

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

COLLEEN STUART ET AL.,

Plaintiffs,

v.

CITY OF TOPEKA, KANSAS, ET AL.,

Defendants.

Case No. 23-2021-JWB-RES

**PRETRIAL ORDER**

On December 6, 2023, U.S. Magistrate Judge Rachel E. Schwartz conducted a pretrial conference in this case by phone. Plaintiffs Colleen Stuart, Jana Harden and Jennifer Cross appeared through counsel Mark Jess and Christie Jess. Defendants City of Topeka and Police Chief Bryan Wheelles, in his individual capacity, appeared through counsel, J. Phillip Gragson and Kara Eisenhut of Henson, Hutton, Mudrick, Gragson, & Vogelsberg, L.L.P.

This pretrial order supersedes all pleadings and controls the subsequent course of this case. It will not be modified except by consent of the parties and the court's approval, or by order of the court to prevent manifest injustice. *See* Fed. R. Civ. P. 16(d) & (e); D. Kan. Rule 16.2(a).

**1. PRELIMINARY MATTERS.**

**a. Subject-Matter Jurisdiction.** Subject-matter jurisdiction is invoked under 28 U.S.C. § 1331 and is not disputed.

**b. Personal Jurisdiction.** The court's personal jurisdiction over the parties is not disputed.

**c. Venue.** Venue in this court is not disputed.

**d. Governing Law.** Subject to the court’s determination of the law that applies to the case, the parties believe and agree that the substantive issues in this case are governed by the following law: federal law, 42 U.S.C. § 2000(e), et seq., and specifically Title VII and 42 U.S.C. § 1983.

**2. STIPULATIONS.**

**a.** The following facts are stipulated:

- i. Plaintiffs Colleen Stuart (“Stuart”), Jana Harden (“Harden”) and Jennifer Cross (“Cross”) are all female officers employed by the Topeka Police Department (“TPD”), which operates under the control, supervision and management of Defendant, City of Topeka (“Defendant Topeka”).
- ii. Defendant Topeka is an employer within the meaning of Title VII.
- iii. Defendant Bryan Wheelles (“Defendant Wheelles”) is currently the Chief of Police for Defendant Topeka.
- iv. On November 23, 2023, Defendant Topeka announced that Defendant Wheelles had been promoted to Chief of Police.
- v. In December 2021, Stuart, Harden, and Michael Cross (who is male) sought a promotion to Major.
- vi. Also in December 2021, Cross applied for a promotion to Captain.
- vii. In January 2023, then City Manager of Defendant Topeka decided to reestablish a previously eliminated fourth position of Major within the TPD.
- viii. On or about February 20, 2023, Harden was selected for promotion to Major, opening up her Captain’s position.
- ix. On or about February 23, 2023, Cross was selected to fill Harden’s open Captain position.

**b.** For purposes of Summary Judgement only, the following deposition exhibits are stipulated to:

- i. Exhibit 4: Memo – 5/24/18 – Harden to Cochran re: Phone conversation with Hanika
- ii. Exhibit 5: Email string – 9/6/18 – B Wheelles/Harden re: One more question

- iii. Exhibit 8: Memo – 8/27/19 – Cochran to Harden re: Removal of discipline from file
- iv. Exhibit 50: Verbal Warning to J. Cross dated 09/08/18.
- v. Exhibit 52: Cross complaint re: proper training attire
- vi. Exhibit 64: Email string – Cochran to sworn and unsworn re: Announcement of his promotion to Chief.
- vii. Exhibit 65: Email string – Wheelles to sworn and unsworn re: Command updates
- viii. Exhibit 67: Email dated 2/8/21 – B. Wheelles to sworn and unsworn re: Cochran promotion to Chief of Staff for City.
- ix. Exhibit 68: Complaint Review Report dated 7/12/22 from JR and S. Starr to Bill Cochran re: Cross clothing attire complaint.
- x. Exhibit 75: Email string – 3/14/19 - J. Cross to J. Monasmith re: Eubanks 3<sup>rd</sup> shift recap issue.84. Letter to J. Cross from J. Russell dated 7/6/22 re: Findings from clothing attire investigation.
- xi. Exhibit 85: Letter to J. Cross from J. Russel dated 7/22/22 re: Findings on allegations filed against her by J. Wheelles.
- xii. Exhibit 91: Letter to J. Wheelles from J. Russell dated 7/14/22 re: findings of complaint against J. Cross.
- xiii. From D. Mudrick depositions
  - Exhibit 1 – Mudrick’s investigation file
  - Exhibit 2 – Hanika Investigation file from HR
- xiv. From the 2nd deposition of J. Wheelles:
  - Ex. 2 – Confidential Investigation Summary dated 4/17/19 from J. Russell and S. Maisberger regarding Hanika complaint.
  - Ex. 3 – Hanika Complaint re: DEA situation – no date.
  - Ex. 8 – Email from J. Wheelles to B. Wheelles dated 5/1/18 re: Hanika applying and receiving warrant.
  - Ex. 11 – Email from J. Wheelles to B. Wheelles dated 07/25/18 re: Grant info needed.
  - Ex. 12 – Email string J. Wheelles and B. Wheelles dated 8/9/18 re: deciphering someone’s email.

c. For purposes of summary judgement and trial both, the following deposition exhibits are stipulated to:

- i. Exhibit 1: Rank History of Major Harden
- ii. Exhibit 9: Email string 3/23/20 – Purney to M. Cross, Harden, Stuart, Haltom – re: Topeka Police Major Process
- iii. Exhibit 10: Email string – 3/24/20 – Harden to Purney re: Interest in Major position and attached resume

- iv. Exhibit 14: Email string – 9/1/21 – B. Wheelles to Majors and Captains re: Request to rank current TPD LTs.
- v. Exhibit 15: Email string – 11/23/21 – B. Wheelles to sworn and unsworn re: announcement of promotion to Chief
- vi. Exhibit 16: Email string – 11/29/21 – B. Wheelles to sworn and unsworn re: Haltom selected DC.
- vii. Exhibit 17: Email string – 11/30/21 – B. Wheelles to Captains re: TPD Major Board Process
- viii. Exhibit 18: Email string – 12/13/21 – Haltom to sworn and unsworn re: M. Cross selection to Major.
- ix. Exhibit 19: Email string – 12/15/21 – Haltom/Harden re: Meeting to discuss Major selection process.
- x. Exhibit 21: Email string – 1/10/22 – Haltom to sworn and unsworn re: Captain promotion selection of Jones and Monasmith.
- xi. Exhibit 23: Email string – 9/20/22 – Harden to Haltom re: Memo prepared on J. Trimble complaint
- xii. Exhibit 24: Email string – 1/6/23 – Haltom/Harden re: Concern with M. Cross retaliating against Harden due to report of veracity issues.
- xiii. Exhibit 25: Harden resume
- xiv. Exhibit 26: Letter to Harden from Chief – 2/20/23 re: Offer of Major position and memo dated 2/22/23 from Harden accepting the offer.
- xv. Exhibit 27: HR Position requisition request dated 2/27/23 for Harden’s Major position.
- xvi. Exhibit 28: TPD 2023 Organizational Chart – after 4<sup>th</sup> major reinstated.
- xvii. Exhibit 38: TPD 2023 Organizational Chart – before 4<sup>th</sup> major reinstated.
- xviii. Exhibit 39: Stuart Resume
- xix. Exhibit 40: Stuart Rank History
- xx. Exhibit 44: TPD 2021 Organizational Chart
- xxi. Exhibit 47: City of Topeka No Discrimination or Harassment Policy
- xxii. Exhibit 49: Rank history of J. Cross.
- xxiii. Exhibit 51: Cover letter and resume of Cross dated 12/31/21.
- xxiv. Exhibit 55: Letter to J. Cross dated 2/23/23 – Offer of promotion to Captain.
- xxv. Exhibit 56: Memo – Cross to B. Wheelles – Acceptance of offer to Captain.
- xxvi. Exhibit 70: Email string dated 4/1/23 – Gretchen Spiker re: Info provided to 13 news on new Major and Captain positions
- xxvii. Exhibit 71: Rank History of Jerry Monasmith, Jr.
- xxviii. Exhibit 72: Letter to J. Monasmith dated 1/31/22 re: Promotion to Captain.
- xxix. Exhibit 76: TPD Policy 1.2 – Organization, Command Protocol and Authority.
- xxx. Exhibit 77: TPD Policy 1.4 – Rules of Conduct for Department Supervisors.
- xxxi. Exhibit 78: TPD Policy 4.72 – Non-Discrimination.
- xxxii. Exhibit 79: TPD Policy 3.4 – Recruitment and Selection.
- xxxiii. Exhibit 80: TPD Policy 3.6 Evaluations, Promotions and Awards.

- xxxiv. Exhibit 81: City of Topeka Personnel Manual Section 2.
- xxxv. Exhibit 94: City of Topeka Personnel policy Section 3 – Employee Conduct.

### **3. FACTUAL CONTENTIONS.**

#### **a. Plaintiffs’ Factual Contentions.**

Defendant Topeka and especially the TPD have engaged in a decades-long policy, pattern and practice of gender discrimination.

Stuart, a woman, began working for the TPD in 1999 and currently serves as a Captain. After he became the Chief of Police on November 23, 2021, Defendant Wheelles began to consider whom he should promote to Deputy Chief. Stuart was among the qualified internal candidates for the position. Without conducting any interviews, Defendant Wheelles selected a male, Captain Jamey Haltom (“Haltom”) for the position on November 28, 2021. Defendant Wheelles promoted Haltom because he is male. Stuart was more qualified than Haltom because she has a master’s degree (Haltom does not) and she was more experienced in that he had completed fewer and less prestigious leadership schools, was in a command position over fewer bureaus and he had not been involved in TPD initiative projects.

In December 2021, Stuart applied for a promotion to Major. Defendants selected a male officer, Michael Cross, for the position. Defendants selected him because he is male. There were substantial department-wide concerns, as each Plaintiff and others testified in their depositions, about Michael Cross’s work ethic and whether he could be trusted. Moreover, Stuart was more qualified and experienced than Michael Cross in that he did not possess a master’s degree and was less experienced.

During her tenure with the TPD, Stuart was subjected to hearing sexist comments from various male members of the TPD, throughout the duration of her career, including Manny Acosta, Tony Darr, Russ Klumpp, Haltom, Scott Gilchrist, John Trimble, and Scott Conklin, including,

“you need to man up[,]” “people are watching you more because you are a woman, so don’t let this show[,]” “you have resting bitch face[,]” and “I always thought you were just impersonable and a bitch because you never smiled or put yourself out there.” Defendant Wheelles interfered with the chain of command under Stuart’s purview by allowing those underneath her command to jump it and by himself jumping the chain of command below to those serving under her; he did not do so to male officers. Stuart repeatedly observed meetings in which a female officer would suggest an idea, the group ignored her and then a male would make the same suggestion and be hailed as a hero. Prior to her promotion to Captain in 2018, Stuart served as the TPD’s Public Information Officer. After her promotion to Captain, a male was selected as Public Information Officer. The TPD changed his title to “Executive Officer,” provided him with an exclusive office (Stuart never had one when she held the position) and required him to perform far fewer duties and hours of availability than Stuart.

Harden, a woman, began with the TPD in 2000 and currently serves as a Major. She was a qualified internal candidate for promotion to Deputy Chief, but Defendants chose Haltom, a male, in November 2021, even though Harden was more qualified in that she had a master’s degree and was more experienced in that he had completed fewer and less prestigious leadership schools, was in a command position over fewer bureaus and he had not been involved in TPD initiative projects.

In December 2021, Harden applied for a promotion to Major. Defendants selected a male officer, Michael Cross, for the position. Defendants selected him because he is male. There were substantial concerns about Michael Cross’s work ethic and whether he can be trusted. Moreover, Harden was more qualified and experienced than Michael Cross in that he did not possess a

master's degree and was less experienced in that he had fewer leadership schools and he had not been in initiative projects.

Defendant Topeka has a long history of discriminating against Harden because of her gender. Between the years of 2002 through 2006, on three different occasions, Defendant Topeka posted an open position for the Response Team (also known as the SWAT team). Harden passed the physical requirements as well as the scenario drills for the position. Harden was not selected for the team on any of these occasions despite her qualifications and experience and, to this day, Defendant Topeka has never selected a female to serve on the team. Officer McNeal told Harden she was not selected because the leadership of the team did not want a female.

In 2015, Harden was passed over for a promotion to Captain and the position was given to Michael Cross, even though Harden had served more bureaus in the department, had more education, and more time in rank. She was told that Michael Cross would bend rules and work in the gray area, and Harden was a "rule follower" and that was not what Defendant Topeka needed at that time. Michael Cross was chosen for the promotion because he is male.

Plaintiffs filed their charges of gender discrimination on May 21, 2022, and filed this suit on January 18, 2023. In a "sham promotion" made only because Harden, Stuart and Cross filed this lawsuit, Defendants selected Harden as a Major on February 20, 2023. Then City Manager, Steve Wade, testified that Defendant Topeka decided to reestablish a previously vacated fourth Major position (the one to which Harden was promoted) after then councilman, Spencer Duncan, suggested that Defendant Topeka do so three or four weeks (or right after Plaintiff's filed this lawsuit) before the decision to refill the position was made on February 20, 2023.

Defendant Wheelles, as he admitted in his deposition, opposed even this reestablishment of the Major position to which Harden was promoted. Defendant Wheelles testified he voiced his

opposition to the City Manager at the time. If the then City Manager had not insisted on the reestablishment of that position, Harden would not have been promoted to Major and Cross would not have been promoted to Harden's vacant Captain position. The City Manager forced Defendant Wheelles to promote Harden and Cross (we know this in part because Defendant Wheelles' wife, Officer Jeralyn Wheelles, admitted in her deposition that she may well have told people in the TPD's narcotics unit that Defendant Wheelles did not want to promote either of them but that the City Manager forced him to do so). Defendant Wheelles then showed his anger and discriminatory animus by declining to show Harden and Cross the TPD's customary celebration of their promotions by refusing, at their promotion ceremony, to: 1) outline and celebrate their stellar careers to that point; and, 2) refusing to take celebratory pictures with Harden and Cross and their family and friends.

Cross began with the TPD in 2004 and currently serves as a Captain. Cross applied for a position as Captain in early 2018. She was not selected, but Stuart and Haltom were both promoted. On February 14, 2018, Cross met with then Chief Bill Cochran and then Deputy Chief, Defendant Wheelles. When Cross asked why she was not selected, they told her it was because she did not have a master's degree. When Cross responded that Haltom did not have a master's degree and that she had a more well-rounded resume, they said it was "just his time" and provided no further information. Cross went on to obtain a master's degree in November of 2020.

In August 2018, she attended a concert with a large group of dance mothers. One of the dance teachers and Cross were invited on stage. Cross did a front handspring on stage. A video of the dance was loaded to social media, and Cross was reprimanded that her online social media conduct was "unbecoming" of a commander. Harden was directed to speak to Cross about this incident. After that conversation, Chief Cochran was shown on social media cross-dressing as

Cher, with no discipline. Likewise, Lieutenants Munoz and Trimble (both male officers) repeatedly used profanity and unprofessional comments on a regular basis that reflected poorly on the police department. Neither was reprimanded or disciplined.

In May 2019, Cross had begun work on her master's degree. Haltom told her it was brought to his attention that she was using her on-duty time to work on her degree and that she needed to ensure that it wasn't affecting her work. Male officers, including Jerry Monasmith, Michael Cross and Joe Perry, were not similarly questioned about similarly doing their schoolwork using on-duty time.

In November 2019, Cross was once again selectively addressed regarding her conduct on social media. She was told she had been the top candidate to take the Public Information Officer/Executive Officer spot until she made a Facebook post that allegedly caused the executive command office of the TPD to question if she would be a bad representative for the police department. Instead, Lieutenant Munoz was placed in the position. The scrutiny Defendant focused on Cross was completely different from Defendant's treatment of Lieutenant Munoz, including his use of the "f" word, further profanity and statements that could be construed as racist or misogynistic.

Throughout 2019, Cross approached Haltom, her direct supervisor, about Lieutenant Jerry Monasmith continuing to circumvent her in the chain of command and for his unprofessional conduct towards her which was creating a hostile work environment. Cross was tired of being treated as incompetent. She met with both Stuart and Harden about her frustration at being treated as incompetent, being cut out of the chain of command with her subordinates and Haltom's refusal to address these issues. This situation became so bad that in October 2019 Cross met with Jacque Russell in Human Resources about Monasmith and the lack of support from Haltom.

Cross applied for the Captain's position in December 2021, but Lieutenants Monasmith and Jones (both males) were given the promotion. She was told that the decision was based on a review of personnel files, resumes, and input from the interview panel. Both Jones and Monasmith were less qualified than Cross, however. Jones had 24 hours towards his master's degree, Monasmith had just completed his in December of 2021, and both males had less experience and less institutional knowledge than Cross. Cross had previously trained Monasmith when he came to the criminal investigation bureau.

After an extended period of experiencing disparate treatment, bullying and harassment by command staff, on April 25, 2022, Cross asked three officers to change clothes during an In-Service training session at lunch when they arrived in blue jeans, in violation of policy and her advance directive to the officers. No exception was made by the officers' chain of command or the Bureau Commander in advance regarding the directed attire for the training. After being asked to change clothes. Officer Jeralyn Wheelles called Monasmith expressing concern, whereupon Monasmith told her she did not need to change. Cross's directive being overturned in response to an employee complaining without discussing it with her warranted concern, undermined her authority as Training Director. It is also notable that, while both the immediate supervisor Lieutenant Ronnie Connell and Monasmith were out of the office, Monasmith was called.

Cross finally and formally made a complaint with Defendant Topeka's human resources department in May 2022. After a thorough investigation, the human resources department substantiated her complaints and found that Monasmith (a male who had illegally been promoted over her) had engaged in bullying and harassment by allowing subordinate officers to jump the chain of command over Cross and undermining her authority. Defendant Topeka's human resources department specifically found that Monasmith violated Defendant Topeka's policy

against “Bullying by Sabotage” by undermining or deliberately impeding Cross’s work, but he was never disciplined, and, as he testified in his deposition, he was even unaware Cross’s complaint against him had been substantiated. he was even unaware Cross’s complaint against him had been substantiated. Prior to this finding, Monasmith “explained” to Cross, in a contentious confrontation in the parking lot in December 2015, that the only reason she had been promoted to Lieutenant was because she is a “woman.”

After Harden’s “sham promotion” to Major on February 20, 2023 (as set forth above and all of the allegations described above are incorporated here by reference), Defendants promoted Cross to Harden’s vacated Captain position on February 23, 2023.

The Plaintiffs suffered disparate treatment and were subject to countless statements showing the TPD’s illegal intent to discriminate on the basis of gender. Even if certain events occurred outside of the relevant statute of limitations for Plaintiffs’ claims, those facts are admissible to show intent.

Plaintiffs’ experience of gender discrimination and the similar experiences of other female TPD officers, as detailed below, show the TPD’s (and Defendant Wheelles’) policy, pattern and practice of gender discrimination. Such a policy, pattern and practice show that Defendants’ gender discrimination is and was a policy, practice or custom of the Defendants within the meaning of *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978).

The TPD has never employed a female officer as Chief of Police or Deputy Chief. Prior to the TPD’s “sham promotion” of Harden to Major in February 2023, only one woman had ever been a Major in the TPD.

Kim Hanika, a female Sergeant with the TPD made a formal complaint to Defendant Topeka’s human resources department in August 2018. After an extensive investigation of her

complaints of disparate treatment and retaliation, Defendant Topeka's human resources department substantiated her complaints against Defendant Wheelles in June or July 2019. The human resources department specifically found that Defendant Wheelles violated city policy by "disclosing information to [his wife, Jeralyn Wheelles] outside the chain of command and position, retaliat[ing against Kim Hanika] and other police department employees, [and engaging in] bullying/intimidation and ordering the destruction of items of a former detective prior to the investigation being closed." During the investigation, the human resources department received a recommendation from an outside expert that Defendant Topeka evaluate whether then Chief Bill Cochran and then Deputy Chief Defendant Wheelles should be terminated. Human resources apparently suggested to then City Manager, Brent Trout, that Defendant Wheelles be suspended without pay for three to four weeks. Neither Cochran nor Defendant Wheelles was ever definitively made aware that Kim Hanika's complaints had been substantiated, and, because they were male, no discipline of either Defendant Wheelles or Bill Cochran ever occurred. This report also found that Defendant Wheelles (Defendant Topeka's top officer in the TPD) interfered and retaliated against female officers whom his wife, Jeralyn Wheelles, deemed her female enemies. These officers include Sergeant Kim Hanika and Harden. Defendant Wheelles also disciplined Cross because of his wife's animosity towards her. Defendant Wheelles' illegal favoritism of his wife is indicative of his gender-based discriminatory animus towards female officers who are not acting in a "traditional" role. If you are not his wife (a female in a "traditional" role), then Defendant Wheelles treats you differently if you are female.

Defendants' discriminatory intent is also indicated by the experiences of other female officers at the TPD. Donna Eubanks believed she has suffered years of disparate treatment because she is female. Julie Hoffman was not allowed to join the TPD's canine unit because she is female

and has been repeatedly passed over for promotions. Francesca Lamb, a woman, was denied the opportunity to work as a Sergeant in Homicide and was instead placed in Special Victims. After repeatedly failing to be promoted past the rank of Sergeant, Lamb finally retired.

Defendants' disparate treatment and failure to promote Plaintiffs has caused them incalculable emotional distress and substantial economic damages. The economic damages will continue far into the future in the form of lower pension payments for as long as they live after retirement.

Such heinous discrimination also warrants an award of substantial punitive damages to deter Defendants, and others, from like conduct in the future.

**b. Defendants' Factual Contentions.**

At its core, this is a "failure to promote" case under Title VII filed by the three female Plaintiffs alleging they were not promoted to higher positions due to their status as females. Plaintiffs also claim that the City of Topeka had a "custom or policy" of gender discrimination directed at females such that the City of Topeka is subject to liability under 42 U.S.C. § 1983 *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). They also claim Defendant Chief Bryan Wheelles is liable under 42 U.S.C. § 1983 alleging he violated their rights under the equal protection clause of the 14th Amendment to the United States Constitution by virtue of not promoting Plaintiffs.

Plaintiffs are long-term employees of the City of Topeka Police Department. Stuart began her employment with Defendant Topeka on June 28, 1999. She was promoted to School Resource Officer in 2003, Corporal in Field Operations in 2009, Corporal in the Administration Bureau in 2011, Sergeant in recruiting and hiring within the Administrations Bureau in 2012, Sergeant in

Special Projects, a newly created position, in 2014, Lieutenant in 2015, Captain in the Field Operations Bureau in 2018, and Captain in the Community Outreach Bureau in 2022.

Harden began her employment with Defendant Topeka on January 10, 2000. She was promoted to Patrolman in the Criminal Investigation Division in 2003, Patrolman on the Anti-Crime Team in 2003, Patrolman in the Narcotics Unit in 2004, Sergeant in the Uniform Services Division in 2009, Sergeant in the Special Operations Division in 2010, Lieutenant in the Uniform Services Division in 2011, Lieutenant in the Special Operations Division in 2012, Lieutenant in the Field Operations Bureau in 2014, Lieutenant in the Professional Standards Unit in 2015, Captain in the Field Operations Bureau in 2017, Captain of the Criminal Investigations Division in 2017, Captain of the Community Outreach Bureau in 2018, and Major in 2023.

Cross began her employment with Defendant Topeka on March 29, 2004. She was promoted to patrol in Community Policing in 2006, School Resource Officer in 2008, Detective in 2009, Sergeant in the Field Operations Division in 2012; Sergeant in the Support Operations Division in 2012, Sergeant in the Criminal Investigation Division in 2015, Lieutenant in the Field Operations Bureau in 2015, Lieutenant in the Criminal Investigations Bureau in 2017, Lieutenant in the Special Operations Bureau in 2020, Lieutenant in Administration in 2021, and Captain in 2023.

Each Plaintiff started as a patrol officer and they were promoted through the ranks by males, and over other male applicants. By 2021, Stuart had attained the position of Captain; Plaintiff Harden had attained the position of Captain; and Plaintiff Cross had attained the position of Lieutenant.

On November 23, 2021, Chief Bryan Wheelles, who had been serving as interim Police Chief, was named permanent Police Chief. As is the historical custom within the TPD, Chief Bryan

Wheeles had authority to select the person to be his Deputy Chief without the formalities of advertising and or formally interviewing candidates for the position. On November 28, 2021, after considering Plaintiffs and others, Chief Wheeles based upon his knowledge of, interactions with and experience within the TPD, selected Jamey Haltom, a male, to be Deputy Chief, for the legitimate non-discriminatory reasons that he was the most capable choice for Chief Wheeles and the person whom Chief Wheeles had and has a very high level of confidence in as a commander at the TPD. He has excellent operational, tactical, investigative and administrative skills and a broad experience base. He had and has a proven track record over many years of sound decision-making under pressure. He has an impeccable record of police service and is an excellent and effective public speaker/presenter. He is highly respected within the TPD, city government and community for his leadership/character, and he shared a similar vision with the Chief of agency mission, priorities, and future progression.

On November 30, 2021, the TPD announced that the sitting Major was retiring and invited eligible applicants to apply for the position. Plaintiffs Stuart and Harden were eligible to apply and applied. They participated in the interviews and were candidates who were considered in the selection process. On December 11, 2021, Plaintiffs Stuart and Harden and Captain Michael Cross (husband of Plaintiff Jennifer Cross) were interviewed by a six-person panel that included members of the TPD as well as members from the community, including the district attorney, a minister, a businessman and law enforcement personnel who worked for an outside agency. Chief Wheeles was not on the panel. The panel each had form questions and wrote notes as the interviews progressed. At the conclusion of each interview, each panelist identified whether each applicant was “promotable” or “not promotable.” Each panelist selected Harden as promotable, however, two panelists selected Stuart as not promotable. All of the panelists selected Michael Cross as

promotable and at least some of the panel members viewed Michael Cross as having performed significantly better in the interview than either Harden or Stuart. Following the interviews, Chief Wheelles conferred with the panel members and based upon those comments, and his experience in the TPD, knowledge of and interactions with the applicants, he selected Michael Cross to the Major position, for legitimate non-discriminatory reasons.

On December 16, 2021, the TPD announced the opening of a Captain's position and invited eligible applicants to apply for the position. Plaintiff Cross was eligible and applied and participated in the interviews and was a candidate who was considered in the selection process. Other male applicants applied as well, including Lt. Monasmith and Lt. Jones. Plaintiff Cross (wife of now Major Michael Cross) was subsequently interviewed by a five-person panel that included members of the TPD as well as a minister and the Chief Deputy District Attorney. Chief Wheelles was not on the panel. The panel each had form questions and wrote notes as the interviews progressed. At the conclusion of each interview, each panelist identified whether each applicant was "promotable" or "not promotable." Each panelist selected Cross, Monasmith and Jones as promotable. Following the interviews, Chief Wheelles conferred with the panel members and based upon those comments, and his experience in the TPD, knowledge of and interactions with the applicants, he selected Monasmith and Jones to the open Captain positions, for legitimate non-discriminatory reasons.

Plaintiffs formulated the false belief that they were not promoted based upon their gender and subsequently filed their Complaint on January 18, 2023. TPD policy 4.9.3(XX)(1) states that "all employees of this Department have a duty to report serious acts of misconduct or failures to perform actions, as defined by Department policy and procedure. Failure to report shall result in corrective or disciplinary action." City of Topeka's Non-Discrimination or Harassment Policy

section 2.4 states, “The City cannot resolve matters that are not brought to its attention. Any employee, regardless of position, who has a complaint of or who witnesses discrimination or harassment at work by anyone, including supervisors, managers, employees, or even non-employees, has a responsibility to immediately bring the matter to the City’s attention.” City of Topeka policy 3.17(A)(1) states that “if any employee suspects a violation of Section 3 of the Personnel Manual, or that any alleged violation of City’s personnel Manual, personnel provisions, departmental policy, procedures or guidelines has occurred, he/she shall report the suspected violation, in writing, within five working days of the incident giving rise to the violation. All such reports shall be submitted to the Director of Human Resources.”

Despite all Plaintiff’s acknowledging receipt and an understanding of these multiple policies requiring them to report their complaints, none of the Plaintiff’s complied with these policies during their employment. Throughout the course of discovery, Stuart has alleged over 20 incidents of what she considers inappropriate behavior amounting to violations of TPD and City policy, yet she has never reported a single occurrence to HR. In fact, of all her complaints, only one of them was reported to her superior and that reported incident was addressed by her supervising Sergeant to Stuart’s satisfaction. Harden has alleged approximately a dozen different complaints. While she did report a few of these incidents to her superiors, she never reported a single occurrence to HR, as is required. Cross has also alleged approximately a dozen different violations of policy throughout her career and she too, failed to report any of those instances to HR until 2019, when she reported an incident that had occurred over a year prior.

After January 18, 2023, then City Manager Steve Wade made a policy and budget decision to re-establish another Major position to address homelessness issues in the Topeka community. Chief Wheelles disagreed that creating another Major position was the best use of a budgetary

increase to address the homelessness issues but, as the City Manager had authority over the decision, Chief Wheelles accepted the decision. Given that Plaintiff Harden had participated in the Major interview process within the prior year and was considered by the panel to be promotable, Chief Wheelles presented Harden with an “unconditional offer” of promotion to the newly created Major position without another formal application and interview process. She accepted the position and became a Major, effective April 1, 2023.

Ms. Harden’s promotion resulted in the opening of her Captain position. Given that Cross had participated in the Captain interview process within the prior year and was considered by the panel to be promotable, Chief Wheelles specifically decided to offer the Captain position to Cross. Thereafter Cross was presented with an “unconditional offer” of promotion to the Captain position without another formal application and interview process. She accepted the position and became a Captain, effective April 1, 2023.

#### **4. LEGAL CLAIMS AND DEFENSES.**

##### **a. Plaintiffs’ Claims.**

Plaintiffs assert that they are each entitled to recover upon the following theories:

- i. Gender discrimination in violation of Title VII against Defendant Topeka (Count I). Defendant Topeka failed to promote Plaintiffs based on their sex in violation of Title VII.
- ii. Violation of 42 U.S.C. § 1983 by violating their 14th Amendment rights to equal treatment because of their gender against Defendant Topeka (Count II) by failing to promote them. Defendant Topeka had a policy, practice, or custom of not promoting qualified candidates, including Plaintiffs, because

of their sex in violation of Section 1983, making Defendant Topeka liable under *Monell*.

- iii. Violation of 42 U.S.C. § 1983 by violating their 14th Amendment rights to equal treatment because of their gender by failing to promote them against Defendant Wheelles, in his individual capacity (Count III).

**b. Defendants' Defenses.**

Defendants asserts the following defenses:

- i. Defendants allege in their Answer (ECF No. 5) at paragraph 60: "The City and Chief Wheelles state and assert Plaintiffs fail to state claims upon which relief can be granted." Defendants submit that in so alleging, they preserved their right to assert a post Answer, 12(b)(6) motion or alternatively a 12(c) motion, which they intend to include in their Summary Judgment. *See Delhomme v. Caremark Rx Inc.*, 232 F.R.D. 573 (2005). Defendants submit that Plaintiffs fail to state a claim under Fed. R. Civ. P. 12(b)(6) with regard to their Title VII claims because they fail to allege in their Complaint (ECF No. 1) that they satisfied *any* condition precedent to filing their Title VII claims. A condition precedent to filing a Title VII claim is filing a charge with the EEOC and receiving a right to sue letter and is a pleading requirement in Title VII cases. *See, Watson v. Republic Airlines, Inc.*, 553 F. Supp. 939 (N.D. GA 1982), 33 Fair Empl. Prac. Cas. (BNA) 475. And while Defendants concede Plaintiffs did in fact satisfy this condition precedent, Plaintiffs did not plead any phrasing in their Complaint (ECF No. 1) that could reasonably be read to establish that they had satisfied this condition precedent. As the deadline for amending has passed, discovery is closed and Plaintiffs did not cure this pleading defect, Defendants intend to present this defense in their summary judgment motion. *Watson* at 944.
- ii. Plaintiffs cannot establish a violation of Title VII of the Civil Rights Act of 1964 for purposes of establishing a violation of 42 U.S.C. § 1983 against both Defendants.
- iii. Plaintiffs' 42 U.S.C. § 1983 claims are subject to a two-year statute of limitations. To the extent they are relying upon any discrete act to establish a violation of Title VII occurring two years prior to the date of the filing of the Complaint herein, such claims are barred.
- iv. Defendant City of Topeka cannot be liable under vicarious liability under 42 U.S.C. § 1983 because there is no official policy or custom of alleged gender discrimination or gender retaliation; no individual violated Plaintiffs' constitutional

rights, and no such alleged official policy or custom directly caused the purported violation.

- v. Defendant Chief Wheelles is entitled to qualified immunity on Plaintiffs' 42 U.S.C. § 1983 claims and Plaintiffs bear the burden to defeat it by identifying a close analogous case or describing conduct so plainly egregious that no reasonable person could have thought he was acting lawfully.
- vi. Neither Defendant took wrongful adverse employment action or tangible employment action against the Plaintiffs.
- vii. Plaintiffs made generic assertions in their Complaint, and in the course of discovery, of a hostile work environment and pattern and practice allegations ("me too evidence"). To the extent Plaintiff seeks to pursue claims based on discrete acts alleged to have occurred prior to July 27, 2021, they are barred from doing so by their failure to file administrative claims with the EEOC within 300 days of the occurrence of the incidents they contend were in violation of Title VII. Plaintiffs are otherwise limited to claims asserted in their respective charges submitted to the EEOC.
- viii. The City of Topeka and Topeka Police Chief, Bryan Wheelles, acted reasonably and in good faith and all actions by the Defendants in promoting others into the positions complained about by Plaintiffs were done for legitimate, non-discriminatory, and non-retaliatory reasons.
- ix. To the extent all Plaintiffs contend they should have been promoted to the position of Deputy Chief, any purported damages are proportionally limited by the fact that all alleged they should have been promoted for the same position, at the same time, when only one position was available. Further, Plaintiffs Stuart and Harden's purported damages are proportionally limited by the fact that both alleged they should have been promoted for the same Major position at the same time when only one position was available. *See United States v. City of Miami*, 195 F.3d 1292 (1999); *Shealy v. City of Albany, Ga.*, 137 F. Supp. 2d 1359 (2001).
- x. Plaintiffs Harden and Cross' back pay damages are also limited to any purported back pay wage loss occurring prior to the unconditional offers and acceptance of promotions to Major and Captain, respectively, occurring subsequent to the filing of their Complaint. *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982); *Figgs v. Quick Fill Corp.*, 766 F.2d 901 (1985). Their front pay damages are also barred and or limited by virtue of their acceptance of the unconditional offers of promotions.
- xi. The City and the Topeka Police Department had and has effective policies against discrimination and harassment and Plaintiffs' complaints were properly investigated and addressed. Plaintiffs failed to avail themselves of these policies by not reporting the complaints as is required by the policies reflected in Defendant's factual contentions.

- xii. The City of Topeka and Topeka Police Chief, Bryan Wheelers, acted in compliance with applicable law in Title VII and 42 U.S.C. § 1983, and otherwise had a good-faith and reasonable belief they were acting in compliance.
- xiii. Defendants deny Plaintiffs have been damaged and damages, if any, are subject to the applicable \$300,000 statutory cap on Compensatory and Punitive damages, per Plaintiff, under Title VII.
- xiv. Further, Plaintiffs are not entitled to recover punitive damages from Defendants as Defendants did not act willfully and Plaintiffs are legally precluded from punitive damages against the City of Topeka under 42 U.S.C. 1983, *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); and precluded under Title VII, *see Lask v. Kansas City, Kansas Community College Board of Trustees*, 2023 WL 5034375 (D. Kan. Aug. 8, 2023).

**5. DAMAGES AND NON-MONETARY RELIEF REQUESTED.**

Plaintiffs' Damages:

**a. Sex Discrimination, Title VII (Count I)**

Lost Wages

1. Plaintiffs seek damages for lost wages.
  - a. Plaintiff, Colleen Stuart's lost wage calculation is based on the difference of the annual salary (\$160,773 and increasing each year) had she been promoted to Deputy Chief in November 2021 and the annual salary (\$110,398 and increases each year) that she earned without the promotion. Her out of pocket lost wages are approximately \$247,845. In the alternative, Stuart did not get promoted in December 2021 when she applied for the position of Major in which Michael Cross was given the promotion. This amount will be incurred as lost wages from December 2021 and as long as she stays in the Captain position.
  - b. Plaintiff Jana Harden's lost wage calculation is based on the difference of the annual salary (\$160,773 and increasing each year) had she been promoted to Deputy Chief in November 2021 and the annual salary (\$113,031) that she earned without the promotion as a Captain and \$127,854 that she earned as a Major. Her out of pocket lost wages are approximately \$153,425. In the alternative, Harden did

not get promoted in December 2021 when she applied for the position of Major in which Michael Cross was given the promotion. The lost wages would be for the period of time from December 2021 to February 2023.

- c. Plaintiff, Jennifer Cross' lost wage calculation is based on the difference of the annual salary (\$126,595) had she been promoted to Captain in December 2021 and the annual salary (\$113,031) that she earned without the promotion until she was promoted to Captain on February 23, 2023. Her out of pocket lost wages are approximately \$15,792.

#### Compensatory damages

1. Plaintiffs seek compensatory damages caused by Defendant's discrimination in an amount to be determined by the jury, but no less than \$300,000 each.
  - a. Plaintiff Colleen Stuart's lost retirement benefits are calculated at \$1,250,000 and she has suffered from emotional distress in the amount no less than \$300,000.
  - b. Plaintiff, Jana Harden's lost retirement benefits are calculated at \$1,414,901 and she has suffered from emotional distress in the amount no less than \$300,000.
  - c. Plaintiff, Jennifer Cross has suffered from emotional distress in the amount no less than \$300,000.

#### Punitive Damages

Plaintiffs seek punitive damages in an amount to be determined by a jury.

#### Attorneys' Fees

If Plaintiffs are the prevailing parties, they will seek reasonable attorneys' fees and expenses incurred. Currently, Plaintiffs' attorneys' fees are estimated as \$518,155 (\$260,000 for Mark Jess, \$193,750 for Christie Jess, \$42,130 for Chris Playter and \$22,275 for Eric Playter) and expenses are \$15,826.15.

#### Post-Judgment Interest

If Plaintiffs are the prevailing parties, they will seek post-judgment interest

on any sums awarded.

- b.** Gender Discrimination pursuant to Section 1983 against Defendant City of Topeka (Count II)

Lost Wages

1. Plaintiffs seek damages for lost wages.
  - a. Plaintiff Colleen Stuart's lost wage calculation is based on the difference of the annual salary (\$160,773 and increasing each year) had she been promoted to Deputy Chief in November 2021 and the annual salary (\$110,398 and increases each year) that she earned without the promotion. Her out of pocket lost wages are approximately \$247,845. In the alternative, Stuart did not get promoted in December 2021 when she applied for the position of Major in which Michael Cross was given the promotion. This amount will be incurred as lost wages from December 2021 and as long as she stays in the Captain position.
  - b. Plaintiff Jana Harden's lost wage calculation is based on the difference of the annual salary (\$160,773 and increasing each year) had she been promoted to Deputy Chief in November 2021 and the annual salary (\$113,031) that she earned without the promotion as a Captain and \$127,854 that she earned as a Major. Her out of pocket lost wages are approximately \$153,425. In the alternative, Harden did not get promoted in December 2021 when she applied for the position of Major in which Michael Cross was given the promotion. The lost wages would be for the period of time from December 2021 to February 2023.
  - c. Plaintiff, Jennifer Cross' lost wage calculation is based on the difference of the annual salary (\$126,595) had she been promoted to Captain in December 2021 and the annual salary (\$113,031) that she earned without the promotion until she was promoted to Captain on February 23, 2023. Her out of pocket lost wages are approximately \$15,792.

Compensatory Damages

1. Plaintiffs seek compensatory damages caused by Defendant's discrimination in an amount to be determined by a jury.
  - a. Plaintiff Colleen Stuart's lost retirement benefits are

calculated at \$1,250,000 and she has also suffered from emotional distress in an amount to be determined by a jury but no less than \$1,000,000.

- b. Plaintiff Jana Harden's lost retirement benefits are calculated at \$1,414,901 and she has also suffered from emotional distress in an amount to be determined by a jury but no less than \$1,000,000.
- c. Plaintiff Jennifer Cross has suffered from emotional distress in an amount to be determined by a jury but no less than \$1,000,000.

### Punitive Damages

Plaintiffs seek punitive damages in an amount to be determined by a jury.

### Attorneys' Fees

If Plaintiffs are the prevailing parties, they will seek reasonable attorneys' fees and expenses incurred. Currently, Plaintiffs' attorneys' fees are estimated as \$518,155 (\$260,000 for Mark Jess, \$193,750 for Christie Jess, \$42,130 for Chris Playter and \$22,275 for Eric Playter) and expenses are \$15,826.15.

### Post-Judgment Interest

If Plaintiffs are the prevailing parties, they will seek post-judgment interest on any sums awarded.

- c. Gender Discrimination pursuant to Section 1983 against Defendant, Bryan Wheelles, Individually (Count III)

### Lost Wages

1. Plaintiffs seek damages for lost wages.
  - a. Plaintiff Colleen Stuart's lost wage calculation is based on the difference of the annual salary (\$160,773 and increasing each year) had she been promoted to Deputy Chief in November 2021 and the annual salary (\$110,398 and increases each year) that she earned without the promotion. Her out of pocket lost wages are approximately \$247,845. In the alternative, Stuart did not get promoted in December 2021 when she applied for the position of Major in which Michael Cross was given the promotion. This amount will be incurred as lost wages from December 2021 and as long

as she stays in the Captain position.

- b. Plaintiff Jana Harden's lost wage calculation is based on the difference of the annual salary (\$160,773 and increasing each year) had she been promoted to Deputy Chief in November 2021 and the annual salary (\$113,031) that she earned without the promotion as a Captain and \$127,854 that she earned as a Major. Her out of pocket lost wages are approximately \$153,425. In the alternative, Harden did not get promoted in December 2021 when she applied for the position of Major in which Michael Cross was given the promotion. The lost wages would be for the period of time from December 2021 to February 2023.
- c. Plaintiff Jennifer Cross' lost wage calculation is based on the difference of the annual salary (\$126,595) had she been promoted to Captain in December 2021 and the annual salary (\$113,031) that she earned without the promotion until she was promoted to Captain on February 23, 2023. Her out of pocket lost wages are approximately \$15,792.

#### Compensatory damages

1. Plaintiffs seek compensatory damages caused by Defendant's discrimination in an amount to be determined by a jury.
  - a. Plaintiff Colleen Stuart's lost retirement benefits are calculated at \$1,250,000 and she has also suffered from emotional distress in an amount to be determined by a jury but no less than \$1,000,000.
  - b. Plaintiff Jana Harden's lost retirement benefits are calculated at \$1,414,901 and she has also suffered from emotional distress in an amount to be determined by a jury but no less than \$1,000,000.
  - c. Plaintiff Jennifer Cross has suffered from emotional distress in an amount to be determined by a jury but no less than \$1,000,000.

#### Punitive Damages

Plaintiffs seek punitive damages in an amount to be determined by a jury.

Attorneys' Fees

If Plaintiffs are the prevailing parties, they will seek reasonable attorneys' fees and expenses incurred. Currently, Plaintiffs' attorneys' fees are estimated as \$518,155 (\$260,000 for Mark Jess, \$193,750 for Christie Jess, \$42,130 for Chris Playter and \$22,275 for Eric Playter) and expenses are \$15,826.15.

Post-Judgment Interest

If Plaintiffs are the prevailing parties, they will seek post-judgment interest on any sums awarded.

**6. AMENDMENTS TO PLEADINGS.**

None.

**7. DISCOVERY.**

Under the scheduling order and any amendments, all discovery was to have been completed by October 20, 2023. Discovery is complete.

Unopposed discovery may continue after the deadline to complete discovery so long as it does not delay briefing or ruling on dispositive motions or other pretrial preparations. Although discovery may be conducted beyond the deadline to complete discovery if all parties agree to do so, under these circumstances the court will not be available to resolve any disputes that arise during the course of such extended discovery.

**8. MOTIONS.**

**a. Pending Motions.**

None currently pending.

**b. Additional Pretrial Motions.**

After the pretrial conference, the parties intend to file the following motions:

- i. Plaintiffs intend to file a motion to exceed the page limitation in regard to their Response to Defendants' motion for summary judgment and motions in limine prior to trial.
- ii. Defendants intend to file a motion to exceed the page limitation on their motion for summary judgment and a motion for summary judgment. If denied, Defendants intend to file a motion for interlocutory appeal as allowable in connection with the Qualified Immunity defense (*Mitchell v. Forsyth*, 472 U.S. 511 (1985)). Defendants also intend to file motions in limine prior to any trial of this matter.

The dispositive-motion deadline, as established in the scheduling order and any amendments, is **January 12, 2024**. The parties should follow the summary-judgment guidelines on the court's website:

<http://ksd.uscourts.gov/wp-content/uploads/2015/10/Summary-Judgment-Guidelines.pdf>

Principal briefs in support of, or in response to, summary judgment motions must not exceed 40 pages and replies must not exceed 15 pages. *See* D. KAN. RULE 7.1(d)(2). Any motion to exceed these page limits or for an extension of briefing deadlines must be filed at least three days before the brief's filing deadline. *See* D. KAN. RULE 6.1(a), 7.1(d)(4).

**c. Motions Regarding Expert Testimony.** Not applicable, i.e., the parties have stipulated that no expert testimony will be used in this case.

## **9. TRIAL.**

The trial docket setting is **September 16, 2024, at 9:00 a.m.** Plaintiffs have designated Kansas City, Kansas, as the place of trial, and Defendants have designated Topeka, Kansas. To the extent the parties continue to disagree on the place of trial, any motion to determine the place of trial must be filed on or before the dispositive motion deadline. This case will be tried by jury.

Trial is expected to take approximately 10 days. The court will attempt to decide any timely filed dispositive motions approximately 60 days before trial. If no dispositive motions are timely filed, or if the case remains at issue after timely dispositive motions have been decided, then the trial judge may enter an order or convene another pretrial conference to set deadlines for filing final witness and exhibit disclosures, exchanging and marking trial exhibits, designating deposition testimony for presentation at trial, motions in limine, proposed instructions in jury trials, and proposed findings of fact and conclusions of law in bench trials.

**10. ALTERNATIVE DISPUTE RESOLUTION (ADR).**

The status of settlement negotiations is as follows: The parties participated in mediation with Larry Rute, however, the parties did not make any substantive progress toward settlement. The parties currently believe the prospects for settlement of this case are poor and they do not believe that further court-ordered ADR would be helpful.

The parties are reminded that, under D. Kan. Rule 40.3, they must immediately notify the court if they reach an agreement that resolves the litigation as to any or all parties. Jury costs may be assessed under this rule if the parties do not provide notice of settlement to the court's jury coordinator at least one full business day before the scheduled trial date.

**IT IS SO ORDERED.**

Dated: December 22, 2023, at Topeka, Kansas.

/s/ Rachel E. Schwartz  
Rachel E. Schwartz  
United States Magistrate Judge