

1 **WO**

2
3
4
5 **IN THE UNITED STATES DISTRICT COURT**
6 **FOR THE DISTRICT OF ARIZONA**

7
8 Antonio Atencia,

No. CV-19-05855-PHX-ROS

9 Plaintiff,

ORDER

10 v.

11 Maricopa County Sheriff's Office, et al.,

12 Defendants.
13
14

15 Plaintiff Antonio Luis Atencia-Salome ("Atencia") is a detention officer employed
16 by the Maricopa County Sheriff's Office ("MCSO") who brought suit alleging race
17 discrimination in employment after he was denied a promotion. (Doc. 10 at 6-11). Atencia
18 asserts claims against Defendants MCSO and Maricopa County Sheriff Paul Penzone for
19 disparate treatment and retaliation in violation of Title VII and a claim against two MCSO
20 Chiefs, Defendants Barry Roska and Russ Skinner, under 42 U.S.C. § 1983 for violation
21 of the Equal Protection Clause. (Doc. 10 at 13-17).

22 Defendants moved for summary judgment. (Doc. 89). They contend Atencia's
23 disciplinary record rendered him ineligible for promotion and race did not play a role in
24 the decision not to promote him. (Doc. 89 at 16). Defendants claim MCSO Policy GC-12
25 ("Policy GC-12") precludes promotion for persons with more than three sustained
26 disciplinary violations. (Doc. 89 at 6-7). In response, Atencia notes he received racist text
27 messages from coworkers, the MCSO has made exceptions to Policy GC-12 in the past,
28 and the MCSO has promoted others with similar disciplinary records. (Doc. 91 at 13-15).

1 After Defendants replied (Doc. 93), Atencia moved to strike portions of Defendants’
2 reply. (Doc. 95). Defendants argue the motion to strike was procedurally improper and
3 that the challenged portions should not be struck. (Doc. 96).

4 The Motion for Summary Judgment (Doc. 89) will be granted in part and the Motion
5 to Strike (Doc. 95) will be granted in full.

6 BACKGROUND

7 At summary judgment, the Court considers only admissible evidence, *see* Fed. R.
8 Civ. P. 56(c)(1)(B), and does not weigh evidence or determine credibility. *House v. Bell*,
9 574 U.S. 518, 559–560 (2006). Summary judgment is appropriate if there is no genuine
10 dispute as to any material fact and the movant is entitled to judgment as a matter of law.
11 *See* Fed. R. Civ. P. 56(a). All facts set forth below are undisputed unless otherwise noted.

12 Atencia is a detention officer employed by the MCSO who identifies as Black and
13 Hispanic and is of Caribbean and South American national origin. (Doc. 10 at 6).

14 From 2011 to 2019, Atencia applied for promotion many times (Doc. 89 at 6), and
15 filed this suit in 2019 after he was denied a promotion to sergeant. (Doc. 91 at 2). The
16 MCSO claims Atencia was denied promotion because Policy GC-12 prohibits promotion
17 of persons who have three or more “sustained”¹ disciplinary violations, or one especially
18 serious, “Category 6,” disciplinary violation,² within the preceding decade. (Doc. 90 at 4).
19 Atencia had four sustained violations, none of which were Category 6 offenses, at the time
20 he was denied promotion. (Doc. 90 at 1-4). The parties dispute how to characterize
21 Atencia’s violations, and whether Policy GC-12 required denial of promotion. *Compare*
22 (Doc. 90 at 3) *with* (Doc. 91 at 10). However, the facts of the underlying violations are

23 ¹ MCSO investigations result in one of five findings. From least to most serious: (1)
24 Unfounded (“the allegation against you was false or not supported by fact”); (2) Exonerated
25 (“an incident occurred, but that your actions were lawful and proper”); (3) Not Sustained
26 (“there was insufficient evidence to prove or disprove the allegation against you”); (4)
27 Partially Sustained (“a portion of the allegations against you was found to be factual”); (5)
28 Sustained (“the allegation against you was supported by sufficient evidence to justify a
reasonable conclusion of responsibility.”). (Doc. 90-2 at 97).

² Disciplinary violations are measured on a scale from 1 (lowest) to 7 (the highest). (Doc.
90-2 at 188). The parties have not defined, and have not offered evidence that defines,
what conduct would warrant a Category 6 disciplinary violation. *But see* (Doc. 90-2 at
188-89) (providing Category 6 offenses receive a range of punishments, with a 40-hour
suspension as the minimum punishment, and dismissal as the maximum).

1 undisputed.

2 Around October 2015, internal investigation IA 15-0825 was opened following a
3 complaint made against Atencia. (Doc. 90 at 1-2). Sergeant Darriel Bone was assigned to
4 investigate three allegations. (Doc. 90-2 at 58-59). Bone’s recommendations were then
5 reviewed by more senior personnel who made the final determination. *See, e.g.*, (Doc. 90-
6 2 at 67). The first allegation was that Atencia provided confidential information to an
7 inmate informant while investigating a potentially “compromised” prison nurse that placed
8 the integrity of an ongoing criminal investigation at risk. (Doc. 90-2 at 58). Sergeant
9 Bone recommended finding Atencia exonerated on the first allegation because the
10 investigation did not show the information Atencia gave to the inmate informant had a
11 negative impact on the investigation or that it was information the informant did not already
12 know. (Doc. 90-2 at 58). The second allegation was, “Atencia made negative comments
13 to inmates regarding MCSO employees by telling [the inmate informant] that investigators
14 ‘fucked up’ an investigation into a nurse bringing contraband into an MCSO Jail” and by
15 criticizing the way other officers handled an investigation. (Doc. 90-2 at 59). Bone
16 recommended sustaining the second allegation after Atencia admitted to making
17 disparaging remarks about other officers. (Doc. 90-2 at 59). The third allegation was that
18 Atencia improperly fraternized “with inmates by providing the names of Detention Officers
19 to inmates to aid in possible legal action against the employees.” (Doc. 90-2 at 59). Bone
20 recommended sustaining the third allegation because although Atencia denied that he
21 suggested taking legal action against MCSO employees, he acknowledged mentioning the
22 ACLU to an inmate and told the inmate the names of other officers. (Doc. 90-2 at 59).
23 The preliminary recommendations—one exoneration and two sustained violations—were
24 upheld by senior personnel. (Doc. 90-2 at 68).

25 During the investigation into IA 15-0825, Bone opened investigation IA 2016-0175
26 after Atencia indicated during an interview with Bone that Atencia may have violated an
27 order from a supervisor not to contact an inmate informant. (Doc. 90-2 at 73). This second
28 investigation also concerned three allegations. (Doc. 90-2 at 69). First, “Atencia violated

1 an order not to contact inmate . . . on or about October 27, 2015.” (Doc. 90-2 at 69).
2 Second, “Atencia violated an order to not have inmate contact when he had a third party
3 relay information to inmate.” (Doc. 90-2 at 69). Third, “Atencia made a false statement
4 to Administrative Investigators” when questioned about violating a directive. (Doc. 90-2
5 at 69). Bone found Atencia made the prohibited contact with inmates, but did not find he
6 lied to investigators and accordingly recommended sustained violations for the first two
7 allegations, and an exoneration for the third. (Doc. 90-2 at 90). The reviewer, Chief
8 Deputy Don Marchand, reduced two of the allegations from “sustained” to “not sustained”
9 and agreed that the third should be found exonerated. (Doc. 90 at 2-3). However,
10 Marchand created and sustained a new allegation for “Failure to Meet Standards.” (Doc.
11 90 at 2-3). Marchand said although he did not sustain two of the allegations, Atencia’s
12 “decision making is of concern to me,” which warranted a new sustained allegation. (Doc.
13 90 at 3). Although Marchand initially recommended that Atencia receive a 16-hour
14 suspension, his discipline was reduced to a written reprimand. (Doc. 90 at 3).

15 In 2017, after Atencia filed an internal complaint with the MCSO, IA 2017-0269
16 was opened to investigate allegations that two MCSO employees, Officer Alexander
17 Mendez and Sergeant Isaac Perez, sent “racially and sexually discriminatory text messages
18 to Officer Atencia.” (Doc. 90-3 at 3-4). The investigation determined Mendez and Perez
19 had repeatedly sent Atencia harassing and discriminatory text messages, permeated with
20 slurs targeting Atencia based on race, sexuality, or his Cuban heritage. (Doc. 90-3 at 10-
21 13, 45-50). When asked by an investigator, Mendez claimed he had used “the words
22 ‘faggot’ and ‘nigger’ as ‘terms of endearment.’ Officer Atencia disputed that idea . . .
23 Atencia said that the words were ‘racist.’” (Doc. 90-3 at 43). The investigator
24 recommended sustaining the allegations against Mendez and Perez. (Doc. 90-3 at 53-58).

25 But during the same investigation, “Atencia was also found to have sent
26 questionable text messages” allegedly in response to the persistent harassment because
27 Atencia used terms such as “mama tranca” (which means “cock sucker” in Spanish,
28 according to the investigator) and “nigger.” (Doc. 90-3 at 12). Although the investigator

1 found “Atencia’s texting was not severe or pervasive” because Atencia only sent offensive
2 text messages on two occasions, the investigator nevertheless recommended sustaining the
3 allegation against Atencia. (Doc. 90-3 at 59). Although Atencia initially received an eight-
4 hour suspension for this violation, the suspension was later rescinded. (Doc. 90-3 at 66).
5 The sustained violation, however, was not removed from his record. (Doc. 90-3 at 66).

6 Atencia thus had four sustained violations within the last decade: Two sustained
7 violations for contacting inmates despite being told not to; Chief Marchand’s “Failure to
8 Meet Standards” violation; and the violation for sending demeaning text messages.
9 According to Policy GC-12, this would allegedly preclude Atencia’s eligibility for
10 promotion. However, the parties agree that, from June 2017 to October 2020, ten³
11 employees were promoted despite having three or more sustained violations. (Doc. 90 at
12 7). Five of the ten employees were minorities, three self-identified as Hispanic, one as
13 Asian Pacific Islander, and one as Black/Not Hispanic. (Doc. 90 at 7). MCSO claims
14 those ten employees were promoted “because either the sustained allegations did not reach
15 the level of seriousness of Plaintiff’s allegations and/or they were further removed in time.”
16 (Doc. 90 at 7). Atencia argues that the promotion of those employees despite comparable
17 disciplinary records demonstrates MCSO’s discriminatory intent. (Doc. 91 at 13). As
18 emphasis, Atencia points out MCSO promoted a White (non-Hispanic) employee who
19 violated Policy GC-12 in two ways—both by having three or more sustained violations and
20 by having a Category 6 violation. (Doc. 91 at 13; Doc. 92 at 7; Doc. 90-4 at 43).

21 It is undisputed that the MCSO supervisors who decided not to promote Atencia,
22 Defendants Roska and Skinner, reviewed no other documents except Atencia’s
23 Promotional Eligibility Review Packet in determining his application for promotion. (Doc.

24
25 ³ Atencia claims 14 employees were promoted despite violating Policy GC-12 from June
26 2017 to October 2020 (Doc. 92 at 8-9), which appears to be confirmed by the record. (Doc.
27 90-4 at 43-45). Atencia claims ten were promoted even though they, like Atencia, had
28 three or more sustained violations; five were promoted even though they had a Category 6
violation (one person had both more than three sustained violations and a Category 6
violation). (Doc. 90-4 at 43-45). Atencia claims, of those 14 employees, eight were White
non-Hispanic, four were Hispanic, one was Black non-Hispanic, and one was Asian Pacific
Islander. (Doc. 90-4 at 43-45). It is for a jury to determine whether ten or fourteen
employees were promoted despite violating Policy GC-12 because it is a disputed fact.

1 90 at 5; Doc. 92 at 7). The record demonstrates the packet erroneously said on the first
2 page that Atencia did not have three or more sustained allegations of misconduct, such that
3 it appeared Policy GC-12 did not apply to Atencia. (Doc. 90-3 at 100). But the packet
4 did include correct descriptions of Atencia’s disciplinary investigations. (Doc. 90-3 at
5 102). Atencia also alleges he was the only prospective promotee for whom Human
6 Resources did not complete an Employee Performance Appraisal (“EPA”) for his
7 Promotional Eligibility Review Packet.⁴ (Doc. 91 at 10). He claims Human Resources did
8 not do its job and that, if an EPA had been completed, it would have shown he was eligible
9 for promotion. (Doc. 91 at 10). He argues this shows he “was treated arbitrarily.” (Doc.
10 91 at 10).

11 ANALYSIS

12 I. Motion to Strike

13 On October 11, 2021, Atencia filed a Motion to Strike Portions of Defendants’
14 Reply in Support of Their Motion for Summary Judgment. (Doc. 95). Atencia seeks to
15 strike portions of Defendants’ Reply on the grounds that Defendants failed to disclose
16 during discovery evidence relied upon in the Reply, including a document containing
17 MCSO diversity information and a website, Datausa.io, containing data regarding MCSO
18 promotion rates, and that the information is immaterial and potentially unreliable. (Doc.
19 95 at 2-4). Atencia also seeks to strike, as untrue, a portion of Defendants’ Reply which
20 states, “Plaintiff did not depose anyone from human resources . . . related to why the
21 decision was made to report that Plaintiff’s [Employment Performance Appraisals] did not
22 meet standards.” (Doc. 95 at 5). Defendants admit the statement is false but argue
23 Atencia’s motion is procedurally improper and that the contested evidence should not be
24 struck because the failure to disclose undisclosed evidence should be excused. (Doc. 96 at
25 2-6).

26 Federal Rule of Civil Procedure 12(f) provides, “[t]he court may strike from a

27 ⁴ Atencia claims “all of [his] Employee Performance Appraisals met standards” and that
28 MCSO erred by failing to checkoff ‘yes’ to Plaintiff meeting performance standards on his
Promotional Eligibility Review Packet.” (Doc. 92 at 11). Atencia has submitted several
of his past EPAs to support this contention. (Doc. 92 at 146-160).

1 pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous
2 matter.”⁵ Fed. R. Civ. P. 12(f). “The function of a 12(f) motion to strike is to avoid the
3 expenditure of time and money that must arise from litigating spurious issues by dispensing
4 with those issues prior to trial.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973
5 (9th Cir. 2010) (citation omitted). The decision whether to strike a pleading is within the
6 discretion of the trial court. *XY Skin Care & Cosmetics, LLC v. Hugo Boss USA, Inc.*, No.
7 CV-08-1467-PHX-ROS, at *1 (D. Ariz. Aug. 4, 2009).

8 The motion to strike was properly filed. Defendants argue the Local Rules require
9 objections to evidence on a written motion to be made in a reply memorandum, and not a
10 separate responsive memorandum. (Doc. 96 at 2-3) (citing LRCiv 7.2(m)(2)). Atencia
11 filed a separate motion to strike Defendant’s Reply because he was not accorded by the
12 rules a right to respond. *See* LRCiv 7.2, 56.1. However, Atencia moved to strike the Reply
13 on the ground that it is prohibited by the Federal Rules, which is permissible under LRCiv
14 7.2(m)(1) (“[A] motion to strike may be filed . . . if it seeks to strike any part of a filing or
15 submission on the ground that it is prohibited (or not authorized) by a statute, rule, or court
16 order.”). A variety of rules prohibit making false statements to the Court, *see, e.g.*, Fed. R.
17 Civ. P. 11(b), and Federal Rule of Civil Procedure 37(c)(1) prohibits a party to use
18 information or witnesses they failed to disclose as required by Rule 26(a) or (e), “unless
19 the failure was substantially justified or is harmless,” or the Court elects to use an
20 alternative form of sanction pursuant to Rule 37(c)(1)(A)-(C). Atencia’s Motion to Strike
21 Portions of Defendants’ Reply (Doc. 95) is proper because it seeks to strike part of a filing
22 on the ground that it is prohibited not authorized by a statute, rule, or order. The untrue
23 statement will be struck.

24 Defendants argue the undisclosed evidence—a document containing MCSO
25 diversity information and the Datausa.io webpage—should not be struck. They argue that
26 the MCSO diversity information should not be excluded because it “is essentially the exact

27
28 ⁵ Although a reply to a motion for summary judgment is not a pleading, *see* Fed. R. Civ. P.
7(a), the Court will consider Atencia’s motion to strike Defendants’ Reply as an objection
to the permissibility of representations and admissibility of evidence included therein.

1 same information previously disclosed related to detention officers, but” includes data for
2 MCSO as a whole, “because Plaintiff’s Response implied that MCSO as a whole uses
3 discriminatory practices” and because Defendants asked questions about state-wide
4 demographics at a deposition. (Doc. 96 at 4). Defendants rely on *Biggs v. Edgecombe*
5 *County Public School Board of Education*, 2020 WL 594098, No. 4:16-CV-271-D
6 (E.D.N.C. Feb. 6, 2020), where the Eastern District of North Carolina declined to strike
7 undisclosed evidence based on a five factor test courts within the Fourth Circuit consider
8 in such circumstances.⁶ *See id.* at *3. Defendants argue their use of the Datausa.io
9 webpage should not be struck because “the information that Plaintiff objects to is easily
10 accessible demographic information that anyone can find online” and is not used in service
11 of a new argument. (Doc. 96 at 6). The motion to strike this evidence will also be granted.
12 The appropriate remedy for undisclosed evidence is exclusion because Defendants have
13 failed to show the failure to disclose was “substantially justified or harmless.” *See* Fed. R.
14 Civ. P. 37(c)(1). It is plainly erroneous to argue non-disclosure should be excused because
15 Plaintiffs asked one deponent a question about statewide diversity rates or because the
16 information is available online. Rule 26’s disclosure requirements are mandatory, and
17 Defendants have not provided sufficient justification for their failure to disclose.⁷ The
18 Court similarly will not consider the evidence

19 **II. Motion for Summary Judgment**

20 Summary judgment may be granted if there is no genuine issue of material fact and
21 the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp.*
22 *v. Catrett*, 477 U.S. 317, 321 (1986). Material facts are those which may affect the outcome
23 of the case and a dispute as to a material fact is “genuine” only if there is sufficient evidence
24 for a reasonable trier of fact to decide in favor of the nonmoving party. *Anderson v. Liberty*

25 ⁶ The five factors are: (1) “the surprise to the party against whom the evidence would be
26 offered”; (2) “the ability of that party to cure the surprise”; (3) “the extent to which allowing
27 the evidence would disrupt the trial”; (4) “the importance of the evidence”; (5) “the
28 nondisclosing party’s explanation for its failure to disclose the evidence.” *Biggs*, 2020 WL
594098, at *3 (quoting *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d
592, 597 (4th Cir. 2003)).

⁷ Because the Court grants the motion to strike on these grounds, it is unnecessary to
address Plaintiff’s argument that the Datausa.io webpage is not reliable. (Doc. 95 at 4).

1 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). On a motion for summary judgment, the Court
2 draws all reasonable inferences that may be taken from the underlying facts in the light
3 most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith*
4 *Radio Corp.*, 475 U.S. 574, 587 (1986). “[T]he district court does not assess credibility or
5 weigh the evidence, but simply determines whether there is a genuine factual issue for
6 trial.” *House*, 574 U.S. at 559–60.

7 **A. Title VII Employment Discrimination**

8 Atencia’s first claim is that Defendants MCSO and Paul Penzone discriminated
9 against him on the basis of his race or national origin when they did not promote him.
10 (Doc. 10 at 13). Defendants argue they are entitled to summary judgment on this claim
11 because Atencia has failed to demonstrate a dispute of material fact regarding their
12 allegedly discriminatory motivations. (Doc. 89 at 10-12).

13 Title VII of the Civil Rights Act of 1964, as subsequently amended, provides in
14 relevant part that it is unlawful for an employer “to fail or refuse to hire or to discharge any
15 individual, or otherwise to discriminate against any individual with respect to his
16 compensation, terms, conditions, or privileges of employment, because of such
17 individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). A
18 discriminatory failure to promote can constitute a violation of this provision. *See*
19 *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

20 Courts apply a three-part burden-shifting framework to Title VII discrimination
21 claims under the case *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its
22 progeny, including *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248
23 (1981) and *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993). “First, the plaintiff
24 has the burden of proving by the preponderance of the evidence a prima facie case of
25 discrimination.” *Burdine*, 450 U.S. at 252-53. This burden “is not onerous” and only
26 requires plaintiff to prove he applied for an available position for which he was qualified,
27 but was rejected under circumstances which give rise to an inference of unlawful
28 discrimination. *Id.* at 253. A rebuttable presumption of intentional discrimination is

1 created once plaintiff demonstrates a prima facie case. *St. Mary's Honor Ctr.*, 509 U.S. at
2 509.

3 Second, if the plaintiff proves a prima facie case, “the burden shifts to the defendant
4 ‘to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’”
5 *Burdine*, 450 U.S. at 253 (quoting *McDonnell Douglas*, 411 U.S. at 802, 804). The
6 “defendant need not persuade the court that [the adverse employment action] was actually
7 motivated by the proffered reasons. It is sufficient if the defendant’s evidence raises a
8 genuine issue of fact as to whether it discriminated against the plaintiff.” *Id.* (internal
9 citation omitted). “‘If the defendant carries this burden of production, the presumption
10 raised by the prima facie case is rebutted’ and ‘drops from the case.’” *St. Mary's Honor*
11 *Ctr.*, 509 U.S. at 507 (quoting *Burdine*, 450 U.S. at 255 & n.10).

12 Third, the plaintiff must then “prove by a preponderance of the evidence that the
13 legitimate reasons offered by the defendant were not its true reasons, but were a pretext for
14 discrimination.” *Id.* “[A]lthough the *McDonnell Douglas* presumption shifts the burden
15 of *production* to the defendant, ‘[t]he ultimate burden of persuading the trier of fact that
16 the defendant intentionally discriminated against the plaintiff remains at all times with the
17 plaintiff.’” *St. Mary's Honor Ctr.*, 509 U.S. at 507 (quoting *Burdine*, 450 U.S. at 253)
18 (emphasis in original).

19 **1. Plaintiff’s initial burden**

20 A plaintiff makes a prima facie case for race discrimination under Title VII if he
21 shows: “(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a
22 job for which the employer was seeking applicants; (iii) that, despite his qualifications, he
23 was rejected; and (iv) that, after his rejection, the position remained open and the employer
24 continued to seek applicants from persons of complainant's qualifications.” *McDonnell*
25 *Douglas*, 411 U.S. at 802.

26 Plaintiff demonstrated he is a racial minority as it is undisputed that he is both Black
27 and Hispanic. (Doc. 91 at 8).

28 Although it is undisputed that Atencia applied for promotion to sergeant, the parties

1 dispute whether he was qualified. Defendants argue that as a matter of law the frequency
2 and severity of Atencia's disciplinary violations rendered him ineligible for promotion.
3 (Doc. 89 at 7). Relying on *Bahri v. Home Depot USA, Inc.*, 242 F.Supp.2d 922, 932 (D.
4 Or. 2002), Atencia argues he was not required to show qualifying performance after he was
5 discriminated against. (Doc. 91 at 10-11). He claims the triggering discrimination was
6 that he received a sustained violation in IA 2017-0269, even though he sent only two
7 offensive texts after receiving harassing messages over several months.⁸ (Doc. 91 at 10-
8 11). Atencia adds that the memorandum of Defendant Roska explaining why Atencia was
9 not promoted said Atencia had sufficient skills to be sergeant. (Doc. 91 at 11)
10 (modification omitted).

11 A strict reading of Policy GC-12 made Atencia ineligible for promotion. He had
12 four sustained violations, and three is technically enough to preclude promotion. However,
13 it is undisputed that from June 2017 to October 2020, MCSO promoted between ten and
14 fourteen employees who otherwise ran afoul of the promotion policy. (Doc. 90 at 7; Doc.
15 92 at 8-9). Although Defendants argue the severity and recency of Atencia's violations
16 render him unqualified for a Policy GC-12 waiver (Doc. 90 at 7), viewing the facts in the
17 light most favorable to Atencia, the Court finds a dispute of material fact regarding whether
18 Atencia was qualified for promotion by exception from Policy GC-12 and whether the non-
19 promotion was the result of discrimination.⁹

20 It is undisputed that Atencia was rejected for promotion and it is undisputed that
21 other persons of different races were promoted instead of Atencia. (Doc. 91 at 12). Atencia
22 thus satisfies his initial burden at summary judgment under *McDonnell Douglas* by

23 ⁸ The messages themselves do not constitute Title VII employment discrimination because
24 the Ninth Circuit has held "ostracism suffered at the hands of coworkers cannot constitute
25 an adverse employment action." See *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th
26 Cir. 2000) (citation omitted).

27 ⁹ Because the Court finds Atencia has created an issue of fact regarding whether he satisfied
28 his initial burden, the Court need not determine whether to adopt the holding of *Bahri v.*
Home Depot USA, or whether Atencia has been discriminated against in a way sufficient
to trigger *Bahri*, if it does apply. See *Bahri*, 242 F.Supp.2d at 932 ("[T]his court declines
to accept Home Depot's suggestion that proof of satisfactory job performance at all times
is a necessary element of plaintiff's prima facie case. Instead, the plaintiff simply must
establish satisfactory job performance prior to the introduction of the allegedly unlawful
discrimination.") (emphasis omitted).

1 demonstrating genuine dispute of material fact regarding whether he was qualified for
2 promotion.

3 **2. Defendants’ burden**

4 The burden shifts to Defendants to produce a legitimate, non-discriminatory reason
5 for not promoting Atencia. Defendants contend Atencia was not eligible for promotion
6 due to the severity and recency of his sustained disciplinary violations. (Doc. 90 at 7).
7 Defendants claim several of the persons promoted despite violating Policy GC-12 were
8 minorities, including three who were Hispanic and one who was Black. (Doc. 90 at 7).
9 Defendants also allege Chiefs Roska and Skinner, who reviewed Atencia’s promotion file,
10 were unaware of Atencia’s race.¹⁰ (Doc. 90 at 8; Doc. 93 at 10-11).

11 These non-discriminatory explanations, taken as true, would rebut the presumption
12 created by the prima facie case of discrimination. *St. Mary’s Honor Ctr.*, 509 U.S. at 506-
13 07 (holding that, to satisfy their burden, a defendant need only “set forth, through the
14 introduction of admissible evidence, reasons for its actions which, *if believed by the trier*
15 *of fact*, would support a finding that unlawful discrimination was not the cause of the
16 employment action”) (emphasis in original; citation and quotation marks omitted).

17 **3. Atencia has demonstrated a genuine dispute of material fact**

18 The burden then shifts to Atencia to demonstrate that the non-discriminatory
19 justification proffered by Defendants “‘was not the true reason for the employment
20 decision’ and that race was.” *Id.* at 508 (quoting *Burdine* 450 U.S. at 256). Atencia argues
21 Defendants’ justification for his non-promotion—that he had too many recent serious
22 disciplinary violations in his file—is pretextual for three reasons.

23 First, he argues he has not committed any “serious” violation because the
24 suspensions he received in IA 15-0825 and IA 2017-0269 were reduced to a written
25 reprimand and rescinded. (Doc. 91 at 13). MCSO promotional policies define serious
26 misconduct as “[c]onduct that, if sustained, would result in discipline of a suspension,
27

28 ¹⁰ Atencia disputes that Roska and Skinner did not know his race. (Doc. 91 at 9); *see also*
infra n. 17.

1 demotion, or dismissal.”¹¹ (Doc. 92 at 5; Doc. 90-4 at 3). Atencia points out he was not
2 suspended, demoted, or dismissed. (Doc. 92 at 5).

3 Second, he argues “Defendants’ claim that Plaintiff’s alleged misconduct was too
4 recent is baseless. IA 15-0825 and 16-0175 are for events that occurred prior to November
5 2015” and the evidence shows Defendants promoted people with disciplinary histories for
6 internal investigations occurring in 2014, 2015, and 2017. (Doc. 91 at 13). He also claims
7 that Policy GC-12 has a 10-year window, does not treat recent violations more severely
8 (Doc. 91 at 13), and that a White employee was promoted even though that employee had
9 both four sustained allegations and a Category 6 violation within the preceding decade.
10 (Doc. 91 at 13; Doc. 92 at 7; Doc. 90-4 at 43).

11 Third, he alleges most employees denied promotions identified as Hispanic, while
12 most given promotions despite violating Policy GC-12 are White.¹² (Doc. 91 at 13).

13 Atencia has demonstrated a genuine dispute of material fact regarding whether
14 Defendants’ non-discriminatory justification is pretextual because Atencia’s evidence,
15 viewed in the light most favorable to him, would refute Defendants’ argument that Atencia
16 was not qualified for promotion.

17 **B. Title VII Retaliation**

18 Atencia’s second claim is that Defendants MCSO and Paul Penzone retaliated
19 against him because he lodged internal complaints regarding the racially discriminatory
20 harassing messages he received from Mendez and Perez. (Doc. 91 at 15).

21 Under Title VII, it is unlawful for an employer to discriminate against employees
22 because the employee “has opposed any practice made an unlawful employment practice
23 by this subchapter.” 42 U.S.C. § 2000e–3(a). “In order to prevail on a claim of unlawful
24 retaliation, a plaintiff must establish (1) that he engaged in a protected activity, (2) that he

25 _____
26 ¹¹ The record does not indicate whether this definition of “serious misconduct” is related
to Policy GC-12.

27 ¹² Of the fourteen persons promoted despite violating Policy GC-12, eight were White not
28 Hispanic, four were Hispanic, one was Asian Pacific Islander, and one was Black not
Hispanic. (Doc. 90-4 at 43-45). Atencia offered an unobjected exhibit which purports to
show that eight of eleven persons denied promotion were Hispanic and only three were
White. (Doc. 92 at 144).

1 suffered an adverse employment decision, and (3) that there was a causal link between
2 plaintiff's activity and the employment decision.” *Lyons v. England*, 307 F.3d 1092, 1118
3 (9th Cir. 2002) (citing *Hashimoto v. Dalton*, 118 F.3d 671, 679 (9th Cir. 1997)).
4 Retaliatory non-promotion is actionable under Title VII, *see id.*, and the retaliating party
5 need not be the entity whose allegedly discriminatory practices were opposed by the
6 complaining party. *See Nilsson v. City of Mesa*, 503 F.3d 947, 953 n.3 (9th Cir. 2007).

7 It is undisputed that Atencia engaged in protected activity by filing an internal
8 complaint with the MCSO¹³ and suffered an adverse employment decision. (Doc. 89 at
9 13-14). Defendants, however, claim Atencia has failed to show a dispute of material fact
10 regarding whether his protected statements caused his non-promotion. (Doc. 89 at 13-14).

11 Defendants claim the MCSO chose not to promote Atencia because he was
12 unqualified, and not in retaliation for his internal complaint. They argue no causal
13 connection can exist because MCSO denied Atencia promotion as a result of Policy GC-
14 12 and the frequency and severity of his disciplinary violations. (Doc. 89 at 14). Atencia
15 alleges Defendants Roska and Skinner retaliated by considering, when weighing his
16 promotion, the disciplinary violation he received for sending demeaning text messages to
17 Mendez and Perez in response to their harassment. (Doc. 91 at 15). The suspension was
18 lifted for that violation but the violation on Atencia’s record was not expunged. (Doc. 90-
19 3 at 66).

20 It is undisputed that Roska and Skinner reviewed no other documents except
21 Atencia’s Promotional Eligibility Review Packet in determining his application for
22 promotion. (Doc. 90 at 5; Doc. 92 at 7). That packet did not refer to Atencia’s internal
23 complaint. (Doc. 90-3 at 100-118). Rather, it merely discussed the discipline Atencia
24 received during the investigation into the inappropriate text messages, and did not note that
25 Atencia was the one who filed the complaint that led to the investigation. (Doc. 90-3 at
26 102-103). Atencia has not offered evidence from which a jury could infer Roska and

27
28 ¹³ Atencia also complained to the EEOC, but that complaint could not have been the cause
of his non-promotion because the EEOC charge was filed after he was denied promotion.
(Doc. 89 at 14).

1 Skinner might otherwise have learned of the complaint.¹⁴ He therefore has failed to
2 demonstrate a dispute of material fact regarding causation because he has not demonstrated
3 a dispute regarding whether Roska and Skinner knew of the protected activity when they
4 chose not to promote him.

5 C. Equal Protection

6 Atencia's final claim is an Equal Protection Clause disparate treatment claim raised
7 under 42 U.S.C. § 1983. He alleges "MCSO has a practice of discriminating against people
8 of Hispanic descent. Officers who are denied a promotion under policy GC-12 are
9 predominantly Hispanic. Officers who are granted a promotion . . . [despite] their
10 disqualification under GC-12 are predominantly White." (Doc. 91 at 16). He alleges this
11 caused MCSO not to promote him. (Doc. 91 at 16). Atencia also claims that a Court-
12 appointed monitor in another case involving the MCSO, *Ortega Melendres v. Arpaio*, No.
13 CV-07-02513-PHX-GMS (D. Ariz. Oct. 2, 2013), *aff'd in part vacated in part sub nom.*,
14 *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015), has noted the MCSO's inconsistent
15 application of GC-12. (Doc. 91 at 16; Doc. 92 at 123).

16 "Section 1983 is not itself a source of substantive rights, but a method for
17 vindicating federal rights elsewhere conferred," such as the Equal Protection Clause.
18 *Sampson v. Cty. of L.A. by and through L.A. Cty. Dep't of Child. & Fam. Servs.*, 974 F.3d
19 1012, 1018 (9th Cir. 2020) (quotation marks and citation omitted). "The Equal Protection
20 Clause of the Fourteenth Amendment commands that no State shall 'deny to any person
21 within its jurisdiction the equal protection of the laws,' which is essentially a direction that
22 all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living*
23 *Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Pyle v. Doe*, 457 U.S. 202, 216 (1982)). "The
24 central inquiry in an Equal Protection Clause claim is whether a government action was
25 motivated by a discriminatory purpose." *Ballou v. McElvain*, 14 F.4th 1042, 1050 (9th Cir.
26 2021) (citation omitted), *amended on denial of reh'g en banc*, --- F.4th ---, 2022 WL

27 ¹⁴ Indeed, Atencia admits Roska and Skinner were not involved in the investigations related
28 to his disciplinary violations and only contends they learned of the investigations from the
Promotional Eligibility Review Packet. (Doc. 92 at 7). He has not claimed Roska and
Skinner had notice of the internal complaint that gave rise to one of the investigations.

1 891791, at *5 (9th Cir. Mar. 24, 2022). A plaintiff may establish discriminatory purpose
2 by producing “‘direct or circumstantial evidence demonstrating that a discriminatory
3 reason more likely than not motivated’ the defendant and that the defendant’s action
4 adversely affected the plaintiff in some way.” *Pac. Shores Props., LLC v. City of Newport
5 Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013) (quoting *McGinest v. GTE Serv. Corp.*, 360
6 F.3d 1103, 1122 (9th Cir. 2004)). But “[w]here direct evidence is unavailable, plaintiffs
7 can, and frequently do, rely on the burden-shifting framework set out in *McDonnell
8 Douglas Corp. v. Green.*” *Ballou*, 2022 WL 891791, at *5.

9 Atencia offers three items of evidence which he argues tend to show Defendants
10 discriminated against him. First, he points out that the independent monitor in *Melendres*
11 has noted the inconsistent application of Policy GC-12 as recently as 2018.¹⁵ (Doc. 91 at
12 16). For example, the monitor reported “concern[.]” with the MCSO’s promotion of
13 persons with disciplinary histories. (Doc. 92 at 133). The statements about the MCSO by
14 the monitor offered by Atencia do provide further historical pedigree to the MCSO’s
15 inconsistent application of Policy GC-12. However, contrary to Atencia’s assertion, the
16 statements do not show “MCSO has a practice of discriminating against people of Hispanic
17 descent.” (Doc. 91 at 16). The monitor’s statements offered by Atencia have nothing to
18 do with race discrimination. Rather, they merely show that exceptions to Policy GC-12
19 may have been distributed inconsistently in the past. Moreover, *Melendres* concerned race
20 discrimination in policing, not discrimination in employment. *See Melendres*, 784 F.3d at
21 1257-58.

22 Second, Atencia offers an exhibit that he claims shows most officers denied
23 promotion pursuant to Policy GC-12 are Hispanic. (Doc. 91 at 16; Doc. 92 at 144). The
24 document offered by Atencia purports to demonstrate that eleven persons were denied
25 promotion under Policy GC-12 between August 2019 and February 2020, and that four
26 were White non-Hispanic and seven were Hispanic, including Atencia. (Doc. 92 at 144).

27 _____
28 ¹⁵ Defendants objected that Atencia failed to disclose some of the monitor’s reports offered
in support of Atencia’s opposition to summary judgment. (Doc. 93 at 3). The Court will
not consider the undisclosed reports for the reasons discussed in Part I.

1 Atencia has not identified the author of the document, its source, or its date of production.¹⁶

2 Third, Atencia notes that the majority of persons promoted despite violating Policy
3 GC-12 are White non-Hispanic. (Doc. 91 at 16). Of the 14 employees promoted despite
4 violating Policy GC-12 (either by having three or more sustained violations, one Category
5 6 violation, or both), eight were White non-Hispanic, four were Hispanic, one was Black
6 non-Hispanic, and one was Asian Pacific Islander. (Doc. 90-4 at 43-45).

7 For their part, Defendants argue “Plaintiff was denied a promotion based on four
8 sustained allegations of misconduct.” (Doc. 89 at 15-16). Defendants claim that all
9 persons who were not promoted by exception from Policy GC-12 were worthy of exception
10 based on the individual facts in their promotional eligibility review packets. (Doc. 89 at
11 15). Defendants also note, of the ten employees promoted from 2017 to 2020 despite
12 having three or more sustained violations, six identified as non-White. (Doc. 89 at 16).
13 Defendants argue Roska and Skinner did not intend to discriminate against Atencia and
14 claim Roska and Skinner could not have discriminated against Atencia because they did
15 not know his race. (Doc. 93 at 10-11).

16 At best, Defendants arguments demonstrate the existence of a dispute of material
17 fact regarding whether MCSO discriminated against Atencia. It is genuinely disputed
18 whether Atencia was qualified for promotion by exception from Policy GC-12 and whether
19 Roska and Skinner intended to discriminate against Atencia based on his race by failing to
20

21
22
23
24

¹⁶ Defendants responded to Plaintiff’s use of the document in their Reply in Support of
25 Their Motion for Summary Judgment, but did not object to the document or contest its
26 admissibility. (Doc. 93 at 3) (“While the snapshot relied on by Plaintiff of employees who
27 were denied a promotion does list more employees who self-identified as Hispanic, that is
28 only one piece of a very large puzzle.”). Because Defendants did not object to the exhibit,
the Court will assume for the purpose of summary judgment that the document would be
admissible at trial. Summary judgment is a trial on paper. As at trial, parties are expected
to object to inadmissible evidence to present the issue to the Court. *See Ballen v. City of
Redmond*, 466 F.3d 736, 745 (9th Cir. 2006) (“A trial court may only consider admissible
evidence in ruling on a motion for summary judgment.”); LRCiv 7.2(m)(2) (setting forth
the procedure for objections to admission of evidence on written motions).

1 grant him an exception.¹⁷ Summary judgment will therefore be denied.¹⁸

2 **CONCLUSION**

3 For the reasons set forth above, Defendants’ Motion for Summary Judgment (Doc.
4 89) will be granted in part and denied in part. Plaintiff’s Motion to Strike Portions of
5 Defendants Reply in Support of Their Motion for Summary Judgment (Doc. 95) will be
6 granted.

7 Accordingly,

8 **IT IS ORDERED** Defendants’ Motion for Summary Judgment (Doc. 89) is
9 **GRANTED IN PART**. Summary judgment is granted in favor of Defendants pursuant to
10 Federal Rule of Civil Procedure 56 on Plaintiff’s retaliation claim. Summary judgment is
11 denied on Plaintiff’s claims for employment discrimination under Title VII and for
12 violation of the Equal Protection Clause under 42 U.S.C. § 1983.

13 **IT IS FURTHER ORDERED** Plaintiff’s Motion to Strike Portions of Defendants
14 Reply in Support of Their Motion for Summary Judgment (Doc. 95) is **GRANTED**.

15 **IT IS FURTHER ORDERED** all Motions in Limine are due no later than
16 **September 13, 2022**. Responses are due no later than **September 23, 2022**. No replies are
17 permitted unless ordered by the Court. Prior to filing any Motion in Limine, the parties
18 must confer and discuss the contents of each proposed motion. No Motion in Limine shall
19 be filed if opposing party does not dispute the relief requested.

20 **IT IS FURTHER ORDERED** the Joint Proposed Pretrial Order is due no later than
21 **October 4, 2022**.

22 ¹⁷ Defendants’ argument that Roska and Skinner could not determine Atencia’s race from
23 the name in his review packet, Antonio Luis Atencia-Salome, appears implausible.
24 Defendants use the websites, “Houseofnames.com” and “Behindthename.com,” to support
25 their argument that Roska and Skinner did not know Atencia’s race or national origin (Doc.
26 93 at 10-11), but they offer no evidence that Roska and Skinner used the websites. Even
27 if it were plausible that Roska and Skinner would not have inferred, or at least been aware
28 of the possibility, that a person named Antonio Luis Atencia-Salome is Hispanic, or there
were evidence Roska and Skinner relied on the websites provided by the defense,
Defendants have merely created a dispute of fact regarding what Roska and Skinner knew
and intended when they did not promote Atencia.

¹⁸ In addition to withstanding the motion for summary judgment with direct evidence of
discrimination, Atencia likely could also show a dispute of material fact under the
McDonnell Douglas test for the reasons set forth in Part II-A. *See Ballou*, 2022 WL
891791, at *5.

1 **IT IS FURTHER ORDERED** the parties shall review the Court’s standard Juror
2 Questionnaire (available on the Court’s website) and each party is to file **NO MORE**
3 **THAN FIVE PROPOSED QUESTIONS** to be added to the standard Juror Questionnaire
4 no later than **October 4, 2022**. Each proposed question shall stand alone and shall not
5 contain sub-parts.

6 **IT IS FURTHER ORDERED** the parties shall file a very brief Joint Statement of
7 the Case, that will be incorporated into the Juror Questionnaire, no later than **October 4,**
8 **2022**.

9 **IT IS FURTHER ORDERED** the parties shall file a second Joint Statement of the
10 Case, of no more than two short paragraphs that will be read to the jury, no later than
11 **October 18, 2022**.

12 **IT IS FURTHER ORDERED** no later than **October 18, 2022**, the parties shall file
13 and submit via email (silver_chambers@azd.uscourts.gov) in Word format proposed Jury
14 Instructions in compliance with the procedures available on the Court’s website, including
15 but not limited to: 1) a joint set of proposed jury instructions where they agree; 2) a separate
16 set of instructions (one for each party) where the parties do not agree; and 3) legal authority
17 supporting all proposed instructions whether the parties agree or not. Where the parties do
18 not agree, the opposing party shall clearly state its objection to the proposed instruction
19 and the proponent of the instruction shall provide a response in support of the proposed
20 instruction.

21 **IT IS FURTHER ORDERED** the parties shall jointly file a proposed form of
22 verdict, or if the parties do not agree, they are to separately file proposed forms of verdict
23 no later than **October 18, 2022**.

24 **IT IS FURTHER ORDERED** no later than **October 18, 2022**, the parties shall
25 deliver to chambers excerpts of the deposition testimony they propose to present as
26 witnesses at trial, in compliance with the procedures available on the Court’s website
27 (found in Deposition Designation Procedure for Judge Silver). The Plaintiffs are to
28 highlight in yellow the portions they wish to offer. and the Defendants are to highlight in

1 blue those portions they wish to offer. If either party objects to any proposed testimony, a
2 specific and concise objection (e.g., “Relevance, Rule 402”) shall be placed in the margin
3 adjacent to the proposed testimony. The party proposing the testimony to which there is
4 an objection is to respond to the objection that has been placed in the margin by the
5 objecting party.

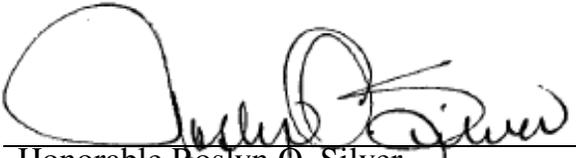
6 **IT IS FURTHER ORDERED** a final pretrial conference is set for **November 8,**
7 **2022 at 10 a.m.** at which time the Court will review with counsel the Juror Questionnaires.
8 The parties shall meet and confer prior to the pretrial conference regarding the Juror
9 Questionnaires and email to the Courtroom Deputy no later than noon on **November 7,**
10 **2022** a list of the jurors they agree should be stricken for cause, and any objections to jurors
11 they do not agree should be stricken for cause. **The parties shall not file this list.** The
12 Court will rule on any disputed jurors at the final pretrial conference.

13 **The parties will be supplied a disk containing the questionnaires approximately**
14 **one week prior to the final pretrial conference. Counsel shall bring a copy of the**
15 **questionnaires to the conference for review. Counsel are required to return the disk**
16 **to the Courtroom Deputy and destroy all copies of the questionnaires no later than**
17 **the last day of trial.**

18 **IT IS FURTHER ORDERED** trial to a jury is set for **November 15, 2022 at 8:30**
19 **a.m.**

20 **IT IS FURTHER ORDERED** the parties shall comply with the Exhibit Procedures
21 found on the Court’s website at www.azd.uscourts.gov / Judges’ Information / Orders,
22 Forms & Procedures for Hon. Roslyn O. Silver.

23 Dated this 29th day of March, 2022.

24
25
26 
27 Honorable Roslyn O. Silver
28 Senior United States District Judge