

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

COLLEEN STUART, JANA HARDEN,)
AND JENNIFER CROSS,)
)
Plaintiffs,)
)
v.)
)
CITY OF TOPEKA, KANSAS, AND)
BRYAN WHEELLES, in his individual)
capacity,)
)
Defendants.)

Case No. 23-CV-2021-JWB-RES

**DEFENDANTS’ REPLY AND MEMORANDUM IN SUPPORT, TO PLAINTIFFS’
MEMORANDUM IN OPPOSITION TO DEFENDANTS’ MOTION FOR SUMMARY
JUDGMENT**

Defendants City of Topeka and Bryan Wheelles submit their Reply to Plaintiffs’
Memorandum in Opposition to Summary Judgment (Doc. 66).

I. DEFENDANTS’ REPLY TO PLAINTIFFS’ DENIALS OF DEFENDANTS’
UNCONTROVERTED MATERIAL FACTS; AND UNRESPONDED TO
ARGUMENT

Defendants object to Plaintiffs’ Response and request it be stricken or otherwise deemed
non-responsive. Judge Broomes’s Standing Order dated May 11, 2018, at 1.D.,
https://www.ksd.uscourts.gov/sites/ksd/files/attachment-1_0.pdf provides in relevant part
concerning motions for summary judgment:

Statements of uncontroverted fact shall cite only facts. Responses to statements of
uncontroverted fact shall cite only controverting facts. Argument and the drawing
of inferences shall be reserved for the authorities and argument section of the
memorandum.

In contrast to the Standing Order, Plaintiffs Response to Defendants motion is replete with
factual “argument” in their response to Defendants’ statement of uncontroverted facts and contains
immaterial “opinion” evidence in lieu of material direct evidence or competent circumstantial

evidence to attempt to controvert stated uncontroverted facts.

Further, Plaintiffs' do not substantively address Defendants' legal arguments, with the exception of their response to the standard for summary judgment. Pursuant to the District of Kansas local rule 7.1, "A party opposing a motion must file a response...If a response is not filed by the applicable deadline, the court will consider and decide the motion as an uncontested motion." (emphasis added). While the Plaintiffs submitted a "response" to Defendant's uncontroverted facts and added additional facts, they failed to respond to any of Defendant's arguments and authorities. As such, the Court should consider all of Defendant's legal arguments as uncontested. Defendants otherwise incorporate by reference their arguments and authorities set forth in their Motion and Memorandum in Support of Motion for Summary Judgment (Docs. 57-58).

Defendants only specifically address the following enumerated denials of Defendants' Statement of Uncontroverted Facts. Regarding the remaining "denials" and in accordance with the Standing Order, Defendants object to those as either immaterial opinion "evidence" and otherwise containing argument. As such, this Court should disregard all arguments and the drawing of inferences in Plaintiffs' responses to Defendants' uncontroverted facts. Defendants will reply only to the "denials" that are material to this case, numbered to correspond with Plaintiffs' response, making the following replies necessary:

134. Jeralyn Wheelles testified that she has not "seen" a policy in writing, and "I don't recall any kind of policy. I don't know. There's a nepotism policy." Doc. 66-5 at 20:6-24. The nepotism policy is in the City's personnel manual and would prevent Chief Wheelles from "...participat[ing] in any decision specifically related to appointing or hiring, or participat[ing] in influencing any decisions specifically related to the appointment or hiring of, his/her spouse...for any type of

employment with the City...” Additionally, it prevents Chief Wheelles from directly supervising his wife, Jeralyn. Further, whether Jeralyn knew if a directive was put in place is irrelevant, as the directive was issued to the Chief and not Jeralyn. Just because she didn’t know about it does not mean that it didn’t exist. See 58-6 at 96 (paragraph D, page 19 of personnel manual).

142. The fact being denied addresses the internal candidates that Chief Wheelles considered. No one except Chief Wheelles can answer this question, yet Plaintiffs attempt to deny the same with a cite to Stuart’s deposition. Stuart testified that “it was general knowledge who was eligible for [deputy chief]. And that would have been myself, ..Captain Harden, and Major Klumpp...Captain Cross would have been eligible,” and she didn’t believe Major Purney would have been eligible because . . . “it requires a bachelor’s degree by position description.” Doc. 66-2 at 83:20-84:5. The position description does not require a bachelor’s degree. See Def. Uncontroverted SOF 133 and 140. Further, all of the candidates for Deputy Chief received the same opportunity. Chief Wheelles testified as to who was qualified, and that he considered all qualified commanders for the position. See Def. SOF 142. He further testified that no one was interviewed and that he considered the same qualifications for each candidate. See Def. SOF 149 and 151. Haltom testified that he didn’t even know he was being considered for the position until it was offered to him. (Haltom Depo. Tr. at pp. 6:24 – 8:10; Att. 1) The fact is, all candidates received the same opportunity, TPD Policy supported the promotional process (See Def. SOF 131), and the process followed historical TPD practices (See Def. SOF 140).

159. Plaintiffs object to the following statement because it does not provide a reference: “At the time of the interviews, Plaintiffs Harden and Stuart had the same qualifications *as referenced above* under the Deputy Chief section.” Emphasis added. Yet, Defendants admit Def. SOF. 147-148, which cite to the record in which is being referenced.

162. Plaintiffs deny that Harden and Michael Cross were marked “promotable” to major by all panelists arguing that one panelist marked Michael Cross as both promotable and not promotable. **It is uncontroverted that only** one of the several interview guide forms for Mike Cross was marked as both promotable and not promotable by Major Klumpp. Importantly, it was marked promotable “[f]or FOB and [p]robably COB [with handwritten notes that say:] Good references. Pursuing Higher Education. Public Involvement, Project Management. Good Networker. -Crime Intervention Planning.” Major Klumpp marked “Not Ready for Promotion to Major” for “Executive and CIB. *Needs more experience in these bureaus.” The 2021 Major job at issue was in “FOB” a.k.a. Field Operations Bureau which means Mike Cross was promotable. Doc. 58-3 at 31, 35; Doc. 58-6 at 77.

II. RESPONSES TO PLAINTIFFS’ ADDITIONAL STATEMENTS OF FACT

Pursuant to Fed. R. Civ. P. 56(c) and D. Kan. 56.1, Defendants submit their Response to Plaintiffs’ Additional Statement of Facts, solely for purposes of this Reply and summary judgment:

1. Controverted that no one had an opportunity to “put interest in” because the Chief considered Captain Stuart and the practice in the department was not to interview candidates. See Def. SOF 140, which was admitted to by Plaintiffs in Doc. 66 at 4; Def. SOF 142. However, this fact is not material to the issues at hand.

2. Uncontroverted but incomplete. Captain Haltom was also eligible. (Doc. 58-12 at 63:10-15; Haltom Depo. Tr. at p. 6:15-19 (Att. 1)).

3. Controverted but immaterial. The testimony cited references Stuart’s personal opinion, not fact. See Def. SOFs 146 (uncontroverted), 151-152.

4. Uncontroverted.

5. Controverted that the concerns were “substantial wide.” Deputy Chief Haltom testified that he “had concerns with the reputation that Mike Cross carries with him with *some*

people within the agency. . . [Mike Cross] may not have the trust of everyone within the agency because I felt that he carries *some* baggage with him. . . . I'm aware of a reputation that he carries with him with some, I don't know, as far as, you know, does the entire agency feel that way about Mike Cross? I can't say that." (Haltom Depo. Tr. at pp. 12:18-14:25 (Att. 1)). Also, immaterial as Chief Wheelles was unaware of these concerns at the time M. Cross was selected for promotion.

6. Controverted that Stuart was more qualified and experienced than Michael Cross but immaterial. The testimony cited references Stuart's personal opinion, not fact. Further, a master's degree is not required, although Michael Cross was working on his. (Defs. SOFs 143-44, 155 (all uncontroverted by plaintiffs)) Stuart was marked "not promotable" by two community leaders and non-COT employees, including the district attorney. (Defs. SOF 163-4 (uncontroverted)).

7. Pls SOF 7 a-j are controverted that all of the comments are "sexist," but uncontroverted that Stuart testified that these comments were made. These comments are not material because most of these comments were made in the early to mid- 2000s, most were not reported to a superior officer in the chain of command or to human resources, and none of them were made by Chief Wheelles. (Stuart Depo. Tr. at 1p. 66:18-20 (Att. 2))

8. a. Uncontroverted. Additionally, Stuart confronted the officer who said it and he explained that he did not know her or what she was capable of. Stuart also reported the incident to her superior officer, and she felt like he gave an appropriate response. (Stuart Depo. Tr. at pp. 26:1-29:14 (Att. 2)) 8.b. Uncontroverted. 8.c. Uncontroverted ("unc.") but immaterial as this allegedly occurred before 2003.

9. Uncontroverted, but see Def. uncontroverted SOF 26, 28.

10. Controverted but immaterial. Stuart could only give one specific example and in the

example she provided, she asked another female officer if that officer heard Stuart talk in the meeting and she did not. (Stuart Depo. Tr. at pp. 125-126:3 (Att. 2))

11. Uncontroverted but immaterial because she never engaged in the test or interview process to get experience in CIB. (Stuart Depo. Tr. at pp. 123:19-124:3 (Att. 2))

12. Controverted but immaterial. See Def. SOF 171 (unc.), 175 (unc.), 176, 172-74, 177, 178 (unc.), 179 (unc.).

13. Controverted and immaterial. Stuart admitted the responsibilities of the job changed. Doc. 66-2 at 127:15-23.

14. Controverted and immaterial. The testimony cited references Harden's personal opinion, not fact. (See Def. SOF 152 (reasons why Chief Wheelles chose Haltom as the Deputy Chief)).

15. Uncontroverted and immaterial. (See Def. SOF 139, which Plaintiffs admitted to, detailing the Deputy Chief position requirements).

16. Controverted but immaterial as this was a discrete incident not reported to the EEOC within 300 days of its occurrence. Further the document provided by Plaintiffs (Doc. 66-20) is an incomplete representation, as it is missing a page, and is just a draft version of the official report. The City hired David Mudrick to review the HR findings because the investigation was incomplete due to HR failing to interview several individuals related to the complaint. Mudrick did not reach the same conclusion as HR after a completing his investigation. (Mudrick Depo. Tr. at p. 33:1-2; Att. 3)

17. Uncontroverted and immaterial, that Shawn Maisberger testified that "there was a concern or a complaint brought forward," but that she "was not a participant in any of those

discussions or viewed documentation,” and she does not recall personally speaking with Harden about her complaints. (Doc. 66-8 at 51:5-12).

18. Uncontroverted that Harden had been left off emails, however, whether male supervisors have been left off emails in a similar fashion is unknown and not supported by any evidence. If it was supported, it would be immaterial because Chief Wheelles is not one of the individuals that left her off.

19. Uncontroverted. (See Def. SOF 181-2).

20. Controverted but immaterial. The cited testimony does not exist. Haltom’s transcript only goes to page 116. Assuming Plaintiffs intended to cite Harden’s depo, her personal opinion is immaterial as it is not fact.

21. Controverted but immaterial as Haltom was not the decision maker for the promotion. Further, when asked if he made the statement, “I know the elephant in the room is why Mike got promoted,” Haltom said, “I don’t remember making that comment.” When asked “if she testifies that that’s what you said, you’re not disputing that, you just don’t remember saying that, correct?” Haltom responded, “The issue that I have with that is that’s not a term that I have used, elephant in the room. I don’t – it’s not something that I say in conversation, so I would dispute that...” (Haltom Depo. Tr. at pp. 46:17 – 47:8; Att. 1)

22. Controverted that a concern had been brought to the attention of Chief Wheelles. Per Chief’s testimony, he had no personal knowledge that there were concerns with Mike Cross’s veracity. (Wheelles Depo. Tr. at pp. 28:7 – 29:22; Att. 4)

23. Uncontroverted and immaterial.

24. Uncontroverted that Harden testified to this, and immaterial.

25. Object to inadmissible hearsay as neither Officer Stanley nor Officer Trimble were deposed. Uncontroverted that Harden testified to this, and immaterial.

26. Uncontroverted (see Def. SOF 41), and immaterial.

27. Uncontroverted (see Def. SOF 48), and immaterial.

28. Uncontroverted (see Def. SOF 67), and immaterial. See explanation in 22 above.

29. Uncontroverted (see Def. SOF 68), and immaterial.

30. Uncontroverted, and immaterial.

31. Uncontroverted that Harden testified to this, and immaterial, as the statement made was not made by the decision maker involved in the promotion.

32. Uncontroverted that the position was removed. Controverted that it was widely known that Harden was the most likely candidate for the position.

33. Controverted that all of the comments are “sexist” but uncontroverted that Harden testified that these comments were made. These comments are not material because most of them were made multiple years ago, most were not reported to a superior officer in the chain of command or to human resources, and none of them were made by Chief Wheelles.

33a. Uncontroverted that she testified to this, and immaterial because there is no timeline for the comments, nor information on who said what or if the statements were reported to supervisors or HR. (Doc. 66-3 at 173:18-20).

33b. Uncontroverted that she testified to this, and immaterial because there is no timeline for the comments, nor information on who said what or if the statements were reported to supervisors or HR. (Doc. 66-3 at 173:21).

33c. Uncontroverted that she testified to this, and immaterial because there is no timeline for the comments, nor information on who said what or if the statements were reported to supervisors or HR. (Doc. 66-3 at 173:21).

33d. Uncontroverted that she testified to this, and immaterial because there is no timeline for the comments, nor information on who said what or if the statements were reported to supervisors or HR. (Doc. 66-3 at 173:21-2).

33e. Uncontroverted that she testified to this, and immaterial because Harden did not report this comment to her supervisors or HR and Chief Wheelles did not make the comment. (See Def. SOF 22).

33f. Uncontroverted that she testified to this, and immaterial because Chief Wheelles did not make the comment. (See Def. SOF 73).

33g. Uncontroverted that she testified to this, and immaterial because Chief Wheelles did not make the comment. Further, Harden immediately addressed the issue and did not report the incident to her supervisor or HR. (See Def. SOF 72).

34. Uncontroverted that Harden testified to this (see Def. SOF 36), and immaterial as it was a discrete act that occurred between 2004-2006 and was never reported to the EEOC.

35. Uncontroverted, and immaterial. TPD modified the standards to rectify the issue. (Wheelles Depo. Tr. at pp. 98:21 – 99:1 Att. 4))

36. Uncontroverted and immaterial.

37. Uncontroverted and immaterial.

38. Uncontroverted and immaterial, as there was no requirement to repost the position opening.

39. Uncontroverted. Chief Wheelles did not believe a fourth major position was justified when TPD was 40 officers down on the frontline. (Wheelles Depo. Tr. at pp. 47:25 – 48:23; (Att. 4))

40. Uncontroverted that Chief Wheelles testified to this, and immaterial.

41. Uncontroverted that it was Officer Jeralyn Wheelles’s opinion (see J. Wheelles Depo. Tr. at p. 45:16 (Att. 5)), “That’s my opinion.”), and immaterial.

42. Uncontroverted that Harden testified to this, and immaterial.

43. Uncontroverted and immaterial.

44. Uncontroverted and immaterial.

45. Uncontroverted to an extent. Chief Wheelles was at the promotional ceremony for Cross and Harden. He did not speak about their accomplishments because he was sick—having stomach problems. (Wheelles Depo. Tr. at pp. 230-231:10 (Att. 4))

46. Uncontroverted to an extent, see above response to 45, and immaterial because the testimony cited references Eubank’s personal opinion, not fact.

47. Uncontroverted but incomplete and immaterial. Jennifer Cross’s complaint was investigated and found to be unsubstantiated. (Maisberger Depo. Tr. at pp. 43:4-45:24 (Att. 6)) Further, the complaint references an incident that occurred after the Plaintiffs filed with the EEOC, which is not relevant to the issues in this case.

48. Objection. Plaintiff did not cite to the record and therefore, this is unsupported by the record and further appears to be an incomplete statement.

49. Controverted that this comment was made by a COT employee. The renowned psychologist Dr. Walt Menninger of the Karl Menninger School of Psychiatry gave a presentation about how women **may be** perceived in the industry. See Def. unc. SOF 77. Emphasis added. This

was a comment, not a fact, and it was not reported to anyone.

50. Controverted but immaterial, as Cochran was not the decision maker in the promotions at issue. Further, Cochran disputes that he made any such statement. (Cochran Depo. Tr. at p. 121:1-23 (Att. 7))

51. Objection. Inadmissible hearsay. Uncontroverted that Cross testified to this, but immaterial as it was not said by any decision maker, it was a discrete act that occurred in 2015, and she failed to report it. Doc. 66-4 at 217:23-24.

52. Uncontroverted and immaterial as it was not said by a decision maker.

53. Uncontroverted but she could give no exact date or time frame about the comments. Also, immaterial as it was not said by Chief Wheelles. (Cross Depo. Tr. at pp. 220:4-221:2 (Att. 8))

54. Uncontroverted and immaterial. This comment was not made by a decision maker, it was said in the early 2000s, and her sergeant asked her if she wanted to make a report and she said no. (J. Wheelles Depo. Tr. at pp. 8: 23-10:1 (Att. 5))

55. Controverted in part as identified below.

55.a. Uncontroverted and immaterial, as it was not made by a decision maker.

55.b. Uncontroverted and immaterial, as it was not made by a decision maker.

55.c. Uncontroverted and immaterial since Cross testified that she responded to the Chief by "...sort of nodding and saying, thanks, Chief. Appreciate it." Cross did not report it to anyone at HR or in the City of Topeka. (Doc. 58-7, p. 7 at 28:22-29:8).

55.d. Uncontroverted but immaterial because there is no evidence that anyone complained about other officers working on their master's degree while at work, or if the City disciplined them.

55.e. Uncontroverted that Cross opined about it but controverted that Haltom's

conversation was discipline. See Cross's own testimony. (Cross Depo. Tr. at p. 101:13-18 (Att. 8))

55.f. Controverted that she lost the opportunity for the PIO position because of the social media post. The then-chief Cochran testified that he selected Munoz because Munoz spoke Spanish and he was trying to expand the Latino outreach efforts. (Cochran Depo. Tr. at pp. 20:22-21:12 (Att. 7)). Cochran, who was the decision-maker, was not aware of any social media posts made by Munoz when he promoted Munoz to PIO. (Cochran Depo. Tr. at pp. 30:6-31:2 (Att. 7))

55.g. Uncontroverted that Captain Harden, the other plaintiff and a female, informed her about the dance video being unbecoming, but this particular conversation unlike a similar conversation that Haltom had with Cross, was in Cross's mind, not a discipline. (Cross Depo. Tr. at p. 101: 1-15 (Att. 8)) Controverted that Cross has any evidence that someone in the police department was not addressed about specific Facebook posts. Cross does not know and admits that she is making an assumption. (Cross Depo. Tr. at p. 100:5-18 (Att. 8))

55.h. Uncontroverted but immaterial because it wasn't said by a decision maker and Cross apparently did not report it.

55.i. Controverted but immaterial. Cochran refutes this testimony. (Cochran Depo. Tr. at pp. 24:4-27:5 (Att. 7)); A master's degree is not required in any of these job descriptions nor specifically under Chief Cochran's reign. (Cochran Depo. Tr. at pp. 25:20-26:3 (Att. 7)). **See Def.**

SOF 143 and 144.

56. Uncontroverted and immaterial.

57. Uncontroverted and immaterial.

58. Uncontroverted and immaterial.

59. Controverted but immaterial. The testimony cited does not support the alleged SOF 59. Jeralyn admitted to it being possible that she was most worried about her husband, she did not state

it as a fact.

60. Uncontroverted and immaterial. Cross admits that she did not report the comment made in 2015 to Human Resources. Doc. 66-4, p. 67:21-68:1.

61. Uncontroverted concerning Cross's subjective feelings, but controverted as follows:

61.a.-b. Controverted that Monasmith's behaviors were discriminatory because they are expected to work together and collaborate. Doc. 66-4 at 111:2-12.

61.c. Controverted but immaterial that Cross testified in detail about multiple incidents as none of these incidents involved Chief Wheelles. When asked for details, she testified about two incidents involving Detective Riggins and Sergeant Eubanks. Doc. 66-4 at 111:13-112:17. No other female employees have complained to Haltom about Monasmith's interactions other than Donna Eubanks telling Haltom that Monasmith's management style was compared to micromanaging. (Haltom Depo. Tr. at p. 68:4-14 (Att. 1)).

61.d. Uncontroverted that Cross subjectively feels a certain way about Monasmith.

61.e. Controverted but immaterial that Cross has any evidence of the reason Monasmith showed up to the scene of a police incident as a member of command staff. Monasmith explained that he typically responds to calls involving a bomb when he is off duty because he supervises the bomb unit. Cross complained to HR about Monasmith showing up and failing to notify her that he was responding to the incident. HR investigated it and found it to be unsubstantiated that he violated policy and circumvented Cross by not notifying the on duty commander (Cross), and HR substantiated that he violated the off-duty policy, which decision is under review. (Monasmith Depo. Tr. at pp. 134:9-136:20 (Att. 9)) Deputy Chief Haltom issued Monasmith discipline for the off-duty conduct. (Haltom Depo. Tr. at pp. 73:21-75:13 (Att. 1))

61.f. Cross reported to Haltom the comment about her only getting promoted because she

was a woman two years after it was said, and Haltom reported it to Major Klumpp. (Haltom Depo. Tr. at pp. 67:15-68:3 (Att. 1))

62. Uncontroverted but see Def. SOF 117-22. HR investigated. Doc. 58-8 at 22. Also, immaterial as it had nothing to do with the decision maker, Chief Wheelles.

63. Controverted that the evidence cited establishes what is contended objectively but immaterial as it had nothing to do with the decision maker, Chief Wheelles. See response to Def. SOF 62.

64. Controverted. The investigation substantiated his violation of a policy prohibiting “undermining or deliberately impeding an employee’s work.” Doc. 58-8 at 22. There are no findings that Haltom failed to support Cross. *Id.* (Russell Depo. Tr. at p. 109:114-110:3 (Att. 10)) Also immaterial as it had nothing to do with the decision maker, Chief Wheelles.

65. Uncontroverted and immaterial as Chief Wheelles is not the individual that undermined her authority.

66. Uncontroverted and immaterial as Chief Wheelles was not the one found to have violated policy. See Doc. 58-5 at 22 for language of finding.

67. Controverted to the extent Plaintiffs are implying that the insubordinate behavior finding involving Jeralyn was related to the same matter with Monasmith because Maisberger was testifying about the Kim Hanika investigation—a different matter.

68. Uncontroverted

69. Uncontroverted.

70. Uncontroverted.

71. Uncontroverted.

72. The findings are contained in 58-2. The document speaks for itself.

73. Uncontroverted.

74. Controverted that Cross has more experience in the TPD but immaterial as it is Cross's opinion, not fact. See Def. SOF. 196, 197.

75. Controverted but immaterial. Harden's testimony is that "there was another lieutenant that she thought was more qualified and has served in a number of bureaus and had quite a bit of experience in a number of different areas that [she] thought he would probably be the next best choice. . . . [and she] would compare him very much to Aaron Jones." Also, Harden marked Monasmith as "promotable." Doc. 66-3 at p. 23-4 (159:11-160:25).

76. Uncontroverted and immaterial as Harden marked Monasmith as "promotable." Doc. 66-3 at p. 24 (160:23-25.)

77. Uncontroverted.

78. Uncontroverted. Chief Wheelles testified that promotional offers are usually made in writing, and he has informed others like sergeants and detectives about promotions in writing. (Wheelles Depo. Tr. at pp. 224:22-225:17 (Att.. 4)).

79. Controverted but immaterial as the statement was not made by the decision maker. Further Purney disagreed with Cross's recollection of the conversation and context. (Purney Depo. Tr. at pp. 31:6-32:21 (Att. 11))

80. Uncontroverted to an extent. Chief Wheelles was at the promotional ceremony for Cross and Harden. He did not speak about their accomplishments because he was sick—having stomach problems. (Wheelles Depo. Tr. at pp. 230-231:10 (Att. 4))

81. Uncontroverted to an extent. Chief Wheelles was at the promotional ceremony for Cross and Harden. He did not speak about their accomplishments because he was sick—having stomach problems. (Wheelles Depo. Tr. at p. 230-231:10 (Att. 4))

82. Uncontroverted that at all relevant times, Jacque Russell was the Human Resources Director, which is the highest-ranking official in Human Resources. Also, immaterial.

83. Uncontroverted that at all relevant times, Shawn Maisberger was the Deputy Director of Human Resources, which is the second highest-ranking official in Human Resources. Also, immaterial.

84. Uncontroverted.

85. Uncontroverted.

86. Uncontroverted.

87. Uncontroverted.

88. Uncontroverted.

89. Uncontroverted and immaterial. The testimony cited references Maisberger's personal opinion, not fact.

90. Uncontroverted and immaterial. The testimony cited references Maisberger's personal opinion, not fact.

91. Uncontroverted and immaterial. The testimony cited references Russell's expectations, not that of the City, TPD, or Chief Wheelers.

92. Uncontroverted and immaterial. The testimony cited references Russell's personal opinion, not fact.

93. Uncontroverted and immaterial. The testimony cited references Maisberger's personal opinion, not fact.

94. Uncontroverted and immaterial. The testimony cited references Russell's personal opinion, not fact.

95. Uncontroverted and immaterial.

96. Uncontroverted.

97. Uncontroverted.

98. Uncontroverted and immaterial.

99. Uncontroverted and immaterial.

100. Uncontroverted.

101. Uncontroverted and immaterial.

102. Uncontroverted and immaterial.

103. Uncontroverted and immaterial.

104. Uncontroverted.

105. Uncontroverted.

106. Uncontroverted and immaterial.

107. Uncontroverted and immaterial.

108. Uncontroverted and immaterial.

109. Uncontroverted and immaterial.

110. Uncontroverted and immaterial.

111. Uncontroverted and immaterial. The testimony cited references Maisberger's personal opinion, not fact.

112. Uncontroverted.

113. Uncontroverted and immaterial. The testimony cited references Maisberger's personal opinion, not fact.

114. Uncontroverted and immaterial.

115. Uncontroverted and immaterial.

116. Uncontroverted and immaterial.

117. Uncontroverted as to Eubank's testimony but immaterial, as the testimony cited references Eubank's personal opinion, not fact.

118. Uncontroverted as to Eubank's testimony but immaterial, as the testimony cited references Eubank's personal opinion, not fact.

119. Uncontroverted.

120. Uncontroverted as to Eubank's testimony but immaterial, as the testimony cited references Eubank's personal opinion, not fact.

121. Uncontroverted as to Eubank's testimony but immaterial, as the testimony cited references Eubank's personal opinion, not fact.

122. Uncontroverted as to Hanika's testimony but immaterial, as the testimony cited references Hanika's personal opinion, not fact.

123. Uncontroverted as to Hanika's testimony but immaterial, as the testimony cited references Hanika's personal opinion, not fact.

124. Uncontroverted as to Hanika's testimony but immaterial, as the testimony cited references Hanika's personal opinion, not fact.

125. Uncontroverted.

126. Uncontroverted.

127. Uncontroverted as to Russell's testimony but immaterial, as the testimony cited references Russell's personal opinion, not fact.

128. Uncontroverted.

129. Uncontroverted as to Russell's testimony but immaterial, as the testimony cited references Russell's personal opinion, not fact.

130. Uncontroverted and immaterial.

131. Uncontroverted.

132. Uncontroverted and immaterial.

133. Uncontroverted and immaterial.

134. Uncontroverted and immaterial.

135. Controverted but immaterial. The testimony cited states that the findings go to “the deputy chief and/or both, and it’s going to depend on the matter that is at hand.” It does not say that the findings go to both every time. Further, Chief Wheelles did not receive any reports that dealt with complaints about his Wife. See Def. SOF’s 134 – 136.

136. Uncontroverted as to Russell’s testimony and immaterial.

137. Uncontroverted as to Russell’s testimony but immaterial, as the testimony cited references Russell’s personal opinion, not fact.

138. Uncontroverted and immaterial.

139. Controverted but immaterial. This is Hanika’s opinion and not supported by fact.

140. Uncontroverted and immaterial.

141. Controverted but immaterial. Per the testimony of Chief Cochran, Hanika was put on administrative leave because Major Purney requested it after having a conversation with Harden about Hanika’s veracity. (Cochran Depo. Tr. at p. 97:19-23; Att. 7).

142. Uncontroverted and immaterial.

143. Uncontroverted that Hanika testified that she felt that way, but immaterial. The testimony cited is Hanika’s personal opinion and not fact.

144. Controverted but immaterial. The testimony cited states she believes they were talking about her investigation, not that she knows with certainty. In fact, she testified that after the report was sent to the Chief, “I **FELT** like there was information getting back.” (Hanika Depo. Tr. at p.

31:11-12 (Att. 12))

145. Controverted but immaterial. HR did not interview all parties involved in the incident. As such, the city manager hired external counsel, Dave Mudrick, to complete the investigation. After completing his investigation, Mudrick did not come to the same findings as HR. (Mudrick Depo. Tr. at p. 32:7-11; Att. 3)).

146. Uncontroverted and immaterial. HR did not complete the final report in this investigation, and as such, their recommendations were no longer applicable.

147. Controverted but immaterial. Per Cochran's testimony, it was eliminated because the DEA interrogated a suspect after they had invoked their rights and refused to admit that what they did was wrong. (Cochran Depo. Tr. at pp. 76:11 – 77:17; Att. 7).

148. Controverted but immaterial. The cited testimony references Hanika's personal opinion, not fact.

149. Controverted but immaterial. The cited testimony references Hanika's personal opinion, not fact.

150. Controverted but immaterial. The cited testimony references Hanika's personal opinion, not fact.

151. Controverted but immaterial. The testimony cited references Hanika's personal opinion, not fact.

152. Controverted but immaterial. The testimony cited references Hanika's personal opinion, not fact.

153. Uncontroverted and immaterial.

154. Controverted and immaterial. The testimony cited references Hanika's personal opinion, not fact.

155. Object due to inadmissible hearsay. Controverted and immaterial. Per the testimony cited, other employees reported that they **felt** that they could not hold Jeralyn Wheelles accountable without being subject to retaliation, not that they were actually unable to hold her accountable without being subject to retaliation.

156. Uncontroverted as to Eubank's testimony and immaterial.

157. Uncontroverted as to Eubank's testimony and immaterial.

158. Controverted but immaterial. The testimony cited references Eubank's own opinion, not fact.

159. Controverted but immaterial. The testimony cited references Eubank's personal opinion, not fact.

160. Uncontroverted and immaterial.

161. Controverted but immaterial. The testimony cited references Eubank's personal opinion, not fact.

162. Controverted but immaterial. The testimony cited references Eubank's personal opinion, not fact.

163. Controverted but immaterial. The testimony cited references Eubank's personal opinion, not fact.

164. Controverted but immaterial. The testimony cited references Eubank's personal opinion, not fact.

165. Uncontroverted and immaterial.

166. Uncontroverted and immaterial.

167. Uncontroverted and immaterial.

168. Controverted but immaterial. The testimony cited references Eubank's personal

opinion, not fact.

169. Uncontroverted and immaterial.

170. Controverted but immaterial. The testimony cited references Eubank's personal opinion, not fact.

171. Controverted but immaterial. The testimony cited references Eubank's personal opinion, not fact.

172. Controverted but immaterial. The testimony cited references Eubank's personal opinion, not fact.

173. Uncontroverted and immaterial.

174. Controverted but immaterial. The testimony cited references Hanika's personal opinion, not fact.

175. Uncontroverted and immaterial.

III. ARGUMENTS AND AUTHORITIES

As can only be inferred by Plaintiffs' exorbitant amount of additional immaterial facts and lack of material response to Defendants' arguments; Plaintiffs are attempting to muddy the waters and cloud the Court's judgment by adding numerous facts that have no relevance to the claims in this case. Count I of Plaintiffs' complaint alleges gender discrimination against the City for "failing to promote them based on their sex or gender." (Doc. 1). Counts II and III are claims of disparate treatment, in violation of 42 USC § 1983, which Plaintiffs can only win if they can prove count one. (Doc. 58: IV(2) at p. 48). Consequently, this case boils down to nothing more than a claim of failure to promote based on gender.

The Plaintiffs' response confuses fact with irrelevant personal opinions. Fact is defined as something that actually exists; an aspect of reality. An actual or alleged event or circumstance, as

distinguished from its legal effect, consequence, or interpretation. *Fact*, Black's Law Dictionary, (2nd pocket ed. 2001). Opinion is defined as a witness's thoughts, beliefs, or inferences about facts in dispute, as opposed to personal knowledge of the facts themselves. *Opinion*, Black's Law Dictionary, (2nd pocket ed. 2001). Plaintiffs' cited facts are nothing more than conclusory allegations.

In *Kelley v. Goodyear Tire and Rubber Co.*, the Plaintiff was attempting to show pretext for failure to hire. The Court held that the employee's [Kelley] opinion on how they performed is irrelevant. "[i]t is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his own performance." *Kelley v. Goodyear Tire and Rubber Co.*, 220 F.3d 1174, 1178 (10th Cir. 2000) *citing* *Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 988 (10th Cir. 1996). "In *Furr*, the Plaintiff's assertion that his performance was adequate held no probative value because only his supervisor's impression that his performance was inadequate and whether that impression was pretextual was at issue." *Id.* As such, the only person whose opinion matters in a failure to promote claim is that of the decision maker in each promotion. As the 2018 Captain promotion was not reported to the EEOC within 300 days of occurrence (Doc. 58), the three relevant promotions are the 2021 Deputy Chief promotion, the 2021 Major promotion, and the 2022 Captain promotion. Chief Bryan Wheelles was the decision maker in all three of those promotions, which means that his opinion is the only opinion that matters in this case. Assuming *arguendo*, that the Plaintiffs' opinions do matter, all three Plaintiffs agreed Michael Cross was qualified to be promoted to Major in 2021 (See Plaintiffs Responses to Defendant's First Request for Admissions (hereinafter "RFA"), no. 23; Att. 13), Jerry Monasmith was qualified to be promoted to Captain in 2021 (See RFA, no. 24; Att. 13)), and Aaron Jones was qualified to be promoted to Captain in 2021 (See RFA, no. 25; Att. 13). The crux of the case comes down to the

word **MORE**. Which candidate was **MORE** qualified than the other. Again, leading us back to the only opinion that matters; that of Chief Wheelles.

As argued in the Defendants' Motion, and not disputed by Plaintiffs in their response, the Plaintiffs have no direct evidence of discriminatory intent on behalf of Chief Wheelles, and as such, must create an inference of discriminatory motive through circumstantial evidence. (Doc. 58). Therefore, the Court must apply the *McDonnell Douglas* burden-shifting analysis in this case. As Chief Wheelles provided legitimate, nondiscriminatory reasons for not promoting the Plaintiffs, the only way for the Plaintiffs to successfully prove their case is to show that Chief Wheelles' stated reasons for promotion are pretextual. Therefore, it can be inferred that every additional fact added in their response is an attempt to do just that. However, their attempt has fallen short. Most of the facts added either happened before Chief Wheelles was promoted to Chief of Police, and instead, were complaints made against other supervisory decisions in which Chief Wheelles did not take part, or they were an attempt by Plaintiffs to turn irrelevant opinion into fact.

In contrast, the Plaintiffs fail to add a single additional fact that would support a finding of pretext. In fact, the Plaintiffs admit that they have never heard Chief Wheelles use any words terms, or phrases that Plaintiffs considered derogatory towards females. (See RFA no. 17; Att. 13). They admitted that Chief Wheelles has promoted females over males while in his position as Chief of Police. (See RFA no. 12: Att. 13). Most importantly, they admitted that all of their male counterparts who received the promotions were qualified to have received them. (See RFA nos. 23-25; Att. 13). Pretext can typically be shown by one of three ways: "(1) with evidence that the defendant's stated reason for the adverse employment action was false...; (2) with evidence that the defendant acted contrary to written company policy prescribing the action to be taken by the defendant under the circumstances...; or (3) with evidence that the defendant acted contrary to

company practice when making the adverse employment decision affecting the plaintiff.” *Tungol v. Certainteed Corp.*, 202 F.Supp.2d 1189, 1197 (D.Kan. 2002). Plaintiffs have not met their burden of proving pretext. There is not a single derogatory statement in the Plaintiffs’ multitude of facts that was made by Chief Wheelles; Chief Wheelles followed TPD policy when conducting the promotions at issue (See Def. SOF 131); and the evidence supports that Chief Wheelles followed TPD’s historical practice when making the promotional decisions at issue (See Def. SOF 140). As such, the Plaintiffs’ claims must be dismissed.

When determining whether a 12(b)(6) motion to dismiss should have been granted in *Ross v. Pentair Flow Technologies*, this Court cited to the Tenth Circuit which held that:

“a complaint raising a claim of discrimination does not need to conclusively establish a prima facie case of discrimination, but it must contain more than “[t]hreadbare recitals of the elements of a cause of action support by mere conclusory statements.” *Khalik v. United Air Lines*, 671 F.3d 188 at 1193(10th Cir.2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173, L.Ed.2d 868 (2009)). ... A plaintiff’s assertion that she is “similarly situated” to other employees is “just a legal conclusion -and a legal conclusion is never enough.” *Hwang v. Kan. State Univ.*, 753 F.3d 1159, 1164 (10th Cir.2014). Rather, a plaintiff must allege “some set of facts”-not just legal conclusions-“that taken together plausibly suggest differential treatment of similarly situated employees.” *Id.* “Pleadings that do not call for at least a reasonable inference of the legally relevant facts are insufficient.” *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1236 (10th Cir. 2013) (internal quotation marks omitted).”

Bekkem v. Wilkie, 915 F.3d 1258, 1274-75 (10th Cir. 2019). Even after finishing discovery in this case, Plaintiffs still have nothing more than threadbare recitals supported by mere conclusory statements, not facts. Almost every additional fact cited by Plaintiffs in their response cited to the opinion of either the Plaintiffs or their female counterparts, with no objective evidence of support. These opinions should not be considered by the Court when determining if Summary Judgment should be granted because an employee’s own opinion about her qualifications or performance, or other non-decision making witnesses’ opinions are essentially legal opinions without

foundation. Further, policy violations do not create a material fact dispute.

In *Ford v. Jackson National Life Insurance Co.*, Ford was attempting to show pretext in her failure to promote claim by proving that she was more qualified for the position. She attempted to do so by stating her own personal opinion as to why she was qualified, as well as the personal opinions of two of her supervisors (but not the decision-maker). The Court held that, “we cannot simply take an employee at his or her word.” *Ford v. Jackson National Life Insurance Co.*, 45 F.4th 1202, 1220 (10th Cir. 2022). The Court further cited to a similar case in which they had previously held that there was, “no objective evidence of disparate treatment in the record.” *Id.* The Court found that while the opinions about Ford “demonstrate only that she was a strong candidate. But that fact was never disputed.” *Id.* Similarly, in the present case, there has never been a dispute that all three Plaintiffs were strong candidates for the positions. Nor was there ever a dispute that they were all qualified for the positions excepting Stuart being marked not promotable. The fact is, the decision-maker, Chief Wheelles, did not believe that the Plaintiffs were more qualified, and as such, they were not promoted. Nothing in the record supports a finding that his stated reasoning is pretext.

This case is simple. Are the Plaintiffs’ able to make out a prima facie case of gender discrimination for failure to promote? Except for Stuart, yes. Did Chief Wheelles present a legitimate, nondiscriminatory reason for his decisions to promote? Yes. Can the Plaintiffs prove that stated reasoning is pretext? No. There are simply no facts to support such a conclusion, and as such, Defendants’ Motion for Summary Judgment must be granted.

IV. CONCLUSION

The Plaintiffs have been promoted by males, over other males, the entirety of their careers. They are all at command level positions, which accounts for the highest-ranking officials in the

TPD. One could and should question how the Plaintiffs received such high ranks if they have allegedly been discriminated against for the past two decades. They all admitted that their male counterparts who received the promotions were qualified for those positions, they simply believed they were **MORE** qualified. The fact of the matter is, their belief or the beliefs of anyone other than Chief Wheelles, do not matter. Chief Wheelles believed the selected individuals were the best fit for the position, and has provided consistent, nondiscriminatory reasons for that choice. Plaintiffs have not met their burden of showing that stated reasoning was pretextual, nor have they presented facts, argument or authority to support *Monell* liability against the City, or the 42 U.S.C. 1983 claim against Chief Bryan Wheelles. As such, Defendants' Motion for Summary Judgment must be granted on all Counts.

Respectfully submitted,

/s/ J. Phillip Gragson

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed on this 25th day of March, 2024 with the clerk using the EM-ECF system which will send notice to all parties of record.

/s/ J. Phillip Gragson

Attorneys For Plaintiffs