genuine issues of material fact preclude summary judgment on this portion of the analysis and the burden shifts to Defendants to show a "legitimate, non-retaliatory reason" for their actions.

(R. 41, Page ID.1116)

Ultimately, the District Court concluded that a "legitimate, non-retaliatory reason" for disciplining Sgt. Strickland was demonstrated, and the retaliation claim was dismissed on summary judgment.

> Defendants have shown "a legitimate, non-retaliatory reason" for their actions. [*Davis v. Verizon*, 389 F. Supp. 2d 458, 477 (W.D.N.Y. 2005)]. Therefore, "the burden shifts back to the plaintiff." *Id.* Plaintiff does not provide evidence that the proffered reason has no basis in fact- he admits in his deposition that he returned to the gas station and obtained the video; he does not dispute that he did not include same in his activity log- instead he argues that another officer should have been charged for failure to complete an activity log for a different event. (Strickland Dep. 178-81, ECF no. 36-3.) He does not provide evidence that the proffered reason did not actually motivate Defendants' conduct, nor that it was insufficient to warrant discipline. Plaintiff cannot (and indeed has not attempted to) overcome Defendants' legitimate nondiscriminatory reason for recommending disciplinary actions. The Court will grant Defendants' motion as to the retaliatory conduct claim and dismiss this claim.

(R. 41, Page ID.1118)

The District Court's ruling ignores significant aspects of the record where Sgt. Strickland clearly and directly challenges the purported legitimate non-retaliatory reasons for disciplinary actions taken against him.

For example, the opinion references the following comment in the police department's internal affairs report: "The members on scene were advising Officer Strickland to leave the venue immediately and their efforts were challenged...Officer Strickland responded by stating, 'You don't know who I am,' and disregarded their direct orders." (R. 36-7, Page ID.889) The District Court then notes: "Yet Plaintiff does not deny saying 'You don't know who I am' - he testified that he does not recall his exact response." (R. 41, Page ID.1117)

However, Sgt. Strickland addressed this issue directly and at length in his deposition. He explained that he had no idea that he was at a crime scene and that police officers were yelling at him because the officers never identified themselves as such and he was unable to visually identify them as officers. He testified:

> If I can't see them, then that's not identification. Exigent circumstances, whether it's exigent circumstances or not, you have to identify yourself. You have to tell somebody whether it is exigent circumstances or not. You still have to explain -- if you tell somebody to do something, you have to explain to them why you're telling them to do it. They never mentioned – no one never yelled out and said, "Hey, get the hell out of there because there's a bomb there." They never said that. The only thing they're doing is screaming profanities. I work in the City of Detroit. I hear that all the time, so this doesn't mark a red flag for me that hey, I'm in a crime scene. There's nothing about that scene that said it was a crime scene. If I would have known there was a grenade there, I would have left. They never said that there was a grenade there. They never said any of that. They never identified themselves. The only thing they're doing is screaming in the midst of a fog where I can't see them.

(R. 36-3, Page ID.767)

Any contest between Sgt. Strickland and the other officers regarding credibility must be resolved by a jury and not by the court at summary judgment.

Sgt. Strickland was also accused of "using authority or position for financial gain or for obtaining privileges or favors." He was essentially accused of using his status as a police officer to obtain the video surveillance recording at the gas station. However, he explained that he obtained the consent and cooperation of the gas station attendants before they had any idea that he was a police officer.

Q Were you there to intimidate the witnesses?
A What witnesses?
Q The BP clerk?
A No.

(R. 36-3, Page ID.781)

Later he testified:

> As I stated before, directly after the incident occurred on that night or that morning, I went into the gas station, asked the attendant if they had footage. He gave me a name and a number. He said come in the following morning and I would be able to look at the video, so he already gave me permission to come in to the gas station to get the video or to review the video even prior to knowing I was a police officer, so the fact that I was there as a police officer or in uniform, he had already gave me the okay to go in and look at the footage…I wasn't in uniform at the time. I was off duty when the incident occurred. Shortly after the incident occurred, I went into the gas station. Right after I was taken out of the handcuffs, I went into the gas station while I was still off duty and asked him if he had footage.

(R. 36-3, Page ID.781)

With respect to an accusation that Sgt. Strickland was "withholding information relative to suspicious persons or places, or any occurrence or circumstances, bearing on crimes or attempted crimes," the following testimony is responsive:

Q And I've reviewed the video and it appeared that you went in and you acted as if you were conducting the investigation. Were you conducting an investigation, sir?
A I don't know how it appeared to you that that was the case, but I wasn't conducting an investigation. I went to get the video is what I just stated. There were some clear violations. I was a union steward at the particular time, so I wanted to make sure that I had a record of it.
Q Okay, and you did not present it to your union steward so that your union steward could go get it instead of you?

A I am a union steward. I was a union steward at the particular time.

(R. 36-3, Page ID.781)

Finally, an accusation of "neglect of duty" was related to Sgt. Strickland's failure to complete an activity log. In response, Sgt. Strickland testified:

> If you look at my charges, you can see I was charged with -– one of the charges were Neglect of Duty because she said I failed to notate something on an activity log. She clearly didn't investigate Officer Murdock who didn't complete an activity log. He wasn't charged with anything…She conducted that investigation. She charged me with this, didn't charge him with that. That to me is inconsistency.

(R. 36-3, Page ID.782)

The District Court minimized the significance of this testimony:

> [Sgt. Strickland] does not dispute that he did not include same in his activity log- instead he argues that another officer should have been charged for failure to complete an activity log for a different event. (Strickland Dep. 178-81, ECF no. 36-3.) He does not provide evidence that the proffered reason did not actually motivate Defendants' conduct, nor that it was insufficient to warrant discipline.

(R. 41, Page ID.1118)

This conclusion fails to consider the possibility that notwithstanding the existence of a regulation, selective and arbitrary enforcement can create a circumstance that renders discipline for violation improper or unjust. Whether such was the case in this matter can only be determined by a jury that is able to place events within context and with the benefit of all admissible evidence and testimony.

Assuming there has been an appropriate proffer of a "legitimate, non-retaliatory reason" for disciplining Sgt. Strickland, he has carried his own burden by responding with testimony that explains the invalidity of that reason. At the very least his testimony creates a genuine dispute of material fact whether Defendants retaliated against Sgt. Strickland, and any issues of credibility must be resolved by a jury.

CONCLUSION

Notwithstanding admissions by Sgt. Strickland's employer that the Sixth Precinct is "racially divided" and the department overall has a "growing racial problem" as well as the presence in the record of averments by Sgt. Strickland that sharply dispute the contentions of his employer, the District Court improperly granted summary judgment to the City of Detroit as to the claim for a racially hostile employment environment. In addition, the District Court distorted or misunderstood certain key facts about Sgt. Strickland's excessive force claim. Because his complaints about handcuffs that were too tight were ignored and he suffered injury as a consequence, Sgt. Strickland has made a prima facie case and his excessive force claim should not have been dismissed on summary judgment. Finally, Sgt. Strickland credibly rebutted the employer's purported non-retaliatory reasons for disciplining him, and he thereby rendered summary judgment improper as to his retaliation claim. For these reasons and others, the District Court's

judgment granting summary judgment in favor of the Defendants should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the word counting feature of counsel's word processing programs shows that this brief contains 12,452 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(A)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Mark P. Fancher

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2020 I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

/s/ Mark P. Fancher

DESIGNATON OF RELEVANT DISTRICT COURT DOCUMENTS

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