

For Opinion See [2007 WL 6847408](#) , [2007 WL 1438763](#) , [2007 WL 841019](#) , [2006 WL 891163](#) , [338 F.Supp.2d 97](#)

United States District Court, District of Columbia.  
Sharon BLACKMON-MALLOY, et al., Plaintiffs,  
v.  
UNITED STATES CAPITOL POLICE BOARD, Defendant.  
No. 01-02221 (EGS).  
June 18, 2008.

Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment

Respectfully submitted, [James Q. Butler](#), Esq., D.C. Bar# 490014, Attorney for Plaintiff, Butler Legal Group, PLLP, 818 18th Street N.W. Suite 630, Washington, D.C. 20006, (202) 223-6767 - office, (202) 223-3039 - fax, James @butlerlawfirmde.com.

In the Third Amended Complaint, seven current or former Capitol Police Officers charge the United States Capitol Police (USCP) with discrimination on the basis of race, in violation of the Congressional Accountability Act (CAA), [2 U.S.C. § 1301](#).

The undersigned counsel currently represents four of the seven Plaintiffs, to include: Sharon Blackmon-Malloy, Regina Bolden-Whitaker, Arnold Fields, and Vernier Riggs.

Although each Plaintiff asserts factually distinct claims, all the claims are grounded in one underlying theme; the United States Capitol Police have subjected the Plaintiffs to systematic and pervasive discrimination, which established a hostile work environment and left each Plaintiff fearful that at any moment the Plaintiff will be the victim of continuously escalating harassment.

## FACTUAL BACKGROUND

### A. SHARON BLACKMON-MALLOY

Sharon Blackmon-Malloy, an African-American female, worked as an officer for the USCP from October 1982 until her retirement on October 31, 2007. Ex. 1, Blackmon-Malloy Decl. ¶¶ 1 -2, On November 4, 2000, Plaintiff Blackmon-Malloy took part in a written examination for promotion from Sergeant to Lieutenant. Ex. 1, Blackmon-Malloy Decl. ¶¶ 4-5. After completing the exam, Plaintiff Blackmon-Malloy received an on-site score of 75, which would have advanced her to the next phase of testing. Ex. 1, Blackmon-Malloy Decl. ¶ 6. Plaintiff Blackmon-Malloy's score after the USCP posted it was 69. Ex. 1, Blackmon-Malloy Decl. ¶ 6. Plaintiff Blackmon-Malloy believed the discrepancy to be racially motivated due to the low number of African-American Sergeants and Lieutenants at the USCP; therefore, she brought the discrepancy between her on-site score of 75 and her posted score of 69 to the attention of Inspector Stephen Ring (white) and USCP Chief James Varey (white). Ex. 1, Blackmon-Malloy Decl. ¶ 9. Additionally, she, along with several other officers, lodged internal complaints regarding the matter. Ex. 1, Blackmon-Malloy Decl. ¶¶ 11-12.

In March 2001, following these complaints, the USCP gave Plaintiff Blackmon-Malloy a CP-550 performance

note entry for an incident that occurred in September 2000. Ex. 1, Blackmon-Malloy Decl. ¶ 14. The USCP had not taken any action with regard to the September 2000 incident until Plaintiff Blackmon-Malloy raised complaints concerning the test score discrepancy. Compl. ¶ 11. Additionally, in February and March 2001, the USCP subjected Plaintiff Blackmon-Malloy to five more CP-550 performance note entries for alleged incorrect placement of Notices of Infractions. Ex. 1, Blackmon-Malloy Decl. ¶ 15. This regulation merely governs where a ticket should be placed on an automobile. *Id.* Ordinarily such a minor infraction does not merit disciplinary action. Ex. 1, Blackmon-Malloy Decl. ¶ 16. As a result of her disagreement with the five merit less CP-550 note entries, the USCP issued Plaintiff Blackmon-Malloy a CP-534 command discipline report. Ex. 1, Blackmon-Malloy Decl. ¶ 17.

In 2001, Plaintiff Blackmon-Malloy initiated a class action law suit to combat the systematic and pervasive discrimination at the USCP. Ex. 1, Blackmon-Malloy Decl. ¶ 18. In response to her proposed class action suit, the USCP retaliated by demeaning Plaintiff Blackmon-Malloy and refusing to acquiesce to her requests for smoke-free working conditions, in direct violation of department policy and to the benefit of white officers. Ex. 1, Blackmon-Malloy Decl. ¶¶ 19-31. The USCP assigned Plaintiff Blackmon-Malloy to the Operations Command Center in September 2001. Ex. 1, Blackmon-Malloy Decl. ¶ 19. While working in the Command Center, her fellow Officers deliberately subjected Plaintiff Blackmon-Malloy to second-hand smoke in violation of General Order 1230, which provides that tobacco products can only be used in approved areas and that tobacco products cannot be used when non-smoking employees may be involuntarily exposed to second-hand smoke. Ex. 1, Blackmon-Malloy Decl. ¶¶ 20-31. Plaintiff Blackmon-Malloy complained; however, her supervisors took no action and white officers continued to smoke, in violation of General Order 1230 and to the detriment of Plaintiff Blackmon-Malloy. *Id.*

In September 2001, Plaintiff Blackmon-Malloy approached Lt. Timothy Connors (white) and asked him to enforce General Order 1230. Ex. 1, Blackmon-Malloy Decl. ¶ 22. He took no action. Ex. 1, Blackmon-Malloy Decl. ¶ 23. Plaintiff Blackmon-Malloy approached USCP Chief Varey (white) and asked him to enforce General Order 1230. Ex. 1, Blackmon-Malloy Decl. ¶ 24. He took no action. Ex. 1, Blackmon-Malloy Decl. ¶ 25. Plaintiff Blackmon-Malloy approached Senate Sergeant-at-Arms Alphonso Lenhardt, with whom she had previously discussed her discrimination concerns, and asked him to enforce General Order 1230. Ex. 1, Blackmon-Malloy Decl. ¶¶ 26-27. He took no action. Ex. 1, Blackmon-Malloy Decl. ¶ 28. Due to USCP's failure to enforce General Order 1230, Plaintiff Blackmon-Malloy developed medical complications caused by a sensitivity to second-hand smoke and subsequently missed three days of work. Ex. 1, Blackmon-Malloy Decl. ¶¶ 29-31. Dr. David C. Gross, Plaintiff Blackmon-Malloy's treating physician, opined that no-smoking policies were designed to prevent the type of illness that afflicted Plaintiff Blackmon-Malloy. *Id.* The U.S. Department of Labor accepted Plaintiff Blackmon-Malloy's Workers' Compensation claim on July 12, 2002. Compl. ¶ 18. Lieutenant Connors, Chief Varey, and Sergeant-at-Arms Lenhardt knew of Plaintiff Blackmon-Malloy's public opposition to departmental discrimination and her participation in the Equal Employment Opportunity process. *Id.*

On February 22, 2003, Plaintiff Blackmon-Malloy completed the Written Examination portion of the Lieutenant's exam, Ex. I, Blackmon-Malloy Decl. ¶ 32. On May 11, 2003, she completed the Simulation Exercises portion of the Lieutenant's Exam. Ex. 1, Blackmon-Malloy Decl. ¶ 33. The USCP bent the examination rules to afford preferential treatment to white officers. Compl. ¶ 25.

During the examination process three African-American officers arrived late to the testing process and the USCP turned them away. Ex. 2, Defense Ex. 7. At the same time, the USCP planned an alternate test time for two white officers who could not take the exam on the scheduled date. *Id.* The USCP allowed the African-

American officers to take the test after determining it would bend the rules for the white officers. *Id.* Before deciding to hold a second test date, the USCP refused the African-American officers entry to the test even though the officers could have been held over for a subsequent test time. *Id.*

Furthermore, the USCP allowed a white Sergeant to take the Simulation Exercises portion of the Lieutenant's Exam in September 2003. Compl. ¶ 26. The USCP also allowed the white Sergeant to take the Written Examination portion of the Lieutenant's exam in October 2003. *Id.* In doing so, the USCP afforded the white Sergeant several more months to prepare for the examination. *Id.* The USCP promoted the white Sergeant to Lieutenant on February 13, 2004. *Id.* The USCP did not promote Plaintiff Blackmon-Malloy at the same time that it promoted the white Sergeant. Compl. ¶ 27.

Additionally, Plaintiff Blackmon-Malloy received an inaccurate, unfair score on the Simulation Exercises portion of the 2003 Lieutenant's Exam. Ex. 1, Blackmon-Malloy Decl. ¶ 34. The unusually low score is questionable considering that Plaintiff Blackmon-Malloy received the highest score on the Skills Assessment's written portion. Compl. ¶ 27. Furthermore, the low score does not reflect the full range of Plaintiff Blackmon-Malloy's abilities, including instructing, directing, coaching, supervising, delegating, scheduling, and coordinating recruits. Ex. 1, Blackmon-Malloy Decl. ¶ 35.

#### B. REGINA BOLDEN-WHITAKER

Plaintiff Bolden-Whitaker, an African-American female, participated in a mediation session in the Office of Compliance concerning her participation in the *Blackmon-Malloy* proposed class action. Ex. 3, Bolden-Whitaker Decl. ¶ 2. Following her participation, USCP counseled Plaintiff Bolden-Whitaker for failing to wear body armor and disciplined her for refusing to sign a non-compulsory deputation form. Ex. 3, Bolden-Whitaker Decl. ¶¶ 4, 10. Plaintiff Bolden-Whitaker's failure to wear body armor was medically excused. Compl. ¶¶ 29-30.

In June and July of 2001 Plaintiff-Bolden Whitaker participated in a mediation session at the Office of Compliance stemming from her role as a plaintiff in the *Blackmon-Malloy* proposed class action. Ex. 3, Bolden-Whitaker Decl. ¶ 2. Following her participation, the USCP counseled Plaintiff Bolden-Whitaker for failing to wear body armor, Ex. 3, Bolden-Whitaker Decl. ¶ 3. The USCP did not counsel similarly situated white officers who were not wearing body armor at that time. Ex. 3, Bolden-Whitaker Decl. ¶ 5.

On April 10, 2003, the USCP asked Plaintiff Bolden-Whitaker to sign a deputation form. Ex. 3, Bolden-Whitaker Decl. ¶ 7. As part of the terms of Plaintiff Bolden-Whitaker's employment, the USCP provided Plaintiff Bolden-Whitaker with a list of documents that the USCP required Plaintiff Bolden-Whitaker to sign. Compl. ¶ 32. The deputation form in question was not part of that list of documents. *Id.* Plaintiff Bolden-Whitaker refused to sign the deputation form. Ex. 3, Bolden-Whitaker Decl. ¶ 9. Plaintiff Bolden-Whitaker did not understand the form and the USCP failed to adequately explain it to Plaintiff Bolden-Whitaker. Ex. 3, Bolden-Whitaker Decl. ¶ 8. The USCP immediately suspended Plaintiff Bolden-Whitaker for refusing to sign the deputation form; however, following an adequate explanation, Plaintiff Bolden-Whitaker signed the form. Ex. 3, Bolden-Whitaker Decl. ¶¶ 10-13. Notwithstanding Plaintiff Bolden-Whitaker's subsequent compliance, Lt. Wall (white) signed a CP-535 Request for Disciplinary Action against Plaintiff Bolden-Whitaker, *Id.* A CP-535 can serve as a basis for future termination. *Id.* On May 3, 2006, while Plaintiff Bolden-Whitaker was still a leader in the *Blackmon-Malloy* proposed class action, Acting Assistant Chief Thompson sustained the CP-535 form. Compl. ¶ 34.

#### C. ARNOLD FIELDS

Sergeant Miller (white) repeatedly harassed Plaintiff Fields. Ex. 4, Fields Decl. ¶ 2. The harassment came to a head on August 6, 2001 when Sergeant Miller requested that Plaintiff Fields provide him with documentation for sick leave that Plaintiff Fields had previously taken. Ex. 4, Fields Decl. ¶ 3. Sergeant Miller is not Plaintiff Fields's supervisor. Ex. 4, Fields Decl. ¶ 5. The information that Sergeant Miller requested was in Plaintiff Fields's file and was known by Sergeant Finkle, Plaintiff Fields's supervisor. Ex. 4, Fields Decl. ¶¶ 4-5. Sergeant Finkle approved the used sick leave. *Id.*

On August 29, 2001, Inspector Goldston summoned Plaintiff Fields to his office to review his annual performance evaluation. Ex. 4, Fields Decl. ¶ 6. Sergeant Miller, who previously harassed Plaintiff Fields regarding Plaintiff Fields's approved sick leave, completed the evaluation form. Ex. 4, Fields Decl. ¶ 7. Plaintiff Fields refused to sign the evaluation because of its biased content. Ex. 4, Fields Decl. ¶ 10. Sergeant Miller used the evaluation to criticize Plaintiff Fields. Ex. 4, Fields Decl. ¶ 8. In the past Sergeant Miller and Plaintiff Fields were involved in confrontations caused by Sergeant Miller's baseless harassment. Ex. 4, Fields Decl. ¶ 2. Following the meeting Plaintiff Fields issued a memorandum to Chief Varey, which discussed in detail the refutation of his annual performance evaluation. Compl. ¶ 39. On October 7, 2002, Plaintiff Fields's refusal to sign the performance evaluation became part of his permanent record. Compl. ¶ 40.

Plaintiff Fields, an African-American male, participated in the *Blackmon-Malloy* proposed class action, which was filed on October 29, 2001. Compl. ¶ 36.

On October 11, 2002, Plaintiff Fields called Officer Alyce Diggs, the office clerk, and requested leave under the Family Friendly Leave Act (FFLA) for October 12, 2002. Ex. 4, Fields Decl. ¶ 11. On October 24, 2002, the USCP ordered Plaintiff Fields to report to headquarters, where a union representative would be waiting. Compl. ¶ 41. Upon his arrival, the USCP informed Plaintiff Fields that it was investigating his October 12, 2002 absence. Ex. 4, Fields Decl. ¶ 12. Plaintiff Fields had taken approved leave on that date to care for his mother-in-law. Ex. 4, Fields Decl. ¶ 11. Officer Alyce Diggs confirmed that Plaintiff Fields requested FFLA and Sergeant Goodine, the investigator, stated that there was no further need for investigation. Compl. ¶ 42. The USCP did not investigate Officer Senn (black), who chose not to participate in the proposed class action, or Officer Jones (white); both officers did not report to work on October 12, 2002. Ex. 4, Fields Decl. ¶¶ 13-14.

After the USCP dismissed the investigation Plaintiff Fields asked for the name of the individual who initiated the investigation. Ex. 4, Fields Decl. ¶ 15. Plaintiff Fields met with Captain DeLuca to ascertain the individual's identity. Ex. 4, Fields Decl. ¶ 16. Although Captain DeLuca knew why Plaintiff Fields pursued the meeting with him, Captain DeLuca was hostile toward Plaintiff Fields from the moment the meeting began. Ex. 4, Fields Decl. ¶ 17. During the conversation Plaintiff Fields took offense to Captain DeLuca's tone and Captain DeLuca was called a racist. Ex. 4, Fields Decl. ¶¶ 17-18. More importantly, during the conversation Captain DeLuca revealed that Sergeant Palka (white) initiated the baseless investigation. Ex. 4, Fields Decl. ¶ 19.

On November 1, 2002, Inspector Frye informed Plaintiff Fields that because he called Captain DeLuca a racist she would be recommending that Plaintiff Fields be subjected to discipline and issued him a CP-534 and deprived him of 24 hours of pay. Ex. 4, Fields Decl. ¶ 20. On January 27, 2003, Inspector Frye informed Plaintiff Fields that all charges under the CP-534 had been dismissed, but that he would be given a CP-550 notation in his personnel file. Compl. ¶ 48. On November 6, 2002, Plaintiff Fields and Inspector Frye met with Deputy Chief McGaffin (white) to discuss the investigation stemming from the October 12, 2002 Family Friendly Leave, Compl. ¶ 46. Deputy Chief McGaffin turned over the case to Internal Affairs. *Id.*

On January 9, 2003, Plaintiff Fields received his annual evaluation. Ex. 4, Fields Decl. ¶ 22. The evaluation rated Plaintiff Fields “below average” in “Acceptance of Responsibility.” Ex. 4, Fields Decl. ¶ 23. The USCP issued the “below average” rating in “Acceptance of Responsibility” after Plaintiff Fields protested the FFLA discriminatory investigation. Compl. ¶ 47.

On March 25, 2003, Plaintiff Fields was on his lunch break inside the Dirksen break room with six other Officers when an alarm sounded. Ex. 4, Fields Decl. 24. Sergeant Sundberg (white) entered the room and informed the officers of the alarm. Ex. 4, Fields Decl. ¶ 26. On March 27, 2003, Sergeant Moriarty (white) and Sergeant Norman (white) called Plaintiff Fields to a meeting. Ex. 4, Fields Decl. ¶ 27. Sergeants Moriarty and Norman were investigating the March 25, 2003 incident. *Id.* Sergeants Moriarty and Norman asked Plaintiff Fields to provide a written statement describing his actions during the evacuation. Ex. 4, Fields Decl. 28. Plaintiff Fields asked to be questioned orally and the Sergeants agreed. Ex. 4, Fields Decl. ¶ 29. The Sergeants never issued a direct order to Plaintiff Fields to provide a written statement. Compl. ¶ 50.

On April 30, 2003, Captain DeLucca (white) signed a CP-534 and a CP-535 Requests for Disciplinary Action charging Plaintiff Fields with misconduct for violating the rules of conduct by failing to respond to an emergency evacuation and for disobeying an order to provide a written statement. Ex. 4, Fields Decl. ¶ 30. On July 14, 2003, an Internal Affairs Investigation, conducted by Sergeant Waldow (white), sustained the findings. Ex. 4, Fields Decl. ¶ 31. On July 21, 2003, Discipline Review Officer William H. Emory issued two CP-535 Requests for Disciplinary Action. Compl. ¶ 53. Mr. Emory informed Plaintiff Fields that he would be penalized with two two-day suspensions for each violation, *Id.*

#### D. VERNIER RIGGS

The USCP subjected Plaintiff Riggs, an African-American female, to repeated harassment and discrimination following her participation in the Equal Employment Opportunity process and the subsequent civil actions. Compl. ¶ 68. From April 1999 through October 2000, Lt. Michael Komara (white) repeatedly denied Plaintiff Riggs's requests for leave. Ex. 5, Riggs Decl. ¶ 3. Lt. Komara would subject Plaintiff Riggs to harassment on the rare occasions that he did grant her request for leave. Ex. 5, Riggs Declaration ¶ 4. Lt. Komara regularly granted Sergeant Cathy Anderson's (white) requests for leave. Ex. 5, Riggs Declaration ¶ 5.

On April 12, 2001, Plaintiff Riggs filed a complaint of discrimination with the Office of Compliance. Ex. 5, Riggs Declaration ¶ 6. On April 13, 2001, the USCP admonished Plaintiff Riggs for Failing to wear a blue long-sleeve shirt to roll-call, Ex. 5, Riggs Declaration ¶ 7. Plaintiff Riggs wore a white short-sleeve shirt to duty, but Inspector Jarboe announced at roll-call that all officers should be wearing blue long-sleeve shirts for duty. Compl. ¶ 70. Lt. Proctor admonished Plaintiff Riggs for failing to wear a blue long-sleeve shirt. Ex. 5, Riggs Declaration ¶ 7. The USCP did not admonish other similarly situated white officers, such as Sergeants Greg Neiman and Kathryn Stillman. Ex. 5, Riggs Declaration ¶¶ 8-9.

Additionally, on April 16, 2001, Plaintiff Riggs observed Donna Boswell, a USCP officer, sitting at her desk with a cardigan covering her police uniform. Ex. 5, Riggs Decl. ¶ 10. In addition to this uniform violation, Donna Boswell also never wore a blue long-sleeve shirt to work, even when required to do so. Ex. 5, Riggs Decl. ¶¶ 11-13. The USCP never admonished or disciplined Donna Boswell for these uniform violations. Ex. 5, Riggs Decl. ¶¶ 14-15.

#### LEGAL STANDARD

## A. SUMMARY JUDGMENT

The moving party is only entitled to summary judgment when the pleadings and the evidence demonstrate that there is no genuine issue of material fact and the moving party can prove that it is entitled to judgment as a matter of law. [Fed. R. Civ. P. 56\(c\)](#).

The central inquiry is whether there are genuine issues of material fact that can only be resolved by a finder of fact. [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 250 (1986). A material fact is “genuine” if a reasonable jury could return a verdict in favor of the non-moving party based on the evidence. *Id.* At 248. When determining whether a material fact is genuine, the court must draw all reasonable inferences in favor of the non-moving party. *Id.* at 255. In considering a motion for summary judgment, the “evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.*

“Summary judgment in discrimination cases must be approached with special caution and the Court ‘must be extra-careful to view all the evidence in the light most favorable’ to plaintiff.” [Hayes v. Shalala](#), 902 F. Supp. 259, 263 (D.D.C. 1995) (quoting [Ross v. Runyon](#), 859 F. Supp. 15, 21-22 (D.D.C. 1994)).

## SUMMARY JUDGMENT IS PREMATURE

Summary judgment at this juncture in the litigation is premature. The Affidavits, Exhibits I and 3-5, clearly state that the Plaintiff cannot present certain facts to justify its opposition. The overwhelming majority of the evidence is within the exclusive control of the Defendant. If the Court finds that genuine issues of material fact do not exist, the Court should postpone the decision on Summary Judgment until the Plaintiffs have had an opportunity to conduct discovery in support of their opposition to said motion.

## LEGAL ARGUMENT

### I. Counts I And II Should Not Be Dismissed Because The USCP Discriminated Against Sharon Blackmon-Malloy By Failing To Promote Her And By Subjecting Her To A Constant Threat Of Harassment.

The USCP discriminated against Plaintiff Blackmon-Malloy by failing to promote her to Lieutenant in 2000 and 2003, and by subjecting her to a hostile work environment by leaving her in fear of harassment. The USCP retaliated against Plaintiff Blackmon-Malloy when it continued to expose her to second-hand smoke against her will and denied her a promotion in 2003. As Plaintiff Sharon Blackmon-Malloy demonstrates below, each claim is inappropriate for summary judgment,

#### A. 2000 Failure To Promote To Lieutenant (Count I)

On November 4, 2000, Plaintiff Blackmon-Malloy took part in the written examination portion of the promotion process from Sergeant to Lieutenant. Ex. 1, Blackmon-Malloy Decl. ¶¶ 4-5. Plaintiff Blackmon-Malloy received an on-site score of 75, which would have advanced her to the next phase of the Lieutenant's examination. Ex. 1, Blackmon-Malloy Decl. ¶ 6. When the official results were posted Plaintiff Blackmon-Malloy received a score of 69, resulting in her not being promoted. Ex. 1, Blackmon-Malloy Decl. ¶ 7.

The USCP claims, through its agent Fields Consulting Group, that the discrepancy between the on-site score and the posted score was due to an error. Ex. 6, Defense Ex. 4, Fields Decl. ¶¶ 2-9. However, the Defendant fails to offer any explanation for what caused the error. This type of obtuse behavior is consistent with the USCP's historic disproportionate promotion of white officers at the expense of African-American officers.

Additionally, the fact that other African-American officers were promoted during the process is informative; however, it is not dispositive of the issue. Changing the test score coupled with the USCP's history of disproportionate promotions of white officers at the expense of African-American officers is consistent with the subjective practices the USCP utilizes to make African-American officers appear to be less worthy of promotion. The USCP utilizes these subjective practices to limit the number of African-American officers that receive promotion.

Under these circumstances, considering the cloud of suspicion surrounding the test score discrepancy and the resulting change, a reasonable jury could conclude that the USCP failed to promote Plaintiff Blackmon-Malloy because of her race.

#### B. 2003 Failure To Promote (Counts I & II)

Additionally, in 2003 the USCP failed to promote Plaintiff Blackmon-Malloy, even though she was qualified for promotion. Compl. ¶ 26. The failure to promptly promote resulted from the USCP's decision to afford preferential treatment to white officers. *Id.* Moreover, the USCP gave Plaintiff Blackmon-Malloy an inaccurate and unfair score on the Simulation Exercises on the 2003 Lieutenant's Exam. Ex. 1, Blackmon-Malloy Decl. ¶ 34.

Although the USCP claims the simulation exercise was graded based on tapes that do not identify any of the candidates by race or name, the USCP fails to disclose the content of the tapes. Ex. 7, Defense Ex. 6, Pittman Decl. ¶ 8. Additionally, the USCP fails to disclose the selection criteria or composition of the external assessors. The results of the simulation exercise are inconsistent with Plaintiff Blackmon-Malloy's abilities, particularly the 4.1 (Outstanding) she received on the Skills Assessment portion of the exam. Compl. ¶ 28. Had Plaintiff Blackmon-Malloy at least a 1.5 on the simulation exercise (she received a 0.5), Plaintiff Blackmon-Malloy would have been promoted in 2003. *Id.* Determining whether the USCP discriminated against Plaintiff Blackmon-Malloy in 2003 by failing to promote her cannot be decided without first removing the cloak and dagger concerning the administration and evaluation of the simulation exercise.

Moreover, the USCP discriminated against Plaintiff Blackmon-Malloy by allowing additional white candidates to take the promotion exam several months later. Compl. ¶ 26. The Defendant thinks it's significant that African-American officers were also permitted to take the second examination; however, the African-American officers were denied entry at the test site and were only allowed to take the second exam because the USCP specially set up a second exam for white officers and wanted to avoid the appearance of impropriety. Ex. 2, Defense Ex. 7. During the first exam, the USCP could have allowed the African-American officers to stay for a subsequent test time but declined to do so. *Id.* Due to the preferential treatment afforded the white officers Plaintiff Blackmon-Malloy was promoted in November 2004 instead of 2003, when she should have been promoted. Unlike *Kilby*, where the Plaintiff failed to prove she was qualified for the promotion, Plaintiff Blackmon-Malloy was clearly qualified for the promotion. That she received a promotion on a future date does not diminish that fact that in 2003 the USCP wrongfully denied her a promotion. See *Kilby-Robb v. Spellings*, 522 F. Supp.2d 148, 156 (D.D.C. 2007). Under the Defendant's logic a Plaintiff could never prove that the Defendant wrongfully denied the Plaintiff a promotion because the Defendant can simply state that the Plaintiff could have been promoted at a future time.

The Defendant's Motion for Summary Judgment should be denied because the USCP wrongfully denied Plaintiff Blackmon-Malloy a promotion in 2003 by affording preferential treatment to white officers through an inequitably administered examination process.

C. The USCP Discriminated Against And Harassed Plaintiff Blackmon-Malloy With Personnel Performance Notes (Count I).

The personnel notes that the USCP repeatedly used to harass Plaintiff Blackmon-Malloy constitute adverse action because they are consistent with the subjective practices that the USCP uses to intimidate African-American officers, making them less likely to be promoted. In context these personnel notes are the type of behavior that exemplifies the discriminatory intimidation needed to create a hostile work environment. See *Stewart v. Evans*, 275 F.3d 1126, 1133-34 (D.C. Cir. 2002).

Specifically, Plaintiff Blackmon-Malloy received the personnel notes for incidents that ordinarily did not merit the issuance of personnel notes. Ex. 1, Blackmon-Malloy Decl, ¶ 16. Plaintiff Blackmon-Malloy received a personnel note in March 2001 for a September 2000 incident. Ex. 1, Blackmon-Malloy Decl. ¶ 14. The USCP issued that personnel note after Plaintiff Blackmon-Malloy filed an internal complaint regarding the 2000 Lieutenant's Promotion Examination. Ex. 1, Blackmon-Malloy Decl. ¶ 11. In February and March 2001 Plaintiff Blackmon-Malloy received personnel notes for alleged incorrect placement of Notices of Infractions. Ex. 1, Blackmon-Malloy Decl. ¶ 15. Ordinarily such a minor infraction does not merit discipline. Ex. I, Blackmon-Malloy Decl. ¶ 16.

Under the circumstances, the USCP's issuance of personnel notes for the above mentioned incidents constitutes an adverse action because it changed the essential nature of Plaintiff Blackmon-Malloy's employment. The USCP relegated Plaintiff Blackmon-Malloy to a situation where she had to tread lightly because the slightest misstep could lead to even further harassment. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (plaintiffs can maintain an action in the absence of an economic effect on employment if the work atmosphere is "so heavily polluted with discrimination as to destroy completely the [employee's] emotional and psychological stability." (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971))

D. USCP Created A Hostile Environment And Retaliated By Exposing Plaintiff Blackmon-Malloy To Second-Hand Smoke (Count II).

The USCP retaliated against Plaintiff Blackmon-Malloy by failing to take action on her repeated requests to curtail the smoking in the Operations Command Center, in violation of General Order 1230. The General Order provides that tobacco products cannot be used when non-smoking employees may be involuntarily exposed to second-hand smoke. Compl. ¶ 13. A plaintiff establishes a claim for retaliation by showing that the plaintiff engaged in protected activity and the defendant responded to that activity by taking action to deter the discriminated against plaintiff from complaining. See *Burlington Northern v. White*, 548 U.S. 53, 54 (2006); See *Rochon v. Gonzales*, 438 F.3d 1211, 1220 (D.C. Cir. 2006).

The Defendants seem to think it significant that Plaintiff Blackmon-Malloy failed to allege that the officers in the offices surrounding the Command Center did not smoke prior to her arrival. That argument misses the mark. That the officers smoked in violation of General Order 1230 is not an act of retaliation in and of itself. The USCP retaliated against Plaintiff Blackmon-Malloy when her superior officers refused to take measures to ensure that Plaintiff Blackmon-Malloy would no longer be exposed to second-hand smoke. Ex. 1, Blackmon-Malloy Decl. ¶¶ 22-28.

Additionally, the superior officers that failed to enforce General Order 1230, specifically Lieutenant Connors, Chief Varey, and Sergeant-at-Arms Lenhardt knew that Plaintiff Blackmon-Malloy had taken action to combat the systematic and pervasive discrimination that was present at the United States Capitol Police Department.



Compl. ¶ 10, 17. The affidavit submitted by Lieutenant Connors fails to state that Lieutenant Connors enforced General Order 1230. Specifically, Lieutenant Connors fails to state that he took action to ensure that smoking officers did not involuntarily expose Plaintiff Blackmon-Malloy to second-hand smoke against her will. Ex. 8, Defense Ex. 10, Connors Decl. Moreover, had Lieutenant Connors given Plaintiff Blackmon-Malloy's second-hand smoke complaint the seriousness it deserved, Plaintiff Blackmon-Malloy may have been spared the medical toll that the continuous exposure to second-hand smoke took on her body. Instead, Lieutenant Connors opted against enforcing General Order 1230 as required, leading to a further marginalization of the rights of African-American officers in the USCP Department.

That Plaintiff Blackmon-Malloy failed to allege that she was the only officer subjected to the second-hand smoke or that all of the officers who were subjected to second-hand smoke participated in this lawsuit is of no significance. Whether or not an action is retaliatory should not be determined in a vacuum. The entirety of the circumstances should be used to determine whether an action is retaliatory. The standard the Courts apply is one of reasonableness; would a reasonable employee in Plaintiff Blackmon-Malloy's position be deterred from pursuing her rights? *See Burlington*, at 54-55. It is hard to imagine under any set of circumstances how an employee subjected to enough second-hand smoke to cause bodily harm would not be deterred from seeking the help of the courts to enforce their rights.

The Defendant's motion for summary judgment must fail because Plaintiff Blackmon-Malloy engaged in protected activity and the Defendants retaliated against her by ignoring her pleas to curtail the smoking in the Command Center, in direct violation of General Order 1230.

## II. The USCP Retaliated Against Plaintiff Bolden-Whitaker By Singling Her Out For Conduct That Went Unpunished When Done By White Officers (Count III).

The USCP retaliated against Plaintiff Bolden-Whitaker when it counseled her for failing to wear body armor, even though other similarly situated white officers received no such counseling, and the USCP further retaliated against Plaintiff Bolden-Whitaker when it issued a CP-535 against her for failing to sign a non-compulsory deputation form. Both of these acts, calculated to dissuade Plaintiff Bolden-Whitaker from failing to sustain her discrimination charge, constitute retaliatory acts. *See Burlington*, 54-55.

### A. Counseling For Failing To Wear Body Armor Even Though Other Similarly Situated White Officers Were Not Counseled Constitutes Retaliatory Action (Count III).

When the USCP counseled Plaintiff Bolden-Whitaker for failing to wear body armor, the USCP declined to counsel similarly situated white officers who also failed to wear body armor. Ex. 3, Bolden-Whitaker Decl. ¶¶ 3, 5. The singled-out counseling occurred after Plaintiff Bolden-Whitaker participated in a mediation process concerning discrimination at the USCP. Ex. 3, Bolden-Whitaker Decl. ¶ 2. An adverse action alone is not enough to warrant a claim of retaliation; however, action designed to discourage a reasonable employee from enforcing their right to be free from discrimination is retaliatory. *See Burlington v. White*, 548 U.S. 53, 57 (2006); *See Walker v. Johnson*, 501 F. Supp.2d 156, 172 (2007).

Unlike *Walker*, where the action by the Defendant against the Plaintiff was neither adverse nor designed to dissuade the plaintiff from engaging in protected activity, the action by the USCP is decidedly different. Plaintiff Bolden-Whitaker participated in a mediation process to stem departmental discrimination. Ex. 3, Bolden-Whitaker Decl. ¶ 2. Following her participation, the USCP counseled her while electing not to counsel other white officers. Ex. 3, Bolden-Whitaker Decl. ¶¶ 3, 5. The message the USCP's action sends clearly falls within the

scope of conduct *Burlington* attempted to curb: if you try to stand up for yourself and your rights we will make the situation even worse for you. Without question the conduct here rises above the level of a written warning, which was the basis for rejecting a retaliation claim in *Brodetski v. Duffey*, 199 F.R.D. 14, 21 (D.D.C. 2001).

Whether an informal entry in her personnel record or not, implicit in the circumstances surrounding the counseling is the USCP's systematic practice to relegate Plaintiff Bolden-Whitaker and similarly situated African-American officers to second-class status. Given the circumstances surrounding the counseling, a reasonable person could be deterred from filing a claim of discrimination if it means that that reasonable person would be subject to further discrimination.

Given the circumstances surrounding the counseling, Defendant's motion for summary judgment must fail because the USCP subjected Plaintiff Bolden-Whitaker to further and much worse discrimination, after she pursued a discrimination claim against the department.

B. CP-535 For Failing To Sign Deputation Form Constitutes Retaliatory Action Because It Was Non-Compulsory (Count III).

The issuance of a CP-535 constitutes retaliation against Plaintiff Bolden-Whitaker because Plaintiff Bolden-Whitaker engaged in protected behavior, the USCP subjected her to adverse action, and there is a causal link. *See Hayes*, at 264. The time lapse between the protected action and the adverse action is informative in determining if there exists a causal link; however, it is not dispositive of the issue. *Id.* at 264. The requirement of causation is satisfied if given the circumstances surrounding the adverse action, the adverse action represents an opportunity to retaliate against the Plaintiff, an opportunity that had not previously presented itself. *Id.* Given the circumstances surrounding Plaintiff Bolden-Whitaker's employment, the issuance of the CP-535 constitutes an adverse action. Although two years passed between the mediation and the issuance of the CP-535, the Defendant's may not have had a prior opportunity to subject Plaintiff Bolden-Whitaker to the type of harassment that this CP-535 represents. *See Hayes*, at 264 (holding that causal connection can be established by showing that employer knew of protected activity and that employer retaliated after plaintiff became vulnerable for action).

The CP-535 constitutes an adverse action for the same reasons that the failure to wear body armor constitutes an adverse action. As part of the terms of Plaintiff Bolden-Whitaker's employment the USCP required her to sign certain documents. Ex. 3, Bolden-Whitaker Decl. ¶ 6. The deputation form was not on the list of required documents. Ex. 3, Bolden-Whitaker Decl. ¶ 7. Although Plaintiff Bolden-Whitaker signed the form in the past, she was not required to sign it in the future; however, this did not stop the USCP for disciplining her for failing to do something that the USCP did not require her to do. This type of behavior by the USCP, discipline in the absence of a violation, constitutes the type of action that would deter a reasonable person from pursuing a discrimination claim. *See Burlington*, at 57. The USCP had no legitimate, non-discriminatory reason for issuing the CP-535 because the USCP did not require Plaintiff Bolden-Whitaker to sign the deputation form as part of her official duties. Ex. 3, Bolden-Whitaker Decl. ¶ 7.

Given the circumstances surrounding the issuance of the CP-535, Defendant's motion for summary judgment must fail because the USCP subjected Plaintiff Bolden-Whitaker to further harassment, after she pursued a discrimination claim.

III. The USCP Discriminated Against Arnold Fields, Subjected Him To A Hostile Work Environment, And Retaliated Against Arnold Fields After He Pursued A Discrimination Claim (Counts IV, V, VI).

The USCP discriminated against Plaintiff Fields by lowering his performance evaluations; subjecting him to baseless investigations for the purposes of harassing him; and issuing him a CP-534 discipline with warning for allegedly failing to obey an order that the USCP never gave him. Summary Judgment is not appropriate because these claims constitute adverse action by the USCP against Plaintiff Fields.

A. The USCP Harassed Plaintiff Fields And Subjected Him To Lower Performance Evaluations To Hurt His Promotion Potential (Counts IV, V, VI).

On two occasions, in August 2001 and January 2003, the USCP gave Plaintiff Fields inaccurate and lowered performance evaluations. Compl. ¶ 38-40, 47. These lowered performance evaluations were racially motivated and designed to limit Plaintiff Fields's opportunities for promotion and to retaliate against him for engaging in protected activity.

On several occasions Sergeant Miller harassed Plaintiff Fields, even though Sergeant Miller was not Plaintiff Fields's supervising officer. Ex. 4, Fields Decl. ¶ 2. The USCP issued the August 2001 performance evaluation after the harassment came to a head in August 2001. Ex. 4, Fields Decl. ¶ 6. Sergeant Miller's harassment tactics represent a clear bias against Plaintiff Fields. Ex. 4, Fields Decl. ¶ 8-9. The performance evaluation rates Plaintiff Fields "below average" in "Human Relations" and repeatedly references his interpersonal skills or lack thereof. *Id.* One wonders how Plaintiff Fields's interpersonal skills would have been evaluated by a superior officer without such a clear bias against Plaintiff Fields.

The USCP issued the second negative performance evaluation in January 2003, which rated Plaintiff Fields "below average" in "Acceptance of Responsibility." Ex. 4, Fields Decl. ¶¶ 22-23. The USCP issued this evaluation after Plaintiff Fields challenged an investigation against him as being racially motivated. Ex. 4, Fields Decl. ¶ 15.

Given the circumstances surrounding the negative performance evaluations and the disproportionate promotions between white and African-American officers, the negative performance evaluations constitute an adverse action by the USCP against Plaintiff Fields. The circumstances here are dissimilar from those in *Brown v. Brody*, where the defendant did not issue the performance evaluation as part of a practice to single out female employees. See *Brown v. Brody*, 199 F.3d 446, 451 (D.C.Cir. 1999). Under these circumstances, the negative performance evaluation can properly be classified as singling out Plaintiff Fields, an African-American officer.

The USCP subjected Plaintiff Fields to a baseless investigation for an absence that was authorized under the Family Friendly Leave Act. Ex. 4, Fields Decl. ¶ 11. The investigation occurred after Plaintiff Fields participated in the *Blackmon-Malloy* proposed class action. Compl. ¶ 36. Plaintiff Fields rightfully challenged the propriety of the investigation because Officer Senn (black, non-participant) and Officer Jones (white) were also absent on October 12, 2002, but the USCP chose not to investigate their whereabouts. Ex. 4, Fields Decl. ¶ 13-14. Because Plaintiff Fields decided to protect his rights the USCP sent him a subtle message: if you try to stand up for yourself and your rights we will make the situation even worse for you.

In context, the USCP's actions cannot be considered anything but an adverse action. The USCP's actions represent more than disparate treatment. First the Defendants harass Plaintiff Fields without cause while allowing other officers to escape harassment-free for the same alleged offense and then the Defendants harass Plaintiff Fields for not taking his harassment silently, reinforcing the message that the disparate promotion rates already send, that Plaintiff Fields is a second-class officer. These actions are nothing but acts that permeate the workplace with intimidation, insult and ridicule, creating a hostile work environment. See *Stewart*, 275 F.3d at 1133-34.

B. The USCP Subjected Plaintiff Fields To Meritless Investigations To Harass, Demean, And Retaliate Against Him For Attempting To Enforce His Right To Be Free From Discrimination (Counts IV, V, VI).

On two separate occasions the USCP subjected Plaintiff Fields to meritless investigations that were designed to harass and demean him. The second investigation concerning Plaintiff Fields's October 12, 2002 absence occurred after Plaintiff Fields began his participation in the *Blackmon-Malloy* proposed class action. Ex. 4, Fields Decl. ¶ 12. The USCP did not investigate Officer Senn (black, non-participant) and Officer Jones (white); both officers were absent that same day. Ex. 4, Fields Decl. ¶¶ 13-14.

In the first investigation Sergeant Miller (white) harassed Plaintiff Fields about his sick leave. Ex. 4, Fields Decl. ¶ 3. Sergeant Miller asked for information that was in Plaintiff Fields's personnel file. Ex. 4, Fields Decl. ¶ 4. Moreover, Sergeant Finkle, Plaintiff Fields's supervising officer, knew that the sick leave was authorized and saw no need to investigate further. Ex. 4, Fields Decl. ¶ 5. The baseless investigation by Sergeant Miller is nothing more than a tactic designed to harass and intimidate Plaintiff Fields on the basis of his race.

The second baseless investigation by the USCP is a retaliatory act aimed at Plaintiff Fields with the purpose of deterring him from participating in the *Blackmon-Malloy* proposed class action. See *Burlington*, at 57 (holding that a plaintiff establishes a claim for retaliation by showing that the plaintiff engaged in protected activity and the defendant responded to that activity by taking action to deter the discriminated against plaintiff from complaining). This action is more than an investigation; it represents the USCP singling out Plaintiff Fields based on his participation in the *Blackmon-Malloy* proposed class action. Officer Senn (black, non-participant) and Officer Jones (white) were also absent on October 12, 2002. Cf. *Ware v. Billington*, 344 F. Supp. 63, 76(D.D.C. 2004) (holding that an investigation is an adverse action only when it represents action designed to single out an individual). Had the USCP contacted Officer Alyce Diggs, the office clerk, it would have learned that the absence was authorized under the Family Friendly Leave Act. Ex. 4, Fields Decl. ¶ 11.

The conduct of the USCP is reprehensible. The baseless investigations, under the circumstances, are sufficiently pervasive and severe to rise to the level of a hostile work environment. See *Stewart*, 275 F.3d 11 33-34,

C. During The Investigation Of The Emergency Alarm Evacuation The USCP Subjected Plaintiff Fields To Further Harassment (Counts IV, V, VI).

On March 25, 2003, Plaintiff Fields did not leave the Dirksen break room during an evacuation alarm. Ex. 4, Fields Decl. ¶¶ 24-26. Plaintiff Fields did not hear the alarm. Compl. ¶ 47. On March 27, 2003, Sergeants Moriarty (white) and Norman (white) called Plaintiff Fields into a meeting to discuss his failure to evacuate. Ex. 4, Fields Decl. ¶ 27. During the meeting Sergeants Moriarty and Norman asked Plaintiff Fields to provide a written statement concerning the incident; however, all parties involved agreed to conduct the inquiry with oral questions. Ex. 4, Fields Decl. ¶¶ 28-29.

On April 30, 2003, Captain DeLucca (white) signed a CP-534 and CP-535 requests for disciplinary action charging Plaintiff Fields with misconduct for violating the rules of conduct by failing to evacuate and for disobeying an order to provide a written statement. Ex. 4, Fields Decl. ¶ 30. Both of these actions are consistent with the pattern of harassment that the USCP has subjected Plaintiff Fields to throughout the course of his employment with the USCP.

The CP's constitute adverse action because Plaintiff Fields is subjected to undue and discriminate harassment. Clearly, given the circumstances, the USCP's actions constitute more than a "warning." See *Brodetski*, 1 99

[F.R.D. at 21.](#)

The Defendant's Motion for Summary Judgment should be denied because the Defendant's actions are sufficient to substantiate a hostile environment and Defendant's response to Plaintiff Fields's participation in the *Blackmon-Malloy* proposed class action constitutes retaliation.

IV. The USCP Discriminated Against Plaintiff Riggs, Subjected Her To A Hostile Work Environment, And Retaliated Against Her After She Complained About The Discrimination (Counts IX & X).

The USCP subjected Plaintiff Riggs to a hostile work environment through its repeated acts of discrimination against her by affording similarly situated white officers preferential treatment. After Plaintiff Riggs filed a discrimination complaint the USCP retaliated against her.

A. The USCP Subjected Plaintiff Riggs To A Hostile Work Environment By Denying Her Requests For Leave While Allowing Other Similarly Situated White Officers To Take Leave (Count IX).

The USCP subjected Plaintiff Riggs to a hostile work environment by denying her requests to use leave while granting similar requests to white officers. Ex. 5 Riggs Decl. ¶¶ 3-5. Unlike *Ware v. Billington*, where the denial of annual leave constituted a disciplinary measure to effectuate a better work product, the denial of leave to Plaintiff Riggs constitutes an adverse action against Plaintiff Riggs because similar requests for leave were granted to Sergeant Cathy Anderson (white). See *Ware*, 344 F. Supp.2d at 76. Because the denial of leave constitutes an adverse action under the circumstances, the USCP's actions created a hostile work environment because the conduct intimidated, ridiculed and insulted Plaintiff Riggs by subjecting her to second-class status. See [Lester v. Natsios](#), 290 F. Supp.2d 11, 32-33 (2003). That the USCP denied Plaintiff Riggs's requests for leave while granting similar requests to Sergeant Anderson reinforces the disparate and discriminatory treatment that permeated the work place, establishing a hostile work environment. See *Stewart*, 275 F.3d 1133-34.

Defendant's motion for Summary Judgment should be denied because denying Plaintiff Riggs leave while granting similar requests to white officers constitutes baseless adverse action designed to create a hostile work environment, subjecting Plaintiff Riggs to second-class status to the benefit of her white co-workers.

B. The USCP Retaliated Against Plaintiff Riggs By Singling Her Out For Wearing A White Shirt The Day After She Filed A Discrimination Complaint (Count X).

On April 12, 2001, Plaintiff Riggs filed a complaint of discrimination with the Office of Compliance. Ex. 5, Riggs Decl. ¶ 6. The following day the USCP verbally admonished her for failing to wear the proper shirt to roll-call. Ex. 5, Riggs Decl. ¶ 7. The USCP did not admonish white officers who failed to wear the proper shirt to roll-call. Ex. 5, Riggs Decl. ¶ 8-9. On April 16, 2001, Donna Boswell, an officer, wore a cardigan sweater over her USCP uniform. Ex. 5, Riggs Decl. ¶ 10. This is a uniform violation. Ex. 5, Riggs Decl. ¶ 11. In fact, Donna Boswell never wore a blue long-sleeve shirt to work, even when the USCP required her to do so. Ex. 5, Riggs Decl. ¶ 12. The USCP never disciplined or admonished Donna Boswell for her repeated uniform violations. Ex. 5, Riggs Decl. ¶¶ 14-15. Given the circumstances surrounding the verbal admonition, this type of behavior by the USCP constitutes adverse action designed to deter Plaintiff Riggs from enforcing her right to be free of discrimination. See *Burlington*, at 57.

Defendant's motion for Summary Judgment should be denied because USCP's verbal admonition of Plaintiff Riggs constitutes adverse action designed to deter her from pursuing her discrimination claim. The USCP discipl-

lined Plaintiff Riggs for violating rules that white officers were not required to follow.

CONCLUSION

For the above mentioned reasons, Plaintiffs Sharon Blackmon-Malloy, Regina Bolden-Whitaker, Arnold Fields, and Vernier Riggs respectfully request that the Court deny Defendant's Motion for Summary Judgment.

Respectfully submitted,

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