

12-1526-cv
Cox v. Onondaga Cnty. Sheriff's Dep't.

1 UNITED STATES COURT OF APPEALS

2
3
4 FOR THE SECOND CIRCUIT

5
6 August Term, 2012

7
8 (Argued: February 20, 2013 Decided: July 23, 2014)

9
10 Docket No. 12-1526-cv

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14 STEVEN COX, THOMAS BINGHAM, EDWARD KALIN, MICHAEL McCARTY, and
15 ROBERT SCOTT FELDMAN,

16
17 Plaintiffs-Appellants,

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19 v.

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21 ONONDAGA COUNTY SHERIFF'S DEPARTMENT; KEVIN E. WALSH, in his
22 individual and official capacity; JOHN WOLOSZYN, in his
23 individual and official capacity; DEPUTY SHERIFF O'DELL WILLIS,
24 in his individual and official capacity; ONONDAGA COUNTY;
25 NICHOLAS PIRRO, ONONDAGA COUNTY EXECUTIVE; JOANNIE MAHONEY,
26 ONONDAGA COUNTY EXECUTIVE,

27
28 Defendants-Appellees.

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32 B e f o r e: WINTER, CHIN, and DRONEY, Circuit Judges.

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34 Appeal from grant of summary judgment by the United States
35 District Court for the Northern District of New York (Norman A.
36 Mordue, Judge) dismissing appellants' Title VII retaliation
37 claims. We hold that the employer's investigation into
38 appellants' claims of racial harassment was not an adverse
39 employment action. We also hold that while appellants have
40 established a prima facie case of retaliation based on threats

1 of discipline against appellants for filing a false report with
2 the EEOC, the employer has demonstrated a non-retaliatory
3 purpose as a matter of law. We therefore affirm.

4 A.J. BOSMAN, Bosman Law Firm, LLC,
5 Rome, NY, for Plaintiffs-
6 Appellants.
7

8 CAROL L. RHINEHART, Onondaga County
9 Department of Law, Syracuse, NY, for
10 Defendants-Appellees Onondaga County
11 Sheriff's Department, Kevin E. Walsh,
12 O'Dell Willis, Onondaga County,
13 Nicholas Pirro, and Joannie Mahoney.
14 LAURA L. SPRING, Sugarman Law Firm,
15 LLP, Syracuse, NY, for Defendant-
16 Appellee John Woloszyn.
17

18 WINTER, Circuit Judge:
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20 Onondaga County Sheriff's Department ("Department") Deputies
21 Steven Cox, Thomas Bingham, Edward Kalin, Michael McCarty, and
22 Robert Scott Feldman appeal from Judge Mordue's granting of
23 summary judgment dismissing their complaint. That complaint
24 asserted retaliation for their complaints of racial harassment to
25 the Equal Opportunity Employment Commission ("EEOC"), in
26 violation of Title VII, 42 U.S.C. § 2000e-3.

27 We hold that the Department's initiation and conduct of an
28 investigation into: (i) the white appellants' claims of racial
29 harassment alleged to have been generated by an African American
30 officer, and (ii) a complaint against appellants for filing false
31 reports with the EEOC of such harassment, were not adverse
32 employment actions. We also hold that threats by the Department

1 to charge appellants with making a false report to the EEOC
2 established a prima facie case of illegal retaliation but that
3 the Department has shown a non-retaliatory purpose, and
4 appellants have presented no evidence of pretext.

5 BACKGROUND
6

7 On review of a grant of summary judgment dismissing a
8 complaint, we view the record in the light most favorable to
9 appellants. Gallo v. Prudential Resid. Servs., Ltd., 22 F.3d
10 1219, 1223 (2d Cir. 1994).

11 The present dispute began when appellants Cox, McCarty,
12 Feldman, and Bingham, as well as a lieutenant, non-appellant Jim
13 Raus, shaved their heads to demonstrate solidarity with appellant
14 Kalin, a cancer patient who lost his hair as a result of
15 chemotherapy treatments. All were employed as "transport/custody
16 officers" in the Onondaga County Sheriff's Department. On August
17 26, 2005, appellants and Raus filed what is known as a "blue
18 form" complaint, initiating an internal departmental procedure,
19 alleging racial harassment. A blue form complaint usually
20 results only in an informal investigation and not in a full
21 investigation by the Department's internal investigation arm, the
22 Professional Standards Unit ("PSU").

23 In the blue form complaint, the deputies and lieutenant
24 stated that they had been the victims of rumors, based on their
25 shaved heads, that they were "skinheads" -- i.e. members of a

1 white-supremacist group. The complaint alleged that "rumors and
2 the talk in the Custody Division [was then] that [the deputies
3 and Lieutenant Raus were] members of a skin head organization."

4 It also stated that "this vicious labeling of [the deputies
5 and lieutenant] was apparently started by a[n] African American
6 Deputy, who work[ed] with [them] in the Transport Unit."

7 Specifically, the blue form complaint alleged that an African
8 American Deputy, O'Dell Willis, had approached Cox and questioned
9 him about why his head was shaven. It further alleged that
10 shortly thereafter, other, unnamed African American Deputies
11 approached Cox, Feldman, and McCarty and questioned them about
12 their shaved heads. None of the inquiries, whether by Willis or
13 by the unnamed deputies, was alleged to have been accusatory or
14 confrontational. Finally, the complaint alleged the
15 complainants' belief that the rumors had made the workplace
16 "racially hostile and unsafe" and in addition, "put [their]
17 families, wives and children in danger." It appears from
18 developments described infra that while Department employees had
19 asked about why appellants' heads were shaved and perhaps
20 mentioned the existence of the rumors, the accusatory harassment
21 was by inmates.

22 The Department's Assistant Chief Wasilewski instructed
23 former Captain Woloszyn to investigate the complainants'
24 allegations. Woloszyn's investigation concluded with a report

1 dated October 21, 2005, that found no evidence of
2 harassment. According to Woloszyn's report, certain deputies had
3 inquired, but not in a hostile way, why the deputies had shaved
4 their heads. According to Woloszyn's report, none of the
5 appellants had heard Department members directly accuse them of
6 being skinheads. Rather, they had heard only from others that
7 such comments had been made. However, after being interviewed by
8 Woloszyn, Lieutenant Raus withdrew as a complainant because he
9 "was not approached by anyone and did not feel harassed but was
10 misled [by Cox] into believing" that harassing conduct had
11 occurred.

12 The Woloszyn report settled little. The subsequent PSU
13 investigation, discussed infra, revealed that while Woloszyn's
14 conclusions about the lack of first-hand testimony about
15 accusatory behavior was correct so far as it went, he may not
16 have actually interviewed appellants McCarty or Bingham, or
17 several other deputies, whom he claimed to have interviewed.
18 Nevertheless, with the assistance of then-Union president Deputy
19 Dan Mathews and a union attorney, the five appellants filed
20 individual racial harassment complaints with the EEOC between
21 September 29 and October 12, 2005.

22 Appellants' EEOC complaints, which were under oath, differed
23 materially from their blue form complaint. Instead of alleging,
24 as they did in the blue form complaint, a non-hostile encounter

1 in which Willis simply asked Cox why his head was shaven, Cox and
2 McCarty stated to the EEOC that an unnamed African American
3 Deputy had accused them of being skinheads in a face to face
4 confrontation. On this record, the reference to an African
5 American Deputy has to be understood to be Willis. Willis is the
6 only African American Deputy mentioned by name in the blue form
7 complaint, which strongly implies -- all but expressly states --
8 that Willis is the source of the allegedly harassing rumors. The
9 PSU investigation, described infra, collected testimony that
10 Willis was believed by all to be the source. The complaint in
11 the present matter named Willis as a defendant and directly
12 alleged that the hostile environment was "fanned by the actions
13 of Defendant Willis." On this record, the reference to an
14 unnamed African American Deputy would have been understood, then
15 and now, to mean Willis. Finally, statements by Cox, McCarty and
16 Feldman indicated prior, hostile, but unrelated, encounters with
17 Willis. Nothing in appellants' brief claims that anyone but
18 Willis was believed to be the source of the alleged harassment.

19 Feldman and Bingham also complained that they had heard from
20 other deputies that they had been referred to as skinheads and
21 called racist by African American Deputies. Kalin's complaint
22 stated that he had been confronted with the existence of rumors
23 that he was a skinhead. Every appellant complained that the
24 Department had acted upon similar complaints of harassment by

1 African American Deputies but failed to act upon theirs.

2 On October 26, 2005, the Department filed a response with
3 the EEOC, signed by Assistant Chief Wasilewski. The response
4 stated that Wasilewski could find no merit to the harassment
5 alleged in either the blue form or the EEOC complaint filed by
6 appellants. It also stated that "the employer has made every
7 effort to determine if any harassment has occurred in this
8 incident. In furtherance of that end, I have submitted this
9 entire package to the Onondaga County Sheriff's Office
10 Professional Standards Unit, our internal investigation arm, for
11 their review, recommendation, and interdiction." The submission
12 to the PSU was pursuant to a written Onondaga policy that
13 harassment complaints were to be investigated by the PSU at the
14 Department Chief's direction.

15 On December 12, 2005, the EEOC dismissed all appellants'
16 complaints and issued a notice to appellants of their right to
17 sue within 90 days. However, appellants never pursued the
18 harassment claim further.

19 The PSU continued with its investigation. When it
20 commenced, it had before it: (i) the original blue form
21 complaint; (ii) the individual EEOC complaints; (iii) Lieutenant
22 Raus's written withdrawal of his blue form complaint; (iv) the
23 October 21, 2005 report of Captain Woloszyn; and (v) the October
24 26, 2005 statement to the EEOC. Also before the PSU was a

1 misconduct allegation by Assistant Chief Wasilewski that he
2 forwarded to the PSU on November 11, 2005. He alleged that Cox,
3 McCarty, Feldman, Bingham, Kalin, and Lieutenant Raus violated
4 Departmental regulations by filing false reports.¹ This
5 allegation was presumably based on the inconsistent factual
6 claims asserted in the blue form complaint and EEOC filings.
7 Wasilewski's misconduct complaint also accused Woloszyn of false
8 statements, presumably for claiming non-existent interviews in
9 his report.

10 The PSU thus had before it a variety of issues: (i) whether
11 appellants had been racially harassed because of rumors started
12 by Willis that they were skinheads; (ii) whether appellants'
13 complaints of racial harassment generated by Willis were
14 knowingly false; and (iii) whether Woloszyn had made a false
15 report regarding his investigation into (i).

16 The issues were yet more complicated. The misconduct
17 complaint in (ii), if upheld, would support an inference that
18 several white officers had engaged in a coordinated effort to
19 harass Willis, who had earlier prevailed in a Title VII lawsuit
20 against the Department alleging a hostile work environment and

¹ The misconduct complaint was based on Sections 2.8 and 4.3 of the Department's policy and procedures. Section 2.8 provides, "[m]embers shall refrain from actions or conduct while on duty which may discredit a member or the Sheriff's Office." Section 4.3 provides, "[m]embers shall not make or submit a report or document, which contains information known by the member to be inaccurate, false or improper . . . nor influence another person to do so."

1 retaliation. See Willis v. Onondaga County Sheriff's Department,
2 No. 5:04-cv-00828 (GTS-GHL), Dkt. No. 67-68, 77. The existence
3 of racial tension in the Department at pertinent times is evident
4 from the record, as is the belief of appellants that their
5 grievances were treated less sympathetically than those of
6 African American officers, particularly Willis.

7 In that context, Sergeant Smith began the PSU
8 investigation. Smith interviewed the appellants individually, in
9 the presence of a union representative. None of them, including
10 McCarty and Cox, claimed to have been called a skinhead to their
11 face by another deputy. Appellants, and most of the other
12 officers in the Department who were interviewed, reported the
13 existence, even persistent existence, of rumors that appellants
14 were skinheads. However, none had heard any officer make such an
15 allegation, albeit several officers made non-hostile inquiries as
16 to why appellants had shaved their heads. Some officers also
17 testified to the existence of rumors that Willis had started the
18 rumors. In his interview with Sergeant Smith, which took place
19 about two weeks after appellants' interviews, Willis flatly
20 denied that he had said anything to suggest the deputies were
21 skinheads and stated that the whole affair put undue stress on
22 him in his work.

23 During the individual interviews of appellants, each was
24 informed that disciplinary action against them was being

1 considered based on the falsity of the EEOC filings. In addition
2 to being questioned on how the skinhead rumors had started and
3 the inconsistencies in some of their allegations, appellants were
4 each questioned about the Woloszyn investigation.

5 Two reports resulted from the PSU investigation. The first,
6 dated January 26, 2006, summarized former Captain Woloszyn's
7 failure to thoroughly investigate the original blue form
8 complaint as well as his submission of a false and misleading
9 report to Assistant Chief Wasilewski in violation of Sections 2.8
10 and 4.3 of the Department's policies and procedures. See Note 1,
11 supra.

12 The second, dated January 31, 2006, summarized the
13 circumstances found to involve a violation of Department policies
14 and procedures in the filing of a false EEOC report by Cox and
15 McCarty. This was based on Cox and McCarty's conceded lack of
16 first-hand knowledge of harassment or confrontational behavior by
17 Willis, even though each alleged a face-to-face confrontation
18 with Willis in the EEOC complaint.

19 However, Sheriff Walsh, the head of the Department, decided
20 not to take any official action against Cox and McCarty. Former
21 Captain Woloszyn was demoted. Between appellants' interviews and
22 Sheriff Walsh's decision not to pursue charges against them, Cox
23 and Matthews, the then-acting Union President, unsuccessfully
24 attempted to obtain a copy of the PSU report upon the conclusion

1 of the investigation.

2 On February 16, 2006, appellants filed a second round of
3 EEOC complaints, this time alleging that the PSU investigation
4 and threats of false reports charges were illegal retaliation for
5 their harassment complaints. The EEOC found evidence of
6 retaliation, finding the department's decision to investigate and
7 consider disciplinary action against appellants for making false
8 allegations in an EEOC complaint to have been discriminatory. It
9 noted that such actions might "have [had] a chilling effect upon
10 the willingness of individuals to speak out against employment
11 discrimination or to participate in the EEOC's administrative
12 process or other employment discrimination proceedings."

13 Appellants were issued notices of their right to sue and
14 timely filed the present action on April 9, 2008. They alleged,
15 in pertinent part, that they were victims of a hostile work
16 environment and unlawful retaliation by the various appellees in
17 violation of Title VII and N.Y. Exec. Law § 296. Appellants also
18 alleged violations of 42 U.S.C. §§ 1981, 1983, 1985, and 1988;
19 the Fourteenth Amendment; and Article 1, Section 11, of the New
20 York State Constitution. Judge McCurn dismissed the claims
21 asserted under 42 U.S.C. § 1981 and the Title VII hostile work
22 environment claims sua sponte. Cox v. Onondaga Cnty. Sheriff's
23 Dep't, No. 5:08-cv-387 (NPM), 2009 U.S. Dist. LEXIS 28101
24 (N.D.N.Y. Apr. 2, 2009). The remaining claims were later

1 dismissed on a grant of summary judgment by Judge Mordue, who
2 held that there was no evidence of a requisite adverse employment
3 action. Cox v. Onondaga Cnty. Sheriff's Dep't, No. 5:08-cv-387
4 (NAM), 2012 U.S. Dist. LEXIS 43913 (N.D.N.Y. Mar. 29, 2012).

5 Appellants have appealed the dismissal only of the
6 retaliation claim. They also claim that Judge Mordue should have
7 recused himself because of a prior relationship with Sheriff
8 Walsh.

9 DISCUSSION

10 We review an appeal from a grant of summary judgment de
11 novo. See, e.g., Terry v. Ashcroft 336 F.3d 128, 137 (2d Cir.
12 2003). Summary judgment is appropriate only where there are no
13 issues of material fact and the movant is entitled to judgment as
14 a matter of law. Id. We may, however, affirm on any ground with
15 support in the record. McElwee v. County of Orange, 700 F.3d
16 635, 640 (2d Cir. 2012).

17 In order to show a prima facie case of retaliation in
18 response to a motion for summary judgment, a plaintiff must
19 submit sufficient admissible evidence to allow a trier of fact to
20 find: (i) conduct by the plaintiff that is protected activity
21 under Title VII; (ii) of which the employer was aware; (iii)
22 followed by an adverse employment action of a nature that would
23 deter a reasonable employee from making or supporting a
24 discrimination claim; (iv) that was causally connected to the

1 protected activity. Kessler v. Westchester Cnty. Dep't of Soc.
2 Servs., 461 F.3d 199, 205-06 (2d Cir. 2006).²

3 Once an employee establishes a prima facie case, the burden
4 shifts to the employer to put forth evidence of a non-retaliatory
5 rationale. See Holt v. KMI-Continental, 95 F.3d 123, 130 (2d
6 Cir. 1996). Once the employer has done so, the employee may
7 prevail by demonstrating that the stated rationale is mere
8 pretext. Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 173,
9 179-80 (2d Cir. 2005). The employee at all times bears the
10 burden of persuasion to show a retaliatory motive. Cosgrove v.
11 Sears, Roebuck & Co., 9 F.3d 1033, 1039 (2d Cir. 1993). The
12 district court held that appellants had failed to establish a
13 prima facie case because they had suffered no adverse employment
14 action.

15 Appellants argue that several aspects of the PSU
16 investigation amount to the requisite adverse employment actions:
17 (i) the investigation was conducted by the PSU instead of within
18 the Department in contrast to other investigations of allegations
19 of harassment or hostile work environment that were handled

²The statutory provision reads in pertinent part:

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

42 U.S.C. § 2000e-3(a).

1 internally; (ii) the PSU's interview of Deputy Willis was less
2 confrontational than their own; (iii) the PSU interviews were
3 more preoccupied with the failings of Captain Woloszyn's
4 investigation and the authorship of appellants' paperwork and
5 filings than with the substance of their allegations; and (iv)
6 appellants' request for a copy of the PSU report was denied on
7 the grounds that disciplinary action was pending. We deal
8 separately, infra, with the portion of appellants' retaliation
9 claim resulting from the fact that they were informed during the
10 investigation that they could be brought up on criminal and
11 administrative charges based on their false complaint to the
12 EEOC.

13 As noted, adverse employment actions are those that "well
14 might . . . dissuade[] a reasonable worker from making or
15 supporting a charge of discrimination." Burlington N. & Santa Fe
16 Ry. Co. v. White, 548 U.S. 53, 68 (2006) (internal quotations and
17 citations omitted). However, "[c]ontext matters," and so "the
18 significance of any given act of retaliation will often depend
19 upon the particular circumstances." Id. at 69.

20 a) The PSU Investigation

21 An employer's investigation of an EEOC complaint alleging
22 racial harassment without more -- that is, without additional
23 particularized facts evidencing a retaliatory intent and

1 resulting in, or amounting to, adverse job consequences for the
2 complainant -- cannot sustain a valid retaliation complaint.

3 While the relevant statutory provisions do not require an
4 employer's investigation, as was the case in Malik v. Carrier
5 Corp., 202 F.3d 97, 105-06 (2d Cir. 2000) (federal law required
6 investigation into workplace sexual harassment; failure to do so
7 was basis for employer liability), they clearly contemplate that
8 employers facing charges before the EEOC will fully inform
9 themselves of all relevant circumstances. After a complaint has
10 been filed, "in writing under oath or affirmation," the
11 Commission must give notice to the employer within 10 days. 42
12 U.S.C. § 2000e-5(b). Then the Commission investigates. After
13 the EEOC has determined that there is reasonable cause to believe
14 that a complaint is true, the respondent (the employer) generally
15 will be asked to submit a position statement with supporting
16 documentation. 29 C.F.R. § 1614.108. Occasionally, the
17 Commission will conduct a fact-finding conference in order to
18 investigate, which can include a meeting intended to determine
19 what facts are disputed and undisputed. "Agencies may use an
20 exchange of letters or memoranda, interrogatories,
21 investigations, fact-finding conferences or any other fact-
22 finding methods that efficiently and thoroughly address the
23 matters at issue." 29 C.F.R. § 1614.108(b). Then the Commission
24 engages in "informal methods of conference, conciliation, and

1 persuasion." 42 U.S.C. § 2000e-5(b). The respondent has 30 days
2 to reach a "conciliation agreement" with the Commission in order
3 to remedy the discrimination. 42 U.S.C. § 2000e-5(f)(1).

4 These provisions clearly contemplate that employers must be
5 allowed to inform themselves of all facts relevant to an EEOC
6 complaint. Employers have a right to answer an EEOC complaint
7 and are asked not only to engage in conciliation but also are
8 sometimes asked to present their view of the facts. If employers
9 are at risk of liability from conducting a non-overreaching
10 internal investigation, meaningful conciliation and fact
11 conferences are not possible.

12 Moreover, we cannot blind ourselves to the fact that an
13 employer's failure to conduct an investigation when faced even
14 with an internal complaint, much less a charge to the EEOC, might
15 be viewed as evidence of an indifference to racial
16 discrimination, if not acquiescence in it. Indeed, we can say
17 with confidence that the law must give breathing room for such
18 investigations to be carried out. See Malik, 202 F.3d at 106-07
19 (law must take care not to "reduce [employers'] incentives to
20 take reasonable corrective action," so "employer[s'] conduct of
21 an investigation and determination of its scope must be viewed ex
22 ante"); United States v. N.Y. Transit Auth., 97 F.3d 672, 677-78
23 (2d Cir. 1996) (granting employers leeway in how to investigate
24 and defend against EEOC proceedings); cf. Tepperwien v. Entergy

1 Nuclear Operations, Inc., 663 F.3d 556, 568-70 (2d Cir. 2011)
2 (fact-finding investigations that do not themselves qualify as
3 disciplinary action but could lead to disciplinary action, where
4 engaged in with good reason, do not constitute adverse employment
5 actions under White).

6 Therefore, employees who complain of racial discrimination,
7 whether internally and/or through an EEOC complaint, may not
8 claim retaliation simply because the employer undertakes a fact-
9 finding investigation.

10 Having said that, we quickly add that an employer's
11 investigation may constitute a cognizable retaliatory action if
12 carried out so as to result in a hostile work environment,
13 constructive discharge, or other employment consequences of a
14 negative nature, or if conducted in such an egregious manner as
15 to "dissuade a reasonable worker from making or supporting a
16 charge of discrimination." See White, 548 U.S. at 57; see also
17 Velikonja v. Gonzales, 466 F.3d 122, 124 (D.C. Cir. 2006) (an
18 investigation that is lengthy in nature, prohibits promotions
19 during its pendency, and by its very nature places a "cloud over
20 [one's] career" qualifies as an adverse employment action under
21 White). Compare Rhodes v. Napolitano, 656 F. Supp. 2d 174, 185-
22 86 (D.D.C. 2009) (noting that length and scope of an
23 investigation into unrelated misconduct could satisfy the White
24 standard), with Tepperwien, 663 F.3d at 568-70 (fact-finding

1 investigations engaged in with good reason that could but do not
2 necessarily lead to disciplinary action constitute trivial harms
3 or "petty and minor annoyances" that would not unduly dissuade a
4 reasonable employee from seeking redress under Title VII).

5 Apart from the threat of disciplinary proceedings, dealt
6 with separately infra, none of the circumstances relied upon by
7 appellants, whether viewed individually or collectively, are
8 sufficient to allow a finder of fact to find illegal retaliatory
9 acts in the conduct of the PSU investigation.

10 First, appellants claim that their "blue form" complaint
11 about racial harassment was the only such complaint to have been
12 investigated by the PSU. However, the circumstances fully
13 justified the investigation by the PSU. Woloszyn's failures
14 ensured that any further attempt to handle these matters
15 informally would be viewed with great skepticism. Indeed,
16 appellants have not claimed that any similar matter --
17 allegations of harassment followed by a defective
18 investigation -- had been handled informally.

19 Critically, moreover, the written policy of the Onondaga
20 Sheriff's Department authorized PSU investigation of harassment
21 complaints at the direction of the Chief. Unlike the
22 circumstances in Stern v. Columbia University, therefore, the PSU
23 investigation was not conducted by a body established in an ad
24 hoc fashion to look into this matter only. 131 F.3d 305, 309 (2d

1 Cir. 1997)). Even if appellants' complaint of racial harassment
2 was the first to result in a PSU investigation, therefore, no
3 trier of fact could find that it was prompted by a retaliatory
4 motive or constituted a hostile work environment, constructive
5 discharge, or deterrent to seeking relief from the EEOC.

6 Second, appellants rely upon the fact that Deputy Willis was
7 treated less confrontationally during his PSU interview.

8 However, Willis's interview occurred after the interviews of
9 appellants revealed that, contrary to appellants' EEOC claim, no
10 appellant (or anyone else) ever saw or heard Willis make any
11 remarks about appellants being skinheads. Even assuming that the
12 questioning of appellants and Willis was of a different character
13 and the difference might be deemed cognizable retaliation, which
14 we do not decide, there were sound reasons not to be
15 confrontational with Willis.

16 Third, appellants' arguments regarding the nature and
17 subject of the questioning during their respective interviews is
18 frivolous. As noted, the PSU had before it a number of issues,
19 all of which resulted from appellants' claims of racial
20 harassment. The questioning complained of related to these
21 matters and was clearly legitimate.

22 Finally, also frivolous is appellants' argument that their
23 request for a copy of the PSU report was denied at the time it

1 was made. Indeed, appellants identify no cognizable harm from
2 that denial.

3 b) The Threats of False Report Charges Against Appellants

4 As noted, during the PSU investigation, Sergeant Smith
5 informed appellants that they might be brought up on charges as a
6 result of having filed false statements. When, a month later,
7 appellants later inquired as to the status of the charges, they
8 were told that charges were "pending."

9 We deal with the threat of false reports charges separately
10 because it raises important issues as to the breadth of legally
11 cognizable claims of retaliation for the filing of charges with
12 the EEOC. Obviously, such a threat would often -- even usually
13 -- be a deterrent to reasonable employees making or supporting
14 discrimination claims.

15 The statutory language, see Note 2, supra, is quite broad
16 but falls well short of suggesting that an absolute privilege
17 immunizes knowingly false EEOC charges. Certainly, such conduct
18 might support criminal charges under 18 U.S.C. §§ 1621 (perjury)
19 and 1505 (obstruction of agency proceedings).

20 However, the fact that false charges before the EEOC are not
21 permitted does not necessarily lead to the conclusion that the
22 employers targeted by such charges are entitled to respond with
23 disciplinary action against the filing employee. Some circuits,
24 see, e.g., Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998 (5th

1 Cir. 1969), have concluded that employers have no authority to
2 "unilaterally" police abuses of the EEOC process. Id. at 1005.
3 Others take the view that, "Title VII was designed to protect the
4 rights of employees who in good faith protest the discrimination
5 they believe they have suffered" and not to "arm employees with a
6 tactical coercive weapon under which employees can make baseless
7 claims simply to advance their own retaliatory motives and
8 strategies." Mattson v. Caterpillar, Inc., 359 F.3d 885, 890-91
9 (7th Cir. 2004) (internal quotations omitted); see also Richey v.
10 City of Independence, 540 F.3d 779, 784-86 (8th Cir. 2008) (where
11 documentary evidence results in a conclusion that an employee has
12 violated non-discriminatory company policy, even if the
13 violations occurred in the context of a workplace harassment
14 investigation, resulting adverse employment actions are not
15 retaliatory).

16 One district court in this circuit has seemingly held that
17 such threats are per se illegal retaliation. See Proulx v.
18 Citibank, N.A., 681 F. Supp. 199, 200-01 (S.D.N.Y. 1988), aff'd
19 without opinion, 862 F.2d 304 (2d Cir. 1988).³ However, this
20 court has applied a "good faith" requirement for protected
21 activity in retaliation cases like the present one. See Quinn v.
22 Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998),

³ We note that while Proulx was affirmed by this court as to the quantum of damages, the liability finding was not appealed. See Proulx v. Citibank, N.A., 709 F. Supp. 396, 397 (S.D.N.Y. 1989).

1 abrogated in part on other grounds by Nat'l R.R. Passenger Corp.
2 v. Morgan, 536 U.S. 101 (2002) ("Quinn need not establish that
3 she successfully described in that complaint conduct amounting to
4 a violation of Title VII. She need only demonstrate that she had
5 a good faith, reasonable belief that the underlying challenged
6 actions of the employer violated the law." (internal quotations
7 and citations omitted)).

8 In reviewing the facts of these various cases, we find no
9 inconsistencies in their results when the ordinary McDonnell-
10 Douglas burden-shifting regime, which governs retaliation cases,
11 Terry, 336 F.3d at 141, is applied. Once the plaintiff has
12 proffered sufficient evidence that a threat of discipline
13 triggered by a claim of discrimination was made, a prima facie
14 case of retaliation will usually have been established.

15 We therefore believe it fairly obvious that a prima facie
16 case has been established in the present matter. As noted, the
17 burden of producing evidence of a non-retaliatory reason for the
18 threat of discipline shifts to the Department, with the burden of
19 showing pretext falling on plaintiffs, who bear the ultimate
20 burden of showing illegal retaliation. It may well be that
21 retaliation cases based on such threats are generally strong and
22 the employers' rebuttals generally non-existent or weak.
23 However, the facts of the present case may be a tad unusual, but

1 they are sufficient to support summary judgment for the
2 appellees.

3 Sergeant Smith's statements about charges for making a false
4 report being possible were completely reasonable in light of the
5 record. Appellants, who had initiated the entire matter, had
6 given materially inconsistent statements regarding Willis's
7 behavior. These ranged from describing Willis as
8 (understandably) asking why they had shaved their heads to
9 stating that Willis had confronted them with accusations of being
10 skinheads. The latter accusation was, on the record before us,
11 false, and seemingly intentionally so. A misconduct complaint
12 based on these false accusations had been filed by Assistant
13 Chief Wasilewski and was referred to the PSU. Informing
14 appellants of the possible results of the investigation was in
15 fact fair to them.⁴

16 Moreover, the false statements were intended by the officers
17 who made them, who were white, to establish a claim of racial
18 harassment by an African American officer. In the context of
19 racial tension within the Department, false charges against
20 Willis could be viewed by a reasonable observer as themselves
21 racial harassment of Willis. Indeed, Willis's deposition
22 testimony indicated that he felt harassed by the accusations, and

⁴ No due process claim has been asserted by appellants, who were, in any event, not charged.

1 the PSU report noted that he felt "undue stress" at work as a
2 result.

3 Employers are under an independent duty to investigate and
4 curb racial harassment by lower level employees of which they are
5 aware. See Duch v. Jakubek, 588 F.3d 757, 762 (2d Cir. 2009).
6 This is because the primary purpose of Title VII "is not to
7 provide redress but to avoid harm." Faragher v. City of Boca
8 Raton, 524 U.S. 775, 806 (1998). It would therefore be anomalous
9 to conclude that an employer is not allowed to investigate, with
10 a view to discipline, false complaints of harassment that
11 themselves might be viewed as intended as racial harassment.
12 Otherwise, employers might have to choose between liability for
13 retaliating against one group of employees or liability to
14 another group for not preventing the first group from harassment
15 of the second with false claims.⁵

16 Our decision is supported by another fact. Law enforcement
17 officials are required to file reports accurately. The
18 Department, therefore, has a greater interest in disciplining
19 officers who do not take that obligation seriously than do most
20 employers. The importance of this policy is underlined by the
21 fact that a generally applicable, non-discriminatory, written

⁵ Smith did not threaten that the charges would be brought unless the EEOC charge was dropped so that the matter could be closed rather than investigated. Compare Lore v. City of Syracuse, 583 F. Supp. 2d 345, 367 (N.D.N.Y. 2008) (statement that one will forego criminal and administrative charges if an EEOC complaint is dropped qualifies as an adverse employment action).

1 policy for dealing with false reporting exists in the Department.
2 Moreover, a law enforcement officer who has filed a false charge
3 under oath with a governmental agency may well be cross-examined
4 about that false filing when a witness in an unrelated case where
5 the officer's credibility is in issue. See Fed. R. Evid. 608(b).

6 In contrast, appellants have presented no evidence that the
7 warning about disciplinary action was intended to retaliate for
8 any reason other than the apparent falsity of their EEOC charges
9 and the complex circumstances those false charges created. As
10 noted, they have the ultimate burden of proof on that issue.
11 Therefore, even if appellants have established a prima facie case
12 on their retaliation claim based on the threat of false reports
13 charges, the Department has presented evidence that defeats that
14 claim as a matter of law.

15 c) Recusal

16 Title 28 U.S.C. § 455(a) requires a judge to recuse himself
17 "in any proceeding in which his impartiality might reasonably be
18 questioned." Under the statute, recusal is required in specific
19 contexts not relevant here as provided for in Section 455(b) and
20 also wherever, "an objective, disinterested observer fully
21 informed of the underlying facts, would entertain significant
22 doubt that justice would be done absent recusal." United States
23 v. Yousef, 327 F.3d 56, 169 (2d Cir. 2003) (internal quotations
24 and alterations omitted). The pertinent trigger for recusal is

1 the "appearance of partiality," Chase Manhattan Bank v.
2 Affiliated FM Ins. Co., 343 F.3d 120, 128-30 (2d Cir. 2003), and
3 a denial of a motion to recuse is reviewed for abuse of
4 discretion. Id. at 126.

5 Appellants argue that the fact that Judge Mordue recused
6 himself from matters involving Sheriff Walsh in 2007 and 2009,
7 see Leader v. Onondaga County, No. 09-cv-0493 (NAM/DEP), 2009
8 U.S. Dist. LEXIS 39296 (N.D.N.Y. 2009), citing a long
9 relationship between the two, compels the conclusion that Judge
10 Mordue should have recused himself from this litigation. We
11 disagree.

12 While at one time there may have been a close relationship
13 between Sheriff Walsh and Judge Mordue, it is undisputed that
14 Judge Mordue, at the time of the instant litigation, had not seen
15 or spoken to Walsh since March 2005. This fact, absent other
16 details about the relationship, negates any inference of
17 partiality. See Independent Order of Foresters v. Donald, Lufkin
18 & Jenrette, Ind., 157 F.3d 933, 945 (2d Cir. 1998) (passage of
19 time negates inference of partiality).

20 d) Unsealing the Record

21 Much of this opinion refers at critical points to parts of
22 the record that have been sealed. Because of the importance of
23 the sealed material to our disposition of this matter, we order
24 that the entire record on appeal be unsealed. See Joy v. North,

