. In mid-2005, Allen completed Sebastian's mid-year review using a 1 to 5 rating system that defined a "3" as "satisfactory performance," a "4" as "excellent performance," and a "5" as "outstanding performance." (Pl. 56.1 Resp. P 43.) Sebastian received four 5s, four 4s, two 3s, and no 2 or 1 ratings. [19] (*Id.*) Subsequently, on Sebastian's 2005 year-end review, Hall gave Sebastian two 5s, four 4s, two 3s, and no 2 or 1 ratings. (*Id.*) Neither evaluation affected his pay or resulted in discipline. (*Id.*)

. On two occasions, one in 2005 and a second in 2006, Hall assigned Sebastian to complete inspections of citizen complaints on the same day that he gave Sebastian the assignment. (Pl. 56.1 Resp. P 57.)

. While Sebastian worked a total of three to four hours of overtime in November 2005 and April 2006, processing for the overtime payments was delayed until October 2006. (Pl. 56.1 Resp. P 53.) Sebastian discussed the matter with Parks and filed a grievance regarding the payment of overtime, but never informed [*57] Allen of the payment delays. (*Id.*) Sebastian has yet to receive compensation for forty-three minutes of overtime worked between March 2007 and July 2007, and has worked with his union steward to recover payment. (*Id.*)

19 Sebastian also testified that Allen gave Sebastian a "lower" performance review as part of his 2004 year-end performance evaluation. (Pl. 56.1 Resp. P 42.) However, he failed to produce the review or explain how the 2004 year-end evaluation was lower than his previous evaluations. (Pl. 56.1 Resp. P 42.)

Alleged Witness Retaliation

Sebastian believes that certain witnesses he intended to call to support his claim were retaliated against by the City. Specifically, he claims that Mohammed Sayeed ("Sayeed"), Bernard Simmons ("Simmons"), Donald Gibson ("Gibbons"), and James Hopkins ("Hopkins") experienced retaliation.

As for Sayeed, in October 2007, Sebastian withdrew Sayeed from his list of potential witnesses because Sebastian says he was actively avoiding service. (Allen 56.1 Resp. P 84; City Defs. 56.1 Resp. P 84.) Nothing more is contained in the record.

As for Simmons, at his deposition Simmons testified as to his belief that certain people began to "giv[e] . . . him a [*58] hard time" after he met with the City Defendants' attorneys. (Allen 56.1 Resp. P 85; City Defs. 56.1 Resp. P 85; Pl. 56.1 Resp., Ex. 5, Simmons Dep. 183.) Specifically, Simmons claimed that, after the meeting, Hall threatened him with, among other things, physical violence. (Pl. 56.1 Resp., Ex. 5, Simmons Dep. 272-73.) In addition, Simmons claims that Hammersmith told Simmons that he wanted to put Simmons in STF permanently. (Allen 56.1 Resp. P 85; City Defs. 56.1 Resp. P 85; Pl. 56.1 Resp., Ex. 5, Simmons Dep. 271-72.) Subsequently, Simmons explained that he believed Hammersmith was putting him there so he "could save his people from going" to STF. (Allen 56.1 Resp. P 85; City Defs. 56.1 Resp. P 85; Pl. 56.1 Resp., Ex. 5, Simmons Dep. 271-72.) Simmons could not recall whether this alleged conversation with Hammersmith occurred prior to or after his meeting with the City Defendants' attorneys. (Allen 56.1 Resp. P 85; City Defs. 56.1 Resp. P 85; Pl. 56.1 Resp., Ex. 5, Simmons Dep. 271-72.) Both Hammersmith and Hall deny making such comments or threats. (City Defs. 56.1 Resp., Ex. M, Hammersmith Aff. P 14, Ex. P, Hall Aff. P 11.)

Sebastian also identified Donald Gibson as a potential [*59] witness in this action. (Allen 56.1 Resp. P 86; City Defs. 56.1 Resp. P 86.) At his deposition, Gibson testified as to his belief that, after he met with the City Defendants' lawyers, people tried to fire him and that his supervisor, Tom Ryan, harassed him, gave him increased paperwork, and gave him "lame duck" assignments. (Allen 56.1 Resp. P 86; City Defs. 56.1 Resp. P 86; Pl. 56.1 Resp., Ex. 25, Gibson Dep. 271-72.) Gibson was subsequently terminated in 2007. (Allen 56.1 Resp. P 86; City Defs. 56.1 Resp. P 86.) Loeff denies that Gibson was terminated because Sebastian identified him as a witness and submits that he was terminated because of a series of performance issues and insubordination resulting in progressive discipline. (Allen 56.1 Resp. P 86; City Defs. 56.1 Resp. P 86; City Defs. 56.1 Resp., Ex. FF, Loeff Aff. P 8.) Sebastian asserts, however, that a majority of the discipline occurred at some point after Gibson met with the City Defendants' attorneys. (Pl. Sur-Response Mem. 15; Pl. Sur-Response, Ex. 24, Notice of Progressive Discipline; Pl. 56.1 Resp., Ex. 25, Gibson Dep. 160.)

Finally, Sebastian also identified James Hopkins, an electrical inspector for the Aviation Department, [*60] as a potential witness. (Allen 56.1 Resp. P 87; City Defs.

56.1 Resp. P 87.) On October 31, 2005, the City withdrew a previously extended job offer to Hopkins that would have allowed him to move from the Aviation Department to the EB Department. (Allen 56.1 Resp. P 87; City Defs. 56.1 Resp. P 87.) Loeff maintains that he withdrew the offer because he discovered that Hopkins was also working outside the City as an electrical inspector and had falsely certified that he fixed certain violations. (Allen 56.1 Resp. P 87; City Defs. 56.1 Resp. P 87; City Defs. 56.1 Resp., Ex. FF, Loeff Aff. P 7.) In his deposition, Loeff testified that he arrived at this conclusion as a result of his conversations with Allen and Hopkins as well as his review of certain documents. (Pl. Sur-response Mem. 14-15; Pl. Sur-response, Ex. 23, Loeff Dep. 138-65, 180-81, 249-50, 269-74.) He could not recall the source of his information regarding Hopkins' allegedly false certification. (Pl. Sur-response, Ex. 23, Loeff Dep. 145-65, 249-50, 269-74.) According to Hopkins, on September 14, 2007, the City also imposed a twenty-nine day suspension upon Hopkins because Hopkins had unpaid parking tickets and had allegedly [*61] failed to execute a Parking Ticket Payment Agreement Plan. (Allen 56.1 Resp. P 87; City Defs. 56.1 Resp. P 87.) Six days later, the suspension was unexpectedly rescinded. [20] (Allen 56.1 Resp. P 87; City Defs. 56.1 Resp. P 87.)

20 In his statement of additional facts, Sebastian further submits that the City rescinded the suspension "[t]hree days after the lawyers in this case appeared at a status hearing and obtained additional time to take discovery on, among other things, Hopkins' suspension." (Allen 56.1 Resp. P 87; City Defs. 56.1 Resp. P 87.) This proposition is not supported by Sebastian's citation to the record and, therefore, will not be considered by the Court.

United States v. Sorich

In 2006, the United States Attorneys Office prosecuted Robert Sorich ("Sorich") as well as others, for participating in a scheme that provided City jobs and promotions in exchange for campaign work or other favored statuses. (Allen 56.1 Resp. P 38; City Defs. 56.1 Resp. P 38; Pl. 56.1 Resp., Ex.40, Indictment.) At the criminal trial, Patricia Molloy ("Molloy"), Mary Jo Falcon ("Falcon"), [21] and Daniel Katalinic ("Katalinic") testified extensively about certain hiring practices they observed during [*62] the course of their employment with the City. [22] (Allen 56.1 Resp. PP 40-66; City Defs. 56.1 Resp. PP 40-66.)

21 Molloy and Falcon asserted their *Fifth Amendment* right against self-incrimination during their respective depositions in this matter. (Allen 56.1 Resp. PP 40, 46; City Defs. 56.1 Resp. PP 40, 46.)

22 In his 56.1(b)(3)(B) Statement of Facts, Sebastian devotes twenty-six lengthy paragraphs to the discussion of Molloy, Falcon, and Katalinic's testimony and/or other participation in the Sorich criminal trial. Because this information is largely irrelevant to the facts of Sebastian's case (as discussed in detail below), the Court has chosen to include a synopsis of the facts contained therein. It has, however, considered all the supported and admissible facts contained within the twenty-six paragraphs.

Molloy worked as Sorich's secretary at the Mayor's Officer of Intergovernmental Affairs ("IGA") until Sorich left the office. (Allen 56.1 Resp. PP 40-41; City Defs. 56.1 Resp. PP 40-41.) At the Sorich criminal trial, Molloy testified that, from 1993 onwards, she compiled a database of information regarding job or promotion requests from coordinators, wards, or unions for over 5,734 [*63] individuals (the "Clout List"). (Allen 56.1 Resp. PP 42-44; City Defs. 56.1 Resp. PP 42-44.) Molloy would delete names from the database if the individual for whom the job was requested died or moved, or if the political coordinator or other individual who requested the job for the individual no longer wanted the person to obtain the job. (Allen 56.1 Resp. P 43; City Defs. 56.1 Resp. P 43.) Molloy also maintained paper index card files that documented similar information. (Allen 56.1 Resp. P 45; City Defs. 56.1 Resp. P 45.) In 2002, Sorich told Molloy to shred the paper files regarding the job seekers. (Allen 56.1 Resp. P 45; City Defs. 56.1 Resp. P 45; Pl. Ex. 45, Falcon Test. 4111.) When asked at her deposition for the current action as to whether she observed various personnel officers from different city departments meet with Sorich, Molloy asserted her *Fifth Amendment* right not to testify. (Allen 56.1 Resp. P 45; City Defs. 56.1 Resp. P 45; Pl. 56.1 Resp., Ex. 44, Molloy Dep. 64-65.)

At the Sorich criminal trial, Falcon testified extensively about her experiences manipulating the hiring process while serving as Director of Personnel for the Department of Sewers and Department of [*64] Water Management. (Allen 56.1 Resp. PP 49-59; City Defs. 56.1 Resp. PP 49-59.) For instance, Falcon explained that, during her transition period into the Department of Sewers position, Falcon's predecessor told her that the mayor's office, not the department commissioner, was her boss with respect to the hiring process, that Sorich was her point of contact at the IGA and if anyone asked about IGA's involvement in the hiring process, Falcon should always deny the existence of such involvement. (Allen 56.1 Resp. P 52; City Defs. 56.1 Resp. P 52.) Falcon also testified that the IGA became involved in

many of the hiring sequences she participated in, that she met with Sorich several times, that she received names of certain individuals from IGA, and that, during some of the meetings, Sorich would refer to note cards or a list with typewritten names (given to Sorich by Molloy) when giving Falcon the names. (Allen 56.1 Resp. PP 51-56; City Defs. 56.1 Resp. PP 51-56; Pl. 56.1 Resp., Ex. 39, Falcon Test. 272-73.) Falcon would then manipulate the hiring process (including interviews and ratings) to ensure that the identified people received the open positions. (Allen 56.1 Resp. PP 56-57; City [*65] Defs. 56.1 Resp. PP 56-57.)

Katalinic, who was a full-time City employee from 1970 through 2003, was the Deputy Commissioner of Street Operations for the Streets & Sanitation Department from 2000 through 2003. (Allen 56.1 Resp. P 61; City Defs. 56.1 Resp. P 61.) From 2000 through 2004, Katalinic was also the head of a political organization that included City employees and assisted in campaign efforts for certain political candidates (the "Katalinic organization"). (Allen 56.1 Resp. P 61; City Defs. 56.1 Resp. P 61; Pl. 56.1 Resp., Ex. 41, Katalinic Revised Plea Agreement; Pl. 56.1 Resp., Ex. 47, Katalinic Test. 2000-01, 2005-08.) During the *Sorich* criminal trial and in his revised plea agreement, Katalinic explained: how he submitted lists to Sorich that contained requests for City jobs and promotions for his political workers; his understanding that the interview process would be manipulated through Sorich and other IGA officials in favor of politically-affiliated candidates; and his knowledge that IGA communicated with the Streets & Sanitation Commissioner's office about who would be hired, and that the personnel department would then implement those selections. (Allen 56.1 Resp. [*66] PP 64-66; City Defs. 56.1 Resp. PP 64-66.)

Hiring Within the Department of Buildings

Allen testified that he does not know and never had any communication regarding the 2004 supervisor interviews with Falcon or with Sorich. (Pl. 56.1 Resp. P 19.)

At the *Sorich* criminal trial, Kozicki testified that, on one occasion in 2004, he changed his rating form during a hiring sequence to fill seven building inspector positions for the Department of Buildings. (Allen 56.1 Resp. P 60; City Defs. 56.1 Resp. P 60.) Specifically, Kozicki testified that, prior to the interviews, Kaderbek made it clear to Kozicki that Kaderbek wanted two individuals - Andrew Ryan ("Ryan") and Kevin Sexton - hired. (Allen 56.1 Resp. P 60; City Defs. 56.1 Resp. P 60.) According to Kozicki, Kaderbek advocated for the two individuals, both of whom were the sons of important union officials, because he believed that they would help with union negotiations and to accomplish some other goals they were trying to achieve. (Allen 56.1 Resp. P 60; City Defs. 56.1 Resp. P 60; Pl. 56.1 Resp., Ex. 75, Kozicki Test. 3070; Pl. 56.1 Resp., Ex. 15, Kozicki Dep. 132-33.) At some point after the interviews and the rating scores were tallied, [*67] Ciaravino told Kozicki that Ryan's scores did not place him in the top seven candidates and that Kozicki had two choices: change his score and resubmit the paperwork or re-interview the candidates. (Allen 56.1 Resp. P 60; City Defs. 56.1 Resp. P 60; Pl. 56.1 Resp., Ex. 75, Kozicki Test. 3099; Pl. 56.1 Resp., Ex. 15, Kozicki Dep. 133-34.) Kozicki chose the former option, changed his scores, and Ryan was ultimately hired. (Allen 56.1 Resp. P 60; City Defs. 56.1 Resp. P 60; Pl. 56.1 Resp., Ex. 15, Kozicki Dep. 133-34.)

STANDARD OF REVIEW

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. In determining whether a genuine issue of fact exists, the Court must view the evidence and draw all reasonable inferences in favor of the party opposing the motion. *Bennington v. Caterpillar Inc., 275 F.3d 654, 658 (7th Cir. 2001)*; *see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. However, the Court will "limit its analysis of the facts [*68] on summary judgment to evidence that is properly identified and supported in the parties' [Local Rule 56.1] statement." *Bordelon v. Chicago Sch. Reform Bd. of Trustees, 233 F.3d 524, 529 (7th Cir. 2000)*. Where a proposed statement of fact is supported by the record and not adequately rebutted, the court will accept that statement as true for purposes of summary judgment. An adequate rebuttal requires a citation to specific support in the record; an unsubstantiated denial is not adequate. *See Albiero v. City of Kankakee, 246 F.3d 927, 933 (7th Cir. 2001)*; *Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 887 (7th Cir. 1998)* ("'*Rule 56* demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.'").

DISCUSSION

I. Evidentiary Issues and Sebastian's Motion to Strike

As a preliminary matter, the Court must address two issues raised by the parties in conjunction with their respective summary judgment submissions.

First, Sebastian has filed a Motion to Strike portions of Allen's and City Defendants' reply pleadings, asserting, [*69] among other things, that they impermissibly

raised new arguments in their respective reply briefs. Having considered the parties' arguments, the Court grants in part and denies in part Sebastian's Motion to Strike consistent with this Opinion. Specifically, the motion is denied to the extent that Defendants' arguments respond to the arguments raised by or evidence presented by Sebastian in his response to Allen's and the City Defendants' motions for summary judgment. The motion is granted with respect to new matters raised by Defendants that could have been introduced in their opening briefs and cannot be characterized as "responsive." *See TAS Distrib. Co. v. Cummins Engine Co., 491 F.3d 625, 630-31 (7th Cir. 2007)* ("[A]rguments first made in the reply brief are waived"); *Autotech Techs., Ltd. P'ship v. Automationdirect.com, Inc., No. 05 C 5488, 249 F.R.D. 530, 2008 U.S. Dist. LEXIS 23499, at *18-21 (N.D. Ill. Mar. 25, 2008).*

Second, Allen and the City Defendants argue that Sebastian's testimony regarding the May 2004 conversation - specifically, Allen's alleged comments regarding Sebastian's national origin and political activity - should be disregarded or stricken because they directly contradict [*70] Sebastian's prior statements. Having considered the cited testimony in the context of Sebastian's prior statements, the Court concludes that Sebastian's testimony creates an issue of credibility that is best left to the trier of fact. *See Flannery v. Recording Indus. Ass'n of Am., 354 F.3d 632, 638-40 (7th Cir. 2004).* With respect to the first statement - regarding national origin alone - City Defendants point out that Sebastian's testimony contradicts his sworn statements to the EEOC, sworn interrogatory answers, and statements in various interviews with and letters to the EEOC, the union, and City officials, certainly making the statements questionable. Such statements, however, standing alone, do not create the inherent inconsistency that necessitates striking his subsequent deposition testimony. *See id. (quoting Bank of Illinois v. Allied Signal Safety Restraint Sys., 75 F.3d 1162, 1169-70 (7th Cir. 1996))* ("'[A] definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence.'").

The second statement - regarding national origin and political activity - presents a closer [*71] question for the Court due to its tenuous nature. In his first deposition, Sebastian testified as follows with respect to the May 2004 conversation:

> Q: Did [Allen] say anything then?
>
> A: He told me right away Tom, you are Indian. You will never get promoted.
>
> Q: Did you say anything?
>
> A: No, that is it. That is what he told me.
>
> Q: That was the end of the conversation?
>
> A: Yes.

(Pl. 56.1 Resp., Ex. 2, Sebastian Dep. 48.) Subsequently, in his second set of interrogatories, when asked by the City "to state each fact . . . supporting the allegation that [each individual defendant] . . . was personally involved in violating Sebastian's freedom of association," Sebastian made no reference to the alleged May 2004 conversation. (Pl. 56.1 Resp. P 85.) In his fourth deposition, however, when asked if he remembered anything else about the May 2004 conversation, aside from the alleged national origin statements, Sebastian replied, "No. [Allen] said, 'Tom, you are Indian. You're never going to get promoted because you are not politically involved.' Something he mentioned to me." (City Defs. 56.1, Ex. I, Sebastian Dep. 693-94.) Finally, the Court notes that, when asked about the May 2004 conversation in his [*72] deposition, Allen testified that Sebastian told Allen he was applying for the promotion and that Patterson told Sebastian that Sebastian would receive the promotion. (Pl. 56.1 Resp., Ex. 8, 190-94.) Allen also recalled that Sebastian then began to lay what appeared to be cancelled checks on Allen's desk and commented on how he had contributed to political funds. (Pl. 56.1 Resp., Ex. 8, 193-94.)

It is well-established that "parties cannot thwart the purposes of *Rule 56* by creating 'sham' issues of fact with [statements] that contradict their prior depositions." *Bank of Illinois v. Allied Signal Safety Restraint Sys., 75 F.3d 1162, 1168 (7th Cir. 1996).* The Court is mindful however, that it must "appl[y] this doctrine with great caution"; "[a] definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence." *Flannery, 354 F.3d at 638* (internal quotations omitted). In this case, under either party's account of what occurred, the testimony illustrates that there was more to the 2004 conversation than Sebastian initially recalled. If the jury believes Sebastian, they could conclude [*73] that Allen commented on Sebastian's national origin, the level of his political activity, or both characteristics. If the jury believes Allen, however, they could conclude that Sebastian, not Allen, commented on his own political contributions before Allen ended the discussion. Thus, while it is true that Sebastian's statements may be said to create the type of contradiction that would warrant this Court striking the subsequent statements, Allen's testimony transforms the issue into one of credibility. Because "[c]redibility and

weight are issues of fact for the jury," the Court will not "usurp the jury's role" in making such determinations. *Id. at 638.* For the reasons stated above, the Court will not strike Sebastian's testimony regarding the May 2004 conversation and deems these facts disputed.

II. Race and National Origin Discrimination Under Title VII (Count 1) [23]

> 23 Allen also moves for summary judgment with respect to Counts I and II, asserting that Sebastian cannot maintain a Title VII claim against Allen because Allen and the other individual defendants are not amenable to suit in their personal capacity under *Title VII.* The allegations within Counts I and II of Sebastian's Second [*74] Amended Complaint are directed at the City, not the individual defendants. Nevertheless, the Court notes that, to the extent that Sebastian has attempted to assert discrimination or retaliation claims against Allen, Kaderbek, or Kozicki in their individual capacity, such claims would fail because *Title VII* does not impose individual liability on supervisory employees. *See Silk v. City of Chicago, 194 F.3d 788, 797 n.5 (7th Cir. 1999).*

Sebastian maintains that the City discriminated against him on the basis of his national origin (Indian) and race (Asian) by failing to promote him to the supervisor position in 2004 in violation of *Title VII.* For the reasons set forth below, City Defendants' Motion for Summary Judgment is denied with respect to Sebastian's national origin and race discrimination claims.

A. *Discrimination Based on National Origin*

A plaintiff may prove employment discrimination under *Title VII* if he either: (1) presents sufficient evidence of discriminatory motivation to create a triable issue of fact (the "direct method") or (2) establishes a *prima facie* case of discrimination under the "burden shifting" method articulated in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)* [*75] (the "indirect method"). *Sublett v. John Wiley & Sons, 463 F.3d 731, 736-37 (7th Cir. 2006).*

Under the "direct method," a plaintiff may use two different kinds of evidence to demonstrate that the employment was the result of discrimination: (1) "direct evidence" or (2) "circumstantial evidence." *Phelan v. Cook County, 463 F.3d 773, 779 (7th Cir. 2006).* Direct evidence of discrimination is evidence which, if believed by the trier of fact, "will prove the particular fact in question without reliance or inference or presumption." *Miller v. Borden, Inc., 168 F.3d 308, 312 (7th Cir. 1999) (quoting Cowan v. Glenbrook Sec. Servs., Inc., 123 F.3d 438, 443 (7th Cir. 1997))* (internal quotation omitted). The typical direct evidence situation is an admission by the decision maker that he acted upon the discriminatory animus. *Phelan, 463 F.3d at 779 (7th Cir. 2006).* Nevertheless, direct evidence "does not require 'a virtual admission of illegality'" or an explicit reference to the plaintiff's protected status. *Sheehan v. Donlen Corp., 173 F.3d 1039, 1044 (7th Cir. 1999).*

Sebastian argues that he has presented sufficient evidence under the direct method to establish a question of fact regarding the [*76] City's discriminatory intent. Specifically, Sebastian contends that Allen's statement and actions constitute direct evidence of discrimination and that this discriminatory animus may be imputed to the City. Words, actions, and motivations of an employee without formal authority to materially alter the terms and conditions of a plaintiff's employment may be imputed to the decision maker if the employee without formal authority exercises "singular influence" over a decision maker who does have such power. *Rozskowiak v. Vill. of Arlington Heights, 415 F.3d 608, 612-13 (7th Cir. 2005).* Singular influence is defined as "so much influence as to basically be herself the true 'functional[]. . . decision-maker.'" *Brewer v. Bd. of Trs. of Univ. of Ill., 479 F.3d 908, 917 (7th Cir. 2007) (quoting Little v. Ill. Dep't of Revenue, 369 F.3d 1007, 1015 (7th Cir. 2004))* (alteration in original). "In some situations, the influence can be exercised by supplying misinformation or failing to provide relevant information to the person making the employment decision." *Id.* Where the decision maker conducts only a perfunctory or "[m]ere paper review" of the non-decision maker's recommendation, that review [*77] will not shield the employer from liability if that recommendation was motivated by unlawful bias. *See id. at 918.* The first inquiry, therefore, is whether the evidence indicates discriminatory animus on the part of Allen; and second, if so, whether this alleged animus may be imputed to Kaderbek, who possessed the final decision-making authority for employment decisions made within the Department.

Sebastian points to Allen's comment regarding Sebastian's national origin during their May 2004 conversation. Generally, derogatory statements based on an employee's national origin can be direct evidence of discriminatory animus if the statement is made by the decision maker (or by a person who influences the decision maker) and the remark was made around the time of and in relation to the employment decision at issue. *See Rozskowiak, 415 F.3d at 612.* The City contends that, because Allen did not explicitly say that he would not hire Sebastian on account of his national origin, Sebastian has failed to establish a sufficient link between Allen's comments and the decision not to promote Sebastian. Yet, a statement need not explicitly refer to an ad-

mission of illegal motivation for a reasonable [*78] jury to conclude that it is evidence of discriminatory motive. *See Sheehan, 173 F.3d at 1044*. According to Sebastian's account of the May 2004 conversation, Allen's statement was made during a discussion regarding Sebastian's application for the 2004 supervisor position and in response to Sebastian's narration of his qualifications with respect to the position. Further, Allen subsequently served on the interview panel for the supervisor position discussed during the May 2004 meeting and, along with Kozicki, conducted Sebastian's interview for the position. Finally, the Court notes that, to the extent that the discriminatory nature of this statement is ambiguous, "the task of disambiguating ambiguous utterances is for trial, not for summary judgment." *Phelan, 463 F.3d at 782* (internal quotations omitted). Thus, the Court, drawing all reasonable inferences in favor of Sebastian, concludes that a reasonable jury could find that Allen's alleged May 2004 statement is evidence of discriminatory animus.

This does not, however, end the Court's inquiry, as Sebastian's claim cannot survive unless a reasonable jury could conclude that the alleged animus may be imputed to the City, and to Kaderbek [*79] specifically. The City argues, without legal support or elaboration, that the alleged animus cannot be imputed because both Allen and Kozicki interviewed Sebastian for the position and Sebastian cannot show that Allen's remark influenced Kozicki's or Kaderbek's decisions. Despite such assertions, the Court concludes that Sebastian has put forth sufficient evidence to create a genuine issue of material fact as to whether and to what extent Allen was involved in the decision not to promote Sebastian and whether Allen's alleged animus motivated the employment decision.

In this case, it is undisputed that Allen and Kozicki interviewed eleven of the fifteen candidates for the supervisor position, including the three successful candidates and Sebastian. It is also undisputed that Kaderbek relied upon Allen's, Bush's, and Kozicki's interview notes, recommendations, and ratings when approving the final decision regarding the selected candidates. The record reveals questions of fact, however, as to whether and to what extent Allen: (1) manipulated the interview process in a manner adverse to Sebastian by, for instance, asking Sebastian different technical questions as compared to all of the [*80] other candidates or questions that were not included on the Code questions list; (2) influenced Kozicki's evaluation through the alleged manipulations and by telling Kozicki that Sebastian answered technical questions incorrectly when he did not; (3) met with Kozicki and Bush after all of the interviews to discuss all the candidates; and (4) ultimately affected the interview recommendations, notes, and ratings sent to Kaderbek through his alleged acts. The record also reveals a question of fact as to whether Sebastian possessed the requisite degree of "singular influence" over Kaderbek, the ultimate decisionmaker in this case. *See Brewer, 479 F.3d at 917*. While it is undisputed that Kaderbek reviewed and relied on the interviewers' recommendations, the record is unclear as to the events surrounding Ciaravino's drafting of the notification letters. Thus, while evidence indicates that Allen, Kozicki, Bush, and Kaderbek were all involved, at least peripherally, in the process that resulted in the decision not to promote Sebastian, there remains a question of fact as to the degree of Allen's influence and the adequacy of Kaderbek's independant investigations before the employment decision [*81] was made. *Compare Brewer, 479 F.3d at 920* (independent investigation conducted where decision maker examined a parking tag that plaintiff improperly modified to confirm that it had been altered).

Thus, the Court concludes that Sebastian has presented sufficient evidence to survive summary judgment with respect to his claim of discrimination on account of national origin.

B. *Discrimination Based on Race*

Sebastian also submits that the City denied Sebastian the promotion on account of his race. In support of this claim, Sebastian attempts to proceed under both the indirect and direct methods. Because it is dispositive, the Court will first address Sebastian's application of the burden-shifting, indirect method of proof. To establish a *prima facie* case for failure to promote under the "indirect method," the plaintiff must show that: (1) he is a member of a protected class; (2) he was qualified for the position sought; (3) he was denied the promotion; and (4) the promoted employee was not a member of the protected class and was not better qualified than the plaintiff. *Sublett, 463 F.3d at 737*. If the plaintiff establishes the *prima facie* case, the burden then shifts to the defendant to articulate [*82] a legitimate, non-discriminatory reason for the adverse action against the plaintiff. *Id.* Once such a reason is given, the burden then returns to the plaintiff to show that the employer's explanation was pretextual. *Id.* In this case, the City argues that summary judgment is appropriate because Sebastian cannot establish the fourth element of the *prima facie* case or that the City's proffered reasons for the denial of the promotion are pretextual.

With respect to the fourth element of the *prima facie* case - that the promoted employees were not better qualified - the City maintains that Sebastian cannot show that Hall, Hammersmith, and Reynolds were less qualified as compared to Sebastian because Sebastian performed poorly during his interview. [24] In [*83] support of this proposition, the City points to the ratings of Sebastian,

Hall, Hammersmith, and Reynolds. In addition, the City submits the testimony and affidavit of Kozicki and Allen in which they state that Sebastian answered interview questions poorly, that Sebastian did not respond fully to questions or provide concrete examples when specifically asked to do so, and that the successful candidates performed better as compared to Sebastian.

> 24 In support of its Motion for Summary Judgment, the City also submits that: (1) Kozicki's and Allen's accounts of the interview are corroborated by their interview notes; (2) Sebastian admitted to an EEOC investigator that he gave short answers during his interview; and (3) unlike Sebastian, each of the successful candidates had supervisory experience in the private sector. The Court will not consider these arguments, as they are based on extrinsic evidence. *See, e.g., Divane v. Sonak Elec. Contractors, Inc., No. 05 C 1211, 2008 U.S. Dist. LEXIS 1901, at *2 (N.D. Ill. Jan. 9, 2008).*

Generally, an employer may rely on subjective criteria, including a candidate's interview performance, when determining whether a candidate is qualified for the position [*84] at issue. *See Blise v. Antaramian, 409 F.3d 861, 868 (7th Cir. 2005).* This Court has found several disputes of material fact concerning events occurring during and after Sebastian's interview that create a genuine issue of fact as to whether Allen's and Kozicki's ratings for Sebastian and subsequent explanations regarding Sebastian's interview are accurate. *See* § IV(B); *see also* § II(A). Thus, similar to the reasons that justify denying summary judgment with respect to the national origin claim against the City and the political retaliation claim against Allen, there exists a genuine issue of fact regarding Sebastian's performance during his interview for the 2004 promotion and whether Sebastian was more qualified that Hammersmith, Hall, and Reynolds.

Sebastian has also create a genuine issue of material fact as to whether the City's proffered reason for the failure to promote is pretextual. "Pretext is a 'lie, specifically a phony reason for some action.'" *Sublett, 463 F.3d at 737.* "The issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons [*85] it offers." *Wade v. Lerner N.Y., Inc., 243 F.3d 319, 323 (7th Cir. 2001).* In this present case, the City maintains that Sebastian did not receive the promotion because Allen and Kozicki wanted to promote individuals who were knowledgeable about the Code, had ideas for the Department, could motivate and manage the employees, could communicate well, and could handle the stress of the job. Consequently, they did not promote Sebastian because he performed poorly during his interview and did not receive the highest scores. This argument essentially mirrors the City's argument regarding the fourth element of the *prima facie* case. As noted above, "[the Seventh Circuit] has . . . never held that a job interview must be scored according to some sort of objective criteria." *Blise, 409 F.3d at 868.* However, "the jury may, under some circumstances, reasonably consider subjective reasons as pretexts." *Giacoletto v. Amax Zinc Co., 954 F.2d 424, 427-28 (7th Cir. 1992); see also Healy v. City of Chicago, 450 F.3d 732, 744 n.16 (7th Cir. 2006)* ("[A] departure from [a standard list of questions] is suspicious."). In this case, the record presents several factual disputes with respect to the actions [*86] that surrounded Sebastian's interview. These factual disputes create a question of fact as to whether Allen and Kozicki honestly believed the reasons proffered. For instance, questions of material fact remain as to: (1) whether Allen asked Sebastian all eight Code questions, different technical questions as compared to all other candidates, and questions that were not included on the Code questions list; (2) whether Allen told Kozicki that Sebastian answered technical questions incorrectly when he did not; (3) whether Allen met with Kozicki and Bush after all of the interviews to discuss all the candidates; and (4) the circumstances surrounding Ciaravino's drafting of the notification letters.

In sum, the Court finds that there are genuine factual disputes as to whether Hall, Hammersmith, and Reynolds were better qualified as compared to Sebastian and whether the City's reasons for not promoting Sebastian are pretextual. Accordingly, the Court denies the City's Motion for Summary Judgment with respect to Sebastian's race discrimination claim. [25]

> 25 Sebastian submits multiple theories in support of his national origin and race discrimination claims. Having concluded that Sebastian has [*87] created a triable issue as to the national origin and race discrimination claims under the direct and indirect methods, respectively, the Court need not address the merits of Sebastian's additional arguments.

III. Retaliation Under Title VII (Count II)

To overcome the City's motion for summary judgment and establish a *prima facie* case of retaliation under *Title VII*, Sebastian may proceed under either the direct or indirect method of proof. *Sitar v. Ind. Dep't of Transp., 344 F.3d 720, 728 (7th Cir. 2003)* (*citing Stone v. City of Indianapolis Pub. Utils. Div., 281 F.3d 640 (7th Cir. 2002)).* Here, Sebastian attempts to proceed under both.

Under the direct method, the plaintiff must establish that: (1) he engaged in a protected activity; (2) he suffered an adverse employment action subsequent to this protected activity; and (3) a causal connection between the two. *Salas v. Wis. Dep't of Corr., 493 F.3d 913, 924 (7th Cir. 2007)* (*citing Sitar v. Ind. Dep't of Transp., 344 F.3d 720, 728 (7th Cir. 2003)*). In the absence of direct evidence, a plaintiff can succeed under the direct method by presenting sufficient circumstantial evidence such that a jury could infer retaliation. *Id.* Circumstantial [*88] evidence can include suspicious timing, ambiguous statements, differing treatment of similarly situated employees, personal animus, pretext, and other evidence which allows the jury to reasonably infer retaliation. *See Hemsworth v. Quotesmith.com, Inc., 476 F.3d 487, 491 (7th Cir. 2007)* (*citing Yong-Qian Sun v. Bd. of Trs., 473 F.3d 799, 812 (7th Cir. 2007)*).

To succeed under the indirect method of proof, the plaintiff must show that: (1) he engaged in a statutorily protected activity; (2) he performed his job according to his employer's legitimate expectations; (3) despite his satisfactory job performance, he suffered an adverse action from the employer; and (4) he was treated less favorably than similarly situated employees who did not engage in the statutorily protected activity. *Sitar, 344 F.3d at 728* (*citing Stone v. City of Indianapolis Pub. Utils. Div., 281 F.3d 640 (7th Cir. 2002)*). The failure to satisfy one element of this prima facie case is "fatal" to the retaliation claim. *Sublett, 463 F.3d at 740* (*citing Hudson v. Chicago Transit Auth., 375 F.3d 552, 560 (7th Cir. 2004)*). If the plaintiff establishes these four elements, the burden shifts to the defendant to come forward [*89] with a legitimate, non-invidious reason for the adverse employment action. *Sitar, 344 F.3d at 728* (*citing Stone v. City of Indianapolis Pub. Utils. Div., 281 F.3d 640 (7th Cir. 2002)*). If the defendant does so, the burden then shifts back to the plaintiff to show that the proffered reason is pretextual. *Id.* While the burden of production shifts between the parties under this method, "'the burden of persuasion rests at all times on the plaintiff.'" *Id.* (*quoting Haywood v. Lucent Techs., 323 F.3d 524, 531 (7th Cir. 2003)*).

To be similarly situated, another employee must be "'directly comparable in all material respects.'" *Sublett, 463 F.3d at 740* (*quoting Hudson v. Chicago Transit Auth., 375 F.3d 552, 558 (7th Cir. 2004)*). Plaintiff must show that he or she is similarly situated with respect to performance, qualifications, and conduct. *Ezell v. Potter, 400 F.3d 1041, 1049 (7th Cir. 2005)*. This normally includes a showing that the employee "'dealt with the same supervisor, was subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them.'" *Gates v. Caterpillar, 513 F.3d 680, 690 (7th Cir. 2008)*. [*90] Ultimately, the employee must show *substantial similarity,* rather than complete identity, when comparing himself to the favorably treated employee. *Humphries v. CBOCS West, Inc., 474 F.3d 387, 405 (7th Cir. 2007)*.

Neither party disputes that Sebastian engaged in protected activities: Sebastian exercised his *First Amendment* right to file a charge with the EEOC, which he did on September 17, 2004, and initiated the instant action on April 18, 2005. The parties disagree as to whether the fifteen sets of action identified by Sebastian in conjunction with his retaliation claim constitute materially adverse actions and, if they do, whether Sebastian can create a triable issue under one of the two methods of proof articulated above. For the sake of clarity, the Court will address each of Sebastian's claimed adverse actions individually. *See Oest v. Ill. Dept. of Corrections, 240 F.3d 605, 612-15 (7th Cir. 2001)* (evaluating each alleged adverse action to test the viability of plaintiff's indirect method retaliation claim).

A materially adverse action is one that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)* [*91] (*quoting Rochon v. Gonzales, 370 U.S. App. D.C. 74, 438 F.3d 1211, 1219 (D.C. Cir. 2006)*). "Context matters" for the purposes of the materially adverse action analysis. *Id. at 69*. Thus, "an act that would be immaterial in some situations is material in others." *Id.* (internal quotations omitted). In all cases, "normally petty slights, minor annoyances, and simple lack of good manners" are insufficient to dissuade an employee from reporting discrimination and are, therefore, not materially adverse. *Id. at 68*.

Sebastian points to numerous alleged examples of retaliatory conduct: (1) Hammersmith's and Hall's instructions to Sebastian to leave the office to do field work; (2) Hall's refusal of Sebastian's request to change an office day in November 2006; (3) Tom Ryan shouting at Sebastian on February 15, 2007; (4) Sebastian's difficulty reaching Hall on three occasions in 2007 when he was sick; (5) the City's requirement that Sebastian fill out paperwork to request vacation time and provide medical documentation for sick time; (6) Hall's one day assignments in 2005 and 2006 instructing Sebastian to complete inspections of citizen complaints; (7) Sebastian's negative [26] performance reviews; (8) unidentified people [*92] following Sebastian; (9) Hall's denial of office supplies to Sebastian on several occasions in 2005 and denial of business cards to Sebastian in 2005 and 2006; (10) Sebastian's assignments in different districts; (11) Bush's denial of Sebastian's request for educational leave; (12) Allen's assignment of Sebastian to the July 2005 skeleton crew; (13) the City's "denial" of overtime;

(14) the various Department employees' four attempts to "discipline" Sebastian; and (15) Allen's assignment of STF shifts to Sebastian. [27]

> 26 While not essential to its holding, the Court also notes that Sebastian has failed to proffer any evidence to support the proposition that any of his performance evaluations were "negative."
> 27 Sebastian also submits that his doctor's inability to speak with or leave a message for Sebastian when he called on two occasions constitutes a materially adverse action. As discussed above, Sebastian fails to present any admissible evidence in support of this proposition. Even if the Court were to consider the argument, however, the facts presented would not create a triable issue as to whether the doctor's inability to speak with or leave a message for Sebastian constitutes a [*93] materially adverse action. There is no evidence as to who answered the phone when the doctor called and whether the person knew of Sebastian's protected activity. Similarly, Sebastian has proffered no evidence to indicate whether he was in the field and unavailable and whether it was routine to prohibit third parties from leaving messages. Absent such evidence (or any combination thereof), a reasonable jury could not infer that the action was materially adverse. *See Burlington Northern, 548 U.S. at 68-69.*

As a preliminary matter, the Court notes that several of the actions, specifically, the first seven, cannot succeed because they either fall into the category of minor slights and annoyances or simply because there is no support in the record for them. *See Burlington Northern, 548 U.S. at 68* ("petty slights or minor annoyances that often take place at work and that all employees experience"); *Lapka v. Chertoff, 517 F.3d 974, 986 (7th Cir. 2008)* (increased work assignments that do not require the plaintiff to work extra hours or result in discipline or a loss of pay are not actionable, nor are lower performance ratings unaccompanied by tangible job consequences); *Roney v. Ill. Dept. of Trans., 474 F.3d 455, 461 (7th Cir. 2007)* [*94] (it is unlikely that a reasonable employee would view a routine assignment as materially adverse); *Speer v. Rand McNally & Co., 123 F.3d 658, 664 (7th Cir.1997)* (no materially adverse employment action where plaintiff's boss "yelled at her and did not make her feel as if she was part of the work group"). Sebastian's allegation that he is being "followed" also fails, as it is wholly unsupported and based upon speculation. *See Allen v. Am. Signature, Inc., No. 07-3698, 2008 U.S. App. LEXIS 7714, at *8 (7th Cir. March 31, 2008).* Nor can Sebastian's assertion regarding the denial of certain office supplies and business cards sustain a claim for retaliation under the direct or indirect method because neither can constitute an action so adverse that it would have prevented a reasonable person from making or supporting a charge of discrimination. Sebastian has proffered no evidence to suggest that it was routine for an electrical inspector like Sebastian to obtain his office supplies from Hall, that Hall was Sebastian's only source of supplies, that Sebastian did not obtain the supplies from another source, or that his inability to obtain the requested supplies (such as Wite-Out or stationary [*95] material) significantly altered the terms or conditions of his employment. *See Burlington Northern, 548 U.S. at 68.*

The Court can also quickly dispose of Sebastian's complaints regarding his coverage of a different district in either 2006 or 2007 and assignment to District 17 in 2007. Sebastian has not produced evidence from which one could infer that the assignments significantly altered his job responsibilities, caused him to work extra hours, resulted in a loss of pay or discipline, or changed the terms and conditions of his employment in any material way. *See Lapka, 517 F.3d at 986* (more difficult and time-consuming assignments are not actionable where they do not significantly alter job responsibilities).

Sebastian also submits that the denial of his April 2007 request for a two-day educational leave is materially adverse for Title VII purposes. While the denial of an educational opportunity that would significantly contribute to an employee's professional advancement may, in some instances, fall into the category of materially adverse action, *see Burlington Northern, 548 U.S. at 69*, Sebastian fails to provide any details from which one could reasonably infer that the two-day seminar [*96] presented such an opportunity. Even if the Court were to assume that the denied leave was actionable, Sebastian has not met his burden on summary judgment with respect to the remaining elements of the *prima facie* case. Sebastian contends that the ambiguity surrounding when Allen signed and approved Sebastian's request for leave creates "suspicious" circumstances that would allow a jury to conclude that Allen was attempting to "mask his retaliatory conduct." However, such a conclusion would "cross the line between reasonable inference and unsupported speculation." *Davenport v. Northrop Grumman Sys. Corp., No. 07-3362, 281 Fed. Appx. 585, 2008 U.S. App. LEXIS 12625, at *6 (7th Cir. June 12, 2008).* In this case, it is undisputed that Bush, rather than Allen, ultimately denied Sebastian's request. The Court further notes that subsequently, in August 2007, Allen emailed the acting Commissioner and requested approval for additional educational leave on behalf of Sebastian, as well as Hall and Reynolds. In light of such facts, a reasonable person could not conclude that the April 2007 denial of educational leave was retaliatory.

As for his assignment to the July 2005 skeleton crew assignment, even if the Court [*97] were to assume Sebastian's account of the events leading up to the assignment and adopt the dubious notion that this one and one-half hour assignment is sufficiently adverse to dissuade a reasonable employee from making or supporting a charge of discrimination, Sebastian has not presented any evidence to support a *prima facie* case under the burden-shifting method. In support of his position, Sebastian contends that no similarly situated individual worked on a skeleton crew. Sebastian does not, however, identify, much less present, admissible evidence of any similarly situated individual outside the protected class who is directly comparable to the plaintiff "in all material respects." Absent such a showing, Sebastian's generalized assertions cannot support a retaliation claim. *See, e.g., Sublett, 463 F.3d at 740* ("It. . . [is] up to . . . [plaintiff] to find others who . . . [are] 'directly comparable in all material respects'") (*citing Hudson v. Chicago Transit Auth., 375 F.3d 552, 561 (7th Cir. 2004)*); *Oest, 240 F.3d at 615* ("conclusory assertion[s]" that plaintiff was treated differently, without specific evidence, will not satisfy the similarly situated requirement).

Nor does the [*98] thirteenth claimed action - that Sebastian was denied overtime in 2007 - stave off dismissal of Count II. [28] In support of his theory, Sebastian submits only his *belief* that he was denied overtime for generator testing in 2007. According to Sebastian, this belief is founded upon the fact that he overheard four or five conversations between Department employees regarding overtime. Sebastian provides no other admissible evidence regarding the nature of those conversations, whether the individuals were similarly situated "in all material respects," or even the identity of the decision maker with respect to the delegation of overtime. To the contrary, Sebastian admitted that he was unaware of any role that Allen would have played in determining who received overtime in 2007 and that he believed that the union steward and union were "probably conspiring" against him. Such beliefs do not create a genuine issue of fact as to retaliation. *See Payne v. Milwaukee County, 146 F.3d 430, 434 (7th Cir. 1998)* (subjective belief insufficient for *prima facie* case of retaliation).

> 28 The Court notes that, although he waited until his sur-response, Sebastian did present an argument regarding the alleged [*99] denial of overtime in 2006. However, because Sebastian fails to present evidence in support of this assertion, the Court need not consider whether an actual denial of overtime would constitute a retaliatory action in the circumstances presented. Additionally, because Sebastian fails to present any argument regarding the delayed processing of or withhold of certain overtime payments, the Court deems this argument waived. *See Culver v. Gorman & Co., 416 F.3d 540, 550 (7th Cir. 2005)* (*quoting United States v. Turcotte, 405 F.3d 515, 536 (7th Cir. 2005)*) ("'unsupported and undeveloped arguments are waived'"); *see also Graham v. AT&T Mobility, LLC, Nos. 06-3020, 06-3734, 247 Fed. Appx. 26, 2007 U.S. App. LEXIS 21598, at *12 (7th Cir. Sept. 6, 2007)* ("[T]his court is not obligated to research and construct legal arguments open to parties, especially when they are represented by counsel.'") (*quoting John v. Barron, 897 F.2d 1387, 1393 (7th Cir. 1990)*).

Next Sebastian claims he was subjected to four instances of "unsubstantiated" discipline subsequent to the filing of his EEOC charge. While Sebastian does not identify the four instances in his response brief or elaborate further on this theory, the Court assumes [*100] that Sebastian is referring to the following incidents: (1) the informal meeting in late 2005 or early 2005 regarding sick time; (2) the June 2005 predisciplinary hearing regarding Sebastian's failure to report to work; (3) the February 22, 2007 verbal counseling regarding a delayed response to Hall's calls; and (4) the July 11, 2007 disciplinary hearing and July 27, 2007 written oral reprimand regarding the March 15, 2007 incident.

As a preliminary matter, the Court notes that Sebastian has failed to present any legal authority or argument in support of his retaliation claim with respect to the first, second, and fourth incidents listed above. Thus, the Court deems these arguments waived. *See Culver v. Gorman & Co., 416 F.3d 540, 550 (7th Cir. 2005)*. Regardless, although Sebastian characterizes the three actions as "factually unsubstantiated efforts to discipline," he does not dispute that he committed the actions that resulted in "discipline" or present any evidence from which one could infer that the "discipline" was anything other than routine. *See Campbell v. Potter, 57 Fed. Appx. 267 (7th Cir. 2003)*. Nor can Sebastian rely on temporal proximity alone, as the first event occurred [*101] approximately nine months after Sebastian filed the EEOC charge and two months after initiating the current action. *See Kodl v. Bd. of Educ., 490 F.3d 558, 563 (7th Cir. 2007)* (*quoting Moser v. Ind. Dep't of Corr., 406 F.3d 895, 903 (7th Cir. 2005)*) ("'Suspicious timing alone is rarely sufficient to create a triable issue'" as to the requisite causal connection); *Contreras v. Suncast Corp., 237 F.3d 756, 765 (7th Cir. 2001)* (one-month gap between EEOC charge and termination insufficient); *EEOC v. Yellow Freight Sys., 253 F.3d 943, 952-53 (7th Cir. 2001)* (en banc) (six-week gap between EEOC charge and termination insufficient). He has once again failed to put forth any specific testimony regarding the identity of any similarly situated individual who previously com-

mitted the same act, but avoided similar "discipline." Absent this showing, Sebastian's generalized assertions cannot support a retaliation claim. *See, e.g., Sublett, 463 F.3d at 740.*

Regarding the third instance of "discipline" - the February 22, 2007 informal meeting and verbal counseling - Sebastian has also failed to create a genuine issue of material fact as to retaliation for two reasons. First, the verbal counseling [*102] and informal meeting do not rise to the level of a materially adverse action. Sebastian has presented no evidence of unsubstantiated progressive discipline, procedurally irregular warnings, or of lost compensation, assignments, or employment opportunities as a result. Further, there is no evidence from which one can infer that the verbal counseling caused any future adverse action. Given this dearth of evidence, a reasonable trier of fact could not conclude that the verbal counseling and informal meeting constituted an adverse employment action. *Compare Allen, 2008 U.S. App. LEXIS 7714, at *8* (written reprimand is not a materially adverse action); *Whittaker v. N. Ill. Univ., 424 F.3d 640, 648 (7th Cir. 2005)* (same); *Luera v. Heart Ctr. Med. Group, 07 C 101, 2008 U.S. Dist. LEXIS 10191, at *21-22 (N.D. Ill. Feb. 8, 2008)* (verbal counseling and write-ups are not actionable), *with Pantoja, 495 F.3d at 849* (disciplinary warnings may constitute adverse employment actions). Second, Sebastian, once again, does not identify a single similarly situated individual outside of the protected class who was treated more favorably. *See Sublett, 463 F.3d at 740.* Instead, he relies primarily on the [*103] direct method of proof and submits the following two pieces of evidence: (1) Allen, rather than Hall, issued the counseling and (2) Allen did not ask Hall to substantiate the timing or obtain the phone records himself. [29] A reasonable jury could not conclude that the verbal counseling was retaliatory based on the mere fact that Allen, rather than Hall, issued the counseling, as such an inference would be based on speculation rather than facts. *See Hedberg v. Indiana Bell Tel. Co., Inc., 47 F.3d 928, 931-32 (7th Cir. 1995)* ("Speculation does not create a genuine issue of fact; instead, it creates a false issue."). Nor has Sebastian proffered any admissible evidence in his *Local Rule 56.1* submissions to support the proposition that Allen did not ask Hall to substantiate the timing of Sebastian's response to Hall's phone calls. [30] Thus, the February 22, 2007 incident does not create a triable issue as to retaliation.

29 The Court notes that Sebastian makes no mention of the minor variation between Hall's and Allen's statements regarding Sebastian's response time on February 5, 2007. Accordingly, the Court deems this argument waived. *See Culver, 416 F.3d at 550 (7th Cir. 2005).*

30 In his sur-response, [*104] Sebastian further submits that the Defendants' failure to produce the phone records to substantiate the factual basis for Sebastian's discipline entitles Sebastian to an adverse evidentiary inference regarding the true contents of those records. This argument is unavailing for two reasons. First, as discussed above, the Court previously struck the extrinsic evidence that supports this argument. Consistent with that decision, the Court also struck any argument founded upon the extrinsic evidence. Second, even if the Court were to consider this argument, Sebastian would not be entitled to the adverse evidentiary inference at this juncture. The "destruction of or inability to produce a document, standing alone, does not warrant an inference that the document, if produced, would have contained information adverse" to the City. *Park v. City of Chicago, 297 F.3d 606, 615 (7th Cir. 2002).* Instead, the City must have destroyed the evidence in bad faith. *Id.* The "bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction." *Crabtree v. Nat'l Steel Corp., 261 F.3d 715, 721 (7th Cir. 2001).* [*105] Similarly, the violation of a record retention policy "creates a presumption that the missing record[s] contained evidence adverse to the violator." *Park, 297 F.3d at 615* (citation omitted). Here, Sebastian's counsel stated during Loeff's deposition that he never received the records. (Pl. Sur-response, Ex. 23, Loeff Dep. 66.) Sebastian has not, however, come forward with any evidence or argument indicating bad faith on behalf of Defendants or even that Sebastian ever requested the phone records during discovery. Thus, Sebastian is not entitled to an adverse inference.

Regarding Sebastian's fifteenth claimed retaliatory act - STF assignments - Sebastian contends he has created a triable issue under the direct method of proof. [31] In support of its position to the contrary, the City maintains that the STF assignments were not adverse employment actions and that Sebastian cannot establish a *prima facie* case of retaliation. Because it is dispositive, the Court will address the City's latter argument first. Under the direct method, Sebastian proffers two admissible pieces of evidence in support of his claim. First, Sebastian argues that Allen assigned him to STF approximately nine days after [*106] Loeff "circulated" the charge to "Kozicki and others." (Pl. Resp. 13.) Fatal to this argument, however, is that Loeff did not "circulate[]" the charge to "Kozicki and others." Instead, the record reveals that Loeff emailed the charge to Kozicki and cop-

ied Kaderbek. Thus, Sebastian cannot rely solely on the nine day lapse between Loeff's email and the STF assignment to create a triable issue. Nor has Sebastian proffered other evidence (or argument) from which one could infer that Allen knew Sebastian filed the EEOC charge prior to Sebastian's assignment to STF. A decision maker cannot retaliate against the employee if she is unaware of the complaints asserted against her. *Miller v. Am. Family Mut. Ins. Co., 203 F.3d 997, 1008 (7th Cir. 2000)*. Thus, without such knowledge, Allen's decision to place Sebastian on STF could not have been retaliatory. *See Luckie v. Ameritech Corp., 389 F.3d 708, 715 (7th Cir. 2004)* ("It is not sufficient that an employer could or even should have known about an employee's complaint; the employer must have had actual knowledge of the complaints for its decisions to be retaliatory") (internal quotations and alterations omitted); *see also Davenport, 281 Fed. Appx. 585, 2008 U.S. App. LEXIS 12625, at *6*; [*107] *Huppert v. Potter, 232 Fed. Appx. 576, 581 (7th Cir. 2007)* (summary judgment denied where the plaintiff provided no evidence that decision makers were aware of the plaintiff's EEO complaint). Second, Sebastian asserts that Allen's distribution of a memorandum indicating that inspectors would rotate through STF assignments a mere two weeks after Sebastian obtained leave from the Court to file a retaliation claim is evidence that Allen previously retaliated against Sebastian through STF assignments. This argument is also unavailing as it is undisputed that, prior to the announcement, Allen rotated sign inspectors on the STF assignment.

> 31 Sebastian also maintains that he has met his burden under the indirect method. In support of this theory, Sebastian submits that Allen assigned Sebastian to STF more than any other candidate for the 2004 supervisor position. This argument is based entirely upon inadmissible evidence. (City Defs. 56.1 Resp. P 76; Allen 56.1 Resp. P 76.) Even if the Court were to consider the statement, Sebastian's argument would be futile because Sebastian has failed to identify a sufficient set of comparators for the similarly situated inquiry. To be similarly situated, [*108] the employees must be "'directly comparable in all material respects.'" *Sublett, 463 F.3d at 740*. A reasonable trier of fact could not conclude that Sebastian was "directly comparable in all material respects" to other electrical inspectors on the days that Allen assigned Sebastian to STF by the mere fact that, at one time, Sebastian applied for the same promotion as other electrical inspectors. *See, e.g., id.; Oest, 240 F.3d at 615*.

Because there is no genuine issue of material fact associated with Sebastian's retaliation claim, City Defendants' motion for summary judgment as to Count II is granted. [32]

> 32 It is unclear from Sebastian's submissions as to whether he also posits that these actions, in the aggregate, constitute an adverse action. Nevertheless, to the extent that Sebastian would submit such a theory, it would not stave off dismissal of Count II. Considering the actions as a whole does not cure Sebastian's failure to submit evidence establishing the *prima facie* case under the direct or indirect method. *See, e.g., Campbell v. Potter, 57 Fed. Appx. 267, 268 (7th Cir. 2003)*. Nor does Sebastian's argument that the alleged retaliation is "corroborated" by the alleged witness harassment [*109] stave off dismissal of his claim. Such reliance on speculation, rather than facts, will not preclude summary judgment. *See Hedberg v. Indiana Bell Tel. Co., Inc., 47 F.3d 928, 931-32 (7th Cir. 1995)*.

IV. Failure to Promote under *§ 1983* Claim (Count III)

To establish a *First Amendment* retaliation claim, a plaintiff must establish: (1) that he engaged in a constitutionally protected activity and (2) that the protected conduct was a "substantial or motivating factor" in defendants' challenged action. *Hall v. Babb, 389 F.3d 758, 762 (7th Cir. 2004)*. If the plaintiff makes this *prima facie* showing, the burden shifts to the defendants to demonstrate that the same action would have been taken in the absence of the protected activity. *Healy, 450 F.3d at 739*. If the defendants carry this burden, the plaintiff "'bears the burden of persuasion to show that [the defendants'] proffered reasons were pretextual and that discrimination was the real reason for the [employment action].'" *Id.* (*quoting Smith v . Dunn, 368 F.3d 705, 708 (7th Cir. 2004)*) (alteration in original).

Allen and the City Defendants do not challenge Sebastian's ability to establish the first element of the *prima facie* case - that [*110] Sebastian engaged in a constitutionally protected activity. Instead, their challenge focuses on whether protected conduct was a "substantial or motivating factor" in their failure to promote Sebastian and whether Sebastian would have been denied the promotion in the absence of this protected activity. The burden in this regard is "not insignificant." *Nelms v. Modisett, 153 F.3d 815, 818 (7th Cir. 1998)* (*quoting Nekolny v. Painter, 653 F.2d 1164, 1168 (7th Cir. 1981)*) ("A disgruntled employee fired for legitimate reasons would not be able to satisfy his burden merely by showing that he carried the political card of the opposition party or that he favored the defendant's opponent in the election."). In other words, "[i]t is not enough to show only that the plaintiff was of a different political persua-

sion than the decisionmakers." *Hall, 389 F.3d at 762.* Instead, the plaintiff must present specific evidence that the defendants knew of his political affiliation and took action against him because of the political affiliation. *Id. at 762-63.* In doing so, the plaintiff cannot rely on speculation or opinions of non-decision makers as proof that the defendants acted because of political affiliation. [*111] *Nelms, 153 F.3d at 819.* Nor can he rely on "self-serving declarations based on nothing more than his own speculation." *Healy v. City of Chicago, No. 00 C 6030, 2004 U.S. Dist. LEXIS 13553, at *17-18 (N.D. Ill. July 20, 2004) (citing Kelly v. Mun. Ct. of Marion County, Ind., 97 F.3d 902, 911 (7th Cir. 1996)).* Additionally, to hold an individual liable, the plaintiff must establish that the individual "caused or participated in an alleged constitutional deprivation." *Rascon v. Hardiman, 803 F.2d 269, 273 (7th Cir. 1986).*

In this case, Sebastian asserts *First Amendment* retaliation claims against Kaderbek, Kozicki, Allen, and the City. Specifically, he claims he was denied the supervisor promotion based on his political affiliation and the exercise of his right to support political officials by, among other things, refusing to contribute to the political campaigns of Chicago aldermen in 2003 and 2004. (Second Am. Compl. Count III, PP 1-37; Pl. Summ. Jmt. Resp. 17-33.)

A. *Defendants Kozicki and Kaderbek*

The "threshold question" in analyzing whether an employment decision was motivated by the plaintiff's political activities "is whether the defendants even knew about" those activities. *Hall, 389 F.3d at 762.* [*112] A decision maker cannot retaliate on account of the protected activity if he is unaware of the protected activity. *See Healy, 450 F.3d at 740-41 (citing Luckie v. Ameritech Corp., 389 F.3d 708, 715 (7th Cir. 2004)).* Because Sebastian has failed to present evidence from which a trier of fact could reasonably infer awareness on the part of Kaderbek or Kozicki, the Court's analysis with respect to the two individuals begins and ends with this inquiry.

Sebastian invites this Court to examine several pieces of evidence that he believes establish a triable issue as to knowledge: (1) testimony from the *Sorich* trial, including Kozicki's admission that he manipulated the selection process at a prior date and time with another applicant for a different position; (2) the alleged "highly politically active" nature of the successful candidates; (3) Defendants' actual awareness of Sebastian's contributions to Alderman Allen's campaigns; and (4) Ciaravino's, Falcon's, and Molloy's invocation of their respective *Fifth Amendment* rights against self incrimination.

With respect to the *Sorich* trial - Sebastian maintains that an inference can be drawn from the repeated use of "unlawful political [*113] sponsorship" to make employment decisions, including the use of the "Clout List" and the similar hallmarks between the selection process in this case and the employment practices at issue in the *Sorich* trial. Yet, Sebastian has failed to connect the testimony of Molloy, Falcon, and Katalinic to the facts in this case or to a widespread practice within the Department of hiring electrical inspectors based on political affiliation. Nor does Kozicki's admission that he changed his interview scores during a 2004 building inspector hiring sequence create a triable issue as to awareness. According to Kozicki, Kaderbek did not advocate for Ryan's, as well as another candidate's, hiring because of political affiliation. Instead, he did so because the two individuals were the sons of important union officials and Kaderbek believed they would help with union negotiations. Such evidence does not create a genuine issue of fact as to whether Kaderbek and Kozicki were aware of Sebastian's political association during a separate and independent hiring process for a different position with different candidates.

Sebastian also asserts that knowledge could be inferred because "the successful candidates [*114] were each highly politically active." (Pl. Resp. Mem. 27.) The Seventh Circuit has "sometimes assumed that a person's holding of an arguably prominent party office could support a finding of common knowledge among decisionmakers, and sometimes . . . [it has] not." *Hall, 389 F.3d at 763* (comparing cases). For instance, in *Garrett v. Barnes, 961 F.2d 629, 632 (7th Cir. 1992),* the plaintiff's public activities, specifically, his membership in the Young Democrats, campaigning on behalf of (and publicly endorsing) the mayor, and his precinct captainship for the democratic party in his district, were sufficient to raise an inference that the decision makers were aware of his political affiliation. In contrast, the court in *Cusson-Cobb v. O'Lessker, 953 F.2d 1079, 1081 (7th Cir. 1992),* found it unreasonable to infer knowledge because the plaintiff failed to "provide any facts to support the conclusory statement that her political affiliation was well known -- she [did] not say how her political affiliation became so well known or who knew her political affiliation."

Much like the plaintiff in *Cusson-Cobb,* Sebastian has failed to support his conclusory assertion that Hall, Reynolds, and Hammersmith [*115] were so "highly politically active" prior to the 2004 supervisor promotions that a reasonable trier of fact could infer that Kozicki and Kaderbek had knowledge of their political activity. For instance, Sebastian maintains that Hall's prominence stems from the fact that he is "a religious leader at a powerful south side Chicago Church . . .

where elected officials and Local 134 union members have attended service" and that he "has volunteered . . . to do political work on behalf of political candidates and officials." (City Defs. 56.1 Resp. P 35.) Putting to one side Sebastian's self-serving description of Hall's work, the remaining evidence reveals that Hall is an ordained minister at a Chicago church, that there have been a few occasions when an elected official has been in attendance at the church, that approximately ten or fewer non-City Local 134 electricians attend the church, and that, in the mid-90's, Hall volunteered to do some political work for a candidate named "Lightfoot." Sebastian presents no evidence from which one could infer that the church was "powerful," that an elected official has attended the church with any regularity, or that Hall has done political work in [*116] the past decade. [33]

> 33 Perhaps recognizing the disparity between Sebastian's characterization of Hall's political activity and the facts revealed by the record, Sebastian contends that the credibility of Hall's statements must be assessed in the context of additional evidence proffered by Sebastian. However, Sebastian bears the ultimate burden of proof and cannot meet this burden "'by relying on the hope that the jury will not trust the credibility of . . . [the] witnesses.'" *Cichon v. Exelon Generation Co., LLC, 401 F.3d 803, 815 (7th Cir. 2005)* (*quoting Perfetti v. First Nat'l Bank of Chicago, 950 F.2d 449, 456 (7th Cir. 1991)*).

Similarly, while Sebastian submits that Reynolds grew up in the same neighborhood as State Representative Kevin Joyce and has known Kevin Joyce since the 1970's, this mere affiliation, without more, does not create a triable issue as to whether Reynolds was politically active or whether Kozicki and Kaderbek were aware of Reynolds' political affiliation. *See, e.g., Boehl v. DeLuca, No. 04 C 5606, 2007 U.S. Dist. LEXIS 11670, at *33-42 (N.D. Ill. Feb. 16, 2007)* (no evidence to support inference of awareness). Nor does the fact that Reynolds began his political [*117] activity in 2002, without any details regarding the nature or frequency of the activity, create such an inference. *See Cusson-Cobb, 953 F.2d 1079, 1081.* To the extent that Sebastian attempts to rely on Reynolds' position as a precinct captain and South Side Irish Parade coordinator, the Court notes that Reynolds assumed these duties in 2005 and 2006 respectively, *after* the 2004 promotions process.

Finally, while Sebastian provides at least some vague details regarding Hammersmith's political activities, the strained inferences are also insufficient to stave off summary judgment. As before, Sebastian has failed to present any actual details to explain how his political affiliation became so well known or who knew of his political affiliation. Furthermore, while Kozicki and Kaderbek were appointed to their positions, the parties present no additional evidence from which one could infer that the two defendants were politically active during the relevant period such that they would otherwise be aware of Hammersmith's, Reynolds', and Hall's political affiliations.

Ultimately fatal to Sebastian's claims against Kaderbek and Kozicki, however, is the absence of any evidence from which one could reasonably [*118] infer that either defendant was aware of Sebastian's political affiliation or activity. Sebastian contends that all the individual defendants had knowledge of his political affiliation based on his alleged contributions to Alderman Allen's campaigns. The record does not, however, support this assertion. While the parties dispute whether Allen and Sebastian discussed Sebastian's contributions, the parties' *Local Rule 56.1* submissions provide no indication that Sebastian ever discussed the nature of his contributions with anyone other than Allen. Nor is there evidence that Allen, if he was aware of Sebastian's contributions, discussed the matter with Kozicki, Kaderbek, or any other City employee. Again, Sebastian's argument is based on speculation rather than the record.

Finally, Sebastian proffers as evidence against Kozicki and Kaderbek that, when Sebastian's counsel attempted to depose Molloy, Falcon, and Ciaravino in conjunction with this action, all three individuals asserted their rights to remain silent. As Sebastian correctly notes, a trier of fact may draw an adverse inference against a party to a civil action who refuses to testify under his *Fifth Amendment* right. *See LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 390 (7th Cir. 1995).* [*119] In the present case, however, the Court is not confronted with a party's refusal to testify. Instead, Sebastian attempts to use the refusal of three nonparty witnesses' invocations of the right as admissible evidence against parties in the current action. "In order to impute a third-party's *Fifth Amendment* invocation to another party, the party seeking to use the invocation must establish some relationship of loyalty between the other two parties." *State Farm Mut. Auto. Ins. Co. v. Abrams, No. 96 C 63656, 2000 U.S. Dist. LEXIS 6837, at * 21 (N.D. Ill. May 11, 2000)* (citing *LiButti v. United States, 107 F.3d 110, 122 (2d Cir. 1997)).* Ultimately, the question of whether a nonparty's refusal to testify may be used against a party is determined on a case-by-case basis and depends on whether such an "'adverse inference is trustworthy under all of the circumstances and will advance the search for truth.'" *Kontos v. Kontos, 968 F. Supp. 400, 406 (S.D. Ind. 1997)* (*quoting LiButti v. United States, 107 F.3d 110, 124 (2nd Cir. 1997)).* Most courts that have imputed an adverse *Fifth Amendment* inference from a nonparty to a party have done so where there is a

close family relationship between the [*120] party and the nonparty or a business relationship, such as an agency or employer-employee relationship. *See State Farm Mut. Auto Ins. Co., 2000 U.S. Dist. LEXIS 6837, at *22* (collecting cases); *Kontos, 968 F. Supp. at 408.*

Citing only to the general rule that an adverse inference may be drawn by a party's invocation of the *Fifth Amendment* right, Sebastian does not make the necessary arguments or provide the necessary supporting facts to draw an adverse inference with respect to Molloy and Falcon. *See generally State Farm Mutual Auto. Ins. Co., 2000 U.S. Dist. LEXIS 6837, at *17-26; Kontos, 968 F. Supp. at 408-09.* Sebastian proffers no evidence that either individual worked for the Department or in a manner that created a business or agency relationship with Kaderbek or Kozicki. Sebastian's application of Ciaravino's invocation of the *Fifth Amendment* as against Kozicki fails for similar reasons. *See Kontos, 968 F. Supp. at 408-09.*

The record presents a closer question with respect to Ciaravino and Kaderbek. While the parties dispute whether Ciaravino was the director of personnel or the Director of Administration for the Department, it is undisputed that Ciaravino was a City employee in the Department, [*121] that Kaderbek was the Commissioner of the Department, and that Kaderbek retained final decision-making authority for employment decisions made within the Department during the time period at issue. Nevertheless, the Court need not determine whether such facts are sufficient to establish a relationship of loyalty because the resulting adverse inference could not create a question of fact as to Kaderbek's requisite awareness. "Before an adverse inference may be drawn from a party's refusal to testify in a civil case, there must be independent corroborative evidence to support the negative inference beyond the invocation of the privilege." *Kontos, 968 F. Supp. at 408-09.* Thus, a moving party must introduce actual independent, material evidence that the elements of the party's case exists; he cannot rely solely on the adverse inference associated with the invocation of the *Fifth Amendment* right. *See LaSalle Bank Lake View, 54 F.3d at 390-91; State Farm Mutual Auto. Ins. Co., 2000 U.S. Dist. LEXIS 6837, at *18-20.* As noted above, Sebastian proffers no actual evidence to support his assertion that Kaderbek was aware of Sebastian's political affiliation or the affiliation of Hall, Reynolds, and [*122] Hammersmith. In fact, the evidence is to the contrary - the interviewers did not review political affiliation and work prior to the interviews. In the absence of such evidence, Sebastian cannot rely on speculation as evidence. *See Hedberg, 47 F.3d at 931-32; Kontos, 968 F. Supp. at 408-09.*

The Court concludes that Sebastian has failed to satisfy the "threshold question" of whether Kaderbek and Kozicki had the necessary awareness of Sebastian's political affiliation or the political affiliation of Hall, Reynolds, and Hammersmith. *See Hall, 389 F.3d at 762.* Because Sebastian fails to present any evidence from which a reasonable jury could infer the requisite awareness, summary judgment is appropriate on Sebastian's claim of political retaliation against Kozicki and Kaderbek. [34] *See Cusson-Cobb, 953 F.2d at 1081; Downey v. Shonkwiler, No. 05-3001, 2007 U.S. Dist. LEXIS 73505, at *11 (C.D. Ill. Oct. 2, 2007)* (no awareness when no evidence that political affiliation was a factor in the decision, let alone a substantial or motivating factor).

> 34 Kozicki and Kaderbek also contend that they are entitled to qualified immunity with respect to Sebastian's *§ 1983* claim. In light of the Court's determination [*123] that a reasonable trier of fact could not conclude that Kozicki or Kaderbek violated Sebastian's *First Amendment* rights, the Court need not address the issue of qualified immunity.

B. *Defendant Allen*

Unlike his claims against Kaderbek and Kozicki, Sebastian has presented sufficient evidence to survive summary judgment with respect to his *§ 1983* political retaliation claim against Allen. Specifically, a genuine issue of material fact exists as to whether Allen was aware of Sebastian's political affiliation, whether the political affiliation was a substantial or motivating fact in the decision not to promote him, and whether Sebastian would not have been promoted even if he had not engaged in the constitutionally protected activity.

Allen initially contends that he cannot be liable under *§ 1983* because he was unaware of Sebastian's constitutionally protected activity. Yet, the record reveals factual disputes regarding: (1) the extent to which Allen encouraged Sebastian to donate to Alderman Allen's campaign; (2) whether Allen told Sebastian that his 2001 contribution was insufficient; (3) whether Allen told Sebastian he was a "cheap Indian"; and (4) whether Allen told Sebastian that he [*124] would not be promoted because he was "not politically involved." A reasonable juror could conclude that Allen was aware of Sebastian's political affiliation during the 2004 supervisor interview process.

A reasonable trier of fact could conclude that "not politically involved" statement was "causally related to the [employment] decision making process" and, therefore, probative of retaliation. *See Williams v. Seniff, 342 F.3d 774, 790 (7th Cir. 2003) (citing Geier v. Medtronic, Inc., 99 F.3d 238, 242 (7th Cir. 1996)).* To the extent that the retaliatory nature of this statement is ambiguous, the

issue is for the jury. *Phelan, 463 F.3d at 782* (internal quotations omitted).

In addition to this statement, Sebastian also proffers evidence of irregularities during and after Sebastian's interview that create a question of fact as to Allen's true intentions. The parties dispute whether Allen: (1) asked Sebastian all eight Code questions; (2) asked Sebastian different technical questions as compared to all of the other candidates; (3) asked Sebastian different questions than those included on the Code questions list; (4) met with Kozicki and Bush after all of the interviews to discuss all the [*125] candidates; and (5) conveyed false information to Kozicki regarding Sebastian's interview.. The Court is mindful that is does not "sit as a superpersonnel department" and that an employer may employ a subjective analysis when assessing an applicant during the interview process. *See Blise, 409 F.3d at 868*. In this case, however, the departure from the standards with respect to Sebastian and the multiple disputes regarding Allen's alleged manipulation of Sebastian's interview creates a genuine issue of material fact for the jury. *See, e.g., Healy, 450 F.3d at 744 n.16* ("[A] departure from [a standard list of questions] is suspicious."). Thus, for the reasons set forth above, Sebastian has also carried his burden on summary judgment with respect to the second element of the *prima facie* case.

Because Sebastian has provided sufficient evidence of a *prima facie* case to survive summary judgment, the burden shifts to Allen to produce evidence that Sebastian would not have received the promotion in the absence of his political affiliation. *See Healy, 450 F.3d at 739*. Here, Allen asserts that Sebastian would not have received the promotion because Allen ranked Sebastian eleventh out of eleven [*126] candidates and Kozicki ranked Sebastian tenth out of fifteen candidates. In addition, Allen submits that Kozicki and Allen both believed that Sebastian performed poorly in his interview and did not provide detailed remarks or examples in response to the questions posed.

Assuming Allen has provided sufficient evidence, Sebastian must "show that [Allen's] proffered reasons were pretextual and that discrimination was the real reason for the [employment action]." *Id.* (internal quotations omitted). Sebastian has put forth sufficient evidence to clear this hurdle at summary judgment. While objective scores resulting from the interview process may, in some instances, serve as a legitimate, non-discriminatory reason for an employment decision, *see, e.g., Healy, 450 F.3d at 741*, the pretextual nature of the process (and the results) may be called into question when "the hiring decision was manipulated by one member who possessed" retaliatory motive, *see Hall, 389 F.3d at 763*. In this case, Sebastian has created a triable issue as to whether and to what extent Allen's alleged retaliatory animus motivated the promotion decision. *Compare Healy, 450 F.3d at 741* (plaintiff failed to present sufficient [*127] evidence that the interview panel acted as the defendant's "'cat's paw'"). Allen, along with Kozicki, interviewed Hall, Hammersmith, Reynolds, and Sebastian. In addition, as noted above, the record reveals multiple factual disputes regarding Sebastian's interview, the information conveyed to Kozicki (and, ultimately, Kaderbek) regarding Sebastian's interview, and Ciaravino's drafting of notification letters. Finally, to the extent that Allen relies on the subsequent explanations regarding Sebastian's performance to substantiate his proffered reason, any decision regarding the merits of the claim and the weight of such evidence is best left to the finder of fact. *See McGreal v. Ostrov, 368 F.3d 657, 677 (7th Cir. 2004)* ("It is rarely appropriate on summary judgment for a district court to make a finding on a state of mind."). Thus, for the reasons stated above, Allen's Motion for Summary Judgment is denied with respect to Count III.

C. *Municipal Liability*

The doctrine of respondeat superior cannot be utilized to hold local governmental units liable for *§ 1983* violations. *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*. A municipality may only be held liable under *§ 1983* when [*128] its policy or custom results in a constitutional injury to the plaintiff. *See id. at 694*. To establish a policy or custom, a plaintiff must allege either: (1) "'an express policy that, when enforced, causes a constitutional deprivation'"; (2) the act of a person with final policymaking authority caused the constitutional injury; or (3) "'a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a 'custom or usage' with the force of law.'" *McTigue v. City of Chicago, 60 F.3d 381, 382 (7th Cir. 1995) (quoting Baxter by Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 734-35 (7th Cir. 1994))*. In the present case, Sebastian does not argue that the City had an express policy of retaliating against persons on account of their political affiliation; nor does he claim that the alleged constitutional deprivation was committed by an individual with final policymaking authority. Instead, Sebastian maintains that the City is liable because: (1) the City has a widespread practice that constitutes a "custom and usage" with the force of law and (2) the individual defendants had sufficient input into the selection [*129] process such that the selection process was "poisoned" by discriminatory motivation. Because Sebastian has not created a triable issue under either theory, the Court grants summary judgment in favor of the City with respect to Count III.

i. Widespread Practice

To support widespread practice, Sebastian proffers: (1) the testimony from the Sorich trial; (2) Kozicki's admission that he previously changed his interview ratings during a 2004 building inspector hiring sequence; and (3) Molloy's, Falcon's, and Ciaravino's invocation of their respective *Fifth Amendment* rights. At the criminal trial, Molloy, who worked as Sorich's secretary at the IGA, testified extensively about the "Clout List" and the index card files compiled during her tenure. Similarly, Falcon, who served as the personnel director for the Department of Sewers from 1994 through 2003 and the Department of Water Management from 2003 through 2005, testified about the corruption within the City's hiring process for the Department of Sewers and Department of Water Management. Finally, Katalinic, who served as the Deputy Commissioner of Street Operations for the Streets & Sanitation Department also testified regarding his requests [*130] for city jobs and promotions for his political workers. Noticeably absent from this evidence is any testimony from the three individuals regarding the hiring process employed in the Department of Buildings in 2004. Molloy's, Falcon's, and Katalinic's testimony is largely irrelevant to this case, as the events described occurred in departments that are not at issue in this case, for different positions, and with different decision makers. *Cf. Colello v. City of Chicago, No. 06 C 6243, 2008 U.S. Dist. LEXIS 68676 (N.D. Ill. Jan. 4, 2008)* (Holderman, J.). Absent such evidence, the Court is unwilling to paint municipal liability with such a broad brush.

Nor does Kozicki's admission that he previously changed his interview ratings scores for candidate Ryan establish this link. Sebastian submits that Kozicki admitted to manipulating the selection process for other Department hiring sequences to ensure that politically favored candidates received the positions. In doing so, Sebastian overstates the evidence provided in his *Local Rule 56.1* submissions. Kozicki changed his interview scores for one individual during a hiring process for a building inspector position because the individual was the son of an important union [*131] official and Kaderbek allegedly believed that hiring the individual as well as one other candidate would help with union negotiations and other Department goals. The evidence proffered provides no indication that Kozicki manipulated the scores on account of political affiliation, but rather, union affiliation. Nor is there any indication that the union affiliation at issue in the 2004 building inspector hiring sequence was related to a political purpose. *See Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996)* (the idea that membership in a union is a political affiliation is "a dubious notion at best"). Further, the Court notes that, even if a trier of fact unreasonably assumed that Kozicki changed the ratings on account of political affiliation, "proof of isolated acts of misconduct will not suffice; a series of violations must be presented to lay the premise of deliberate indifference." *Palmer v. Marion County, 327 F.3d 588, 595-96 (7th Cir. 2003).*

Finally, Sebastian relies on Molloy's, Falcon's, and Ciaravino's invocation of their *Fifth Amendment* right. While Sebastian may impute the adverse inference associated with their *Fifth Amendment* invocations to the City because [*132] of the agency relationship between the three individuals and the City, *see State Farm Mut. Auto. Ins. Co., 2000 U.S. Dist. LEXIS 6837, at *22*, such adverse inferences do not stave off dismissal of the municipal liability claim for two reasons. First, with respect to Molloy and Falcon, Sebastian has failed to present evidence, through their testimony at the *Sorich* trial or otherwise, that either individual had personal involvement in or knowledge regarding corrupt hiring processes within the Department of Buildings during the relevant time period. *See Hall, 389 F.3d at 764.* Second, with respect to all three nonparty witnesses, Sebastian has failed to present independent corroborative evidence that the elements of the claim exist. *See State Farm Mut. Auto. Ins. Co., 2000 U.S. Dist. LEXIS 6837, at *18-20.* As noted above, a party cannot rely solely on the adverse inference associated with invocation of the *Fifth Amendment* right to establish a claim. *See LaSalle Bank Lake View, 54 F.3d at 390-91.*

Thus, because Sebastian has failed to proffer competent evidence from which a reasonable trier of fact could infer that City final policymakers knew of a widespread practice and acquiesced in a [*133] pattern of unconstitutional conduct such that the City was deliberately indifferent to an obvious or known consequence of the practice, the Court grants the City's motion for summary judgment with respect to Sebastian's widespread practice claim of municipal liability.

ii. Tainted Selection Process

Sebastian does not dispute the City's contention that Kaderbek did not have final policymaking authority, nor does he argue that the ultimate decision maker delegated final policymaking authority to Kaderbek or ratified the unconstitutional conduct of a subordinate. [35] Instead, Sebastian argues that the City may be liable because the individual defendants "poisoned" the selection process with discriminatory motivation through its critical "input" in the decision making process. In doing so, Sebastian relies primarily on *Waters v. City of Chicago, 416 F. Supp. 2d 628 (N.D. Ill. 2006).* In *Waters,* the court analogized and applied the well-established "cat's paw" theory of Title VII liability to a *§ 1983* municipal liability claim against the City of Chicago. *See Waters, 416 F. Supp. 2d at 630-31.* Specifically, the *Waters* court noted "that if the ultimate decision is poisoned by discriminatory [*134] or retaliatory motivation on the part of an-

other person whose input is critical to the ultimate decision, it does not matter that the ultimate decisionmaker is as pure as driven snow-*Section 1983* liability can be imposed." *Id. at 631-32.*

> 35 While Sebastian cites to *Waters v. City of Chicago, 416 F. Supp. 2d 628 (N.D. Ill. 2006)*, which discusses ratification and delegation, Sebastian's argument centers upon the theory of a selection process "poisoned" by the "input" of the individual defendants. Thus, the Court will not consider whether the ultimate decision maker delegated final policymaking authority to Kaderbek or ratified the unconstitutional conduct of a subordinate. *See Culver, 416 F.3d at 550*; *see also Graham, 247 Fed. Appx. 26, 2007 U.S. App. LEXIS 21598, at *12.*

The Court respectfully declines to adopt the *Waters* approach. While the Court has recognized and applied this theory in the context of Title VII liability, Sebastian has not cited, nor is the Court aware of, any binding legal authority that supports the application of this theory in the context of *§ 1983* municipal liability claims. To the contrary, the Seventh Circuit has emphasized that "[n]either respondeat superior nor negligent supervision [*135] of subordinates is an authorized ground of liability in a suit under *42 U.S.C. § 1983*," *see Wilson v. City of Chicago, 6 F.3d 1233, 1240 (7th Cir. 1993)*, and that a plaintiff cannot establish municipal liability under *§ 1983* "by simply alleging that the municipality failed to investigate an incident," *Baskin v. City of Des Plaines, 138 F.3d 701, 705 (7th Cir. 1998)*. *See also Monell, 436 U.S. at 691.*

In light of the foregoing, the Court grants the City's motion for summary judgment with respect to Count III.

IV. Indemnification (Count IV)

Finally, the City [36] moves for summary judgment on Sebastian's claim for indemnification. In Count IV, Sebastian asserts a demand of judgment pursuant to *745 ILCS 10/9-102* against the City for any amount awarded to Sebastian for the acts of Allen, Kozicki, and Kaderbek. (Pl. Sec. Am. Compl., Count IV PP 1-37.) *Section 10/9-102* of the Illinois Tort Immunity Act directs a local public entity "to pay any tort judgment . . . for compensatory damages . . . for which it or an employee while acting within the scope of his employment is liable." *745 ILCS 10/9-102*. Under *Section 10/2-109*, however, "[a] local public entity is not liable for an injury resulting [*136] from an act or omission of its employee where the employee is not liable." *745 ILCS 10/2-109*. Having concluded that neither Kaderbek nor Kozicki retaliated against Sebastian in violation of *§ 1983*, the Court grants summary judgement in favor of the City on Sebastian's claim for indemnification with respect to Kaderbek and Kozicki. *See 745 ILCS 10/2-109.*

> 36 In his reply memorandum, Allen submits that he is also entitled to summary judgment with respect to Count IV. The allegations within Count IV of Sebastian's Second Amended Complaint are directed solely at the City, not the individual defendants. Thus, Allen need not move for summary judgment with respect to Count IV as the Second Amended Complaint does not contain such a claim against him in his individual capacity.

Still at issue, however, is whether the City may be held liable for the actions taken by Allen with respect to Sebastian's *§ 1983* claim. The City may be held liable for actions taken by its employee while acting within the scope of his employment. *See 745 ILCS 10/9-102.* Sebastian must establish that Allen was acting within the scope of his employment when he engaged in the activities underlying Sebastian's political retaliation [*137] claim. *See Pyne v. Witmer, 129 Ill. 2d 351, 543 N.E.2d 1304, 1309, 135 Ill. Dec. 557 (Ill. 1989).* To be within the scope of employment, an employee's acts must be: (a) the kind he is employed to perform; (b) substantially within the authorized time and space limits; and (c) actuated, at least in part, by a purpose to serve the master. *Id.*

The City maintains that Allen was not acting within the scope of his employment because the City prohibits the use of political factors in employment decisions affecting career service employees. Sebastian submits, however, that the conduct was within the relevant scope because it was part of the culture of the City. Neither argument, both of which are noticeably deficient with respect to analysis and legal authority, is persuasive. An intentional tort is considered to be within the scope of employment when it is committed, at least in part, to serve or further the employer's business, despite its illegality or violation of employer policy. *See Prothro v. Nat'l Bankcard Corp., No. 04 C 7857, 2006 U.S. Dist. LEXIS 57553, at *19 (N.D. Ill. Aug. 3, 2006)* (*citing* Restatement (Second) of Agency § 219(1)); *see also Taboas v. Mlynczak, 149 F.3d 576, 582-83 (7th Cir. 1998)* (an employment decision [*138] motivated by ill will or bad faith may still be within the scope of employment). Summary judgment "is generally inappropriate when scope of employment is at issue. Only if no reasonable person could conclude from the evidence that an employee was acting within the course of employment should a court hold as a matter of law that the employee was not so acting." *Pyne, 543 N.E.2d at 1309* (internal citations omitted).

In the present case, there remains a question of fact as to whether Allen was acting within the scope of his employment with respect to Sebastian's *§ 1983* claim. According to Sebastian's version of the events at issue, Allen was Sebastian's superior in the EB Department. Sebastian approached Allen while the two individuals were at work and proceeded to discuss the supervisor position when Allen allegedly commented on Sebastian's lack of political activity. Kozicki subsequently asked Allen to participate in the interview process in his capacity as a City employee, which he did in a number of ways, including creating the Code questions, directly interviewing the candidates, discussing the candidates' interviews, and scoring the candidates. Such facts present a genuine issue [*139] of material fact as to whether Allen was acting within his scope of employment and, more specifically, whether he was motivated, at least in part, to serve the City's interests. Accordingly, summary judgment is denied with respect to Count IV. *See id. at 1309-11.*

CONCLUSION AND ORDER

For the reasons stated herein, Defendant Allen's Motion For Summary Judgment is denied with respect to Count III and granted with respect to Counts I and II. Defendants City of Chicago, Kaderbek and Kozicki's Motion For Summary Judgment is granted in part and denied in part. Specifically, summary judgment is denied as to Counts I and IV, but granted with respect to Counts II and III. Finally, Sebastian's Motion to Strike portions of Defendants' reply pleadings is granted in part and denied in part consistent with this Opinion.

So ordered.

/s/ Virginia M. Kendall

Hon. Virginia M. Kendall

United States District Court

Northern District of Illinois

Date: July 24, 2008

MISTY ROBY, Plaintiff, v. CWI. INC. d/b/a CAMPING WORLD, INC., Defendants.

No. 07 C 4520

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2008 U.S. Dist. LEXIS 84701

September 11, 2008, Decided
September 11, 2008, Filed

SUBSEQUENT HISTORY: Costs and fees proceeding at *Roby v. CWI, Inc., 2009 U.S. Dist. LEXIS 131171 (N.D. Ill., May 13, 2009)*
Affirmed by *Roby v. CWI, Inc., 579 F.3d 779, 2009 U.S. App. LEXIS 19317 (7th Cir. Ill., 2009)*

COUNSEL: [*1] For Misty Roby, Plaintiff: Ronald J. Broida, LEAD ATTORNEY, Joseph K. Nichele, Broida and Associates, Ltd., Naperville, IL.

For CWI, Inc, a Kentucky corporation, doing business as Camping World, Inc, Defendant: Victoria Lyne Donati, LEAD ATTORNEY, Natalie Erin Norfus, Sonya Rosenberg, Neal, Gerber & Eisenberg, Chicago, IL.

JUDGES: Samuel Der-Yeghiayan, United States District Court Judge.

OPINION BY: Samuel Der-Yeghiayan

OPINION

MEMORANDUM OPINION

SAMUEL DER-YEGHIAYAN, District Judge

This matter is before the court on Defendant CWI, Inc. d/b/a Camping World, Inc.'s ("CW") motion for summary judgment. For the reasons stated below, we grant the motion for summary judgment in its entirety.

BACKGROUND

Plaintiff Misty Roby ("Roby") alleges that she began working for CW as a cashier in May 2005. Roby contends that her supervisor, Joe Schiavone ("Schiavone"), began making sexually suggestive statements to Roby. On one occasion, Schiavone allegedly kneeled down near Roby's legs and when Roby asked if she should move, Schiavone allegedly responded: "I like it down here." (Compl. Par. 5). According to Roby, on another occasion Schiavone came up behind Roby and pressed his body against her body. Roby contends that in July 2005 she [*2] took maternity leave and, while Roby was on leave, Schiavone told another CW employee that after Roby returned to work Schiavone would "either lose his job or lose his wife because he wanted to be romantically and sexually involved with Roby." (Compl. Par. 7). On another occasion, Schiavone allegedly "smacked Roby on the buttocks." (Compl. Par. 10). Roby allegedly requested to work a different shift from Schiavone, but she was allegedly assigned the store closing shift with Schiavone. Roby states that she complained to management, but was only told not to discuss the situation with anyone else at work. Schiavone allegedly told other CW employees that Roby was trying to get him fired. Schiavone allegedly intimidated and taunted Roby and told Roby that nothing would happen to him because he is a "Mason." (Compl. Par. 13). Roby also contends that after she complained about Schiavone, on one occasion he placed his hand on her hip. Roby contends that on January 28, 2006, CW terminated Roby's employment. Roby brought the instant action and includes in her complaint a hostile work environment claim based on an alleged violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), *42 U.S.C. § 2000e et seq.* [*3] (Count I), and a Title VII retaliation claim (Count II). CW moves for summary judgment on both claims.

LEGAL STANDARD

Summary judgment is appropriate when the record, viewed in the light most favorable to the non-moving party, reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In seeking a grant of summary judgment, the moving party must identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*(quoting *Fed. R. Civ. P. 56(c)*). This initial burden may be satisfied by presenting specific evidence on a particular issue or by pointing out "an absence of evidence to support the non-moving party's case." *Id. at 325*. Once the movant has met this burden, the non-moving party cannot simply rest on the allegations in the pleadings, but, "by affidavits or as otherwise provided for in [*Rule 56*], must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*. [*4] A "genuine issue" in the context of a motion for summary judgment is not simply a "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Rather, a genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Insolia v. Philip Morris, Inc., 216 F.3d 596, 599 (7th Cir. 2000)*. The court must consider the record as a whole, in a light most favorable to the non-moving party, and draw all reasonable inferences that favor the non-moving party. *Anderson, 477 U.S. at 255*; *Bay v. Cassens Transport Co., 212 F.3d 969, 972 (7th Cir. 2000)*.

DISCUSSION

I. Whether Schiavone was Roby's Supervisor

We note that CW initially argues in a conclusory fashion that Schiavone was technically not Roby's supervisor since he did not have the authority to hire, fire, demote, or promote Roby. (Mem. SJ 8). CW asserts that Tim Heaton ("Heaton") was Roby's direct supervisor. (Mem. SJ 1). Roby responds by pointing to portions of the record indicating that she and other employees in the same position had a reasonable [*5] basis to conclude that Schiavone was Roby's supervisor. (Ans. SJ 9). CW did not support its argument that Schiavone was not Roby's supervisor. CW instead argued in its memorandum that whether Schiavone was Roby's supervisor is irrelevant and that, even if Schiavone was Roby's supervisor, under the analysis for supervisor liability, Roby cannot prevail. (Mem. SJ 8). Thus, for the purposes of the instant motion we will treat Schiavone as Roby's supervisor.

II. Hostile Work Environment Claim

CW moves for summary judgment on the hostile work environment claim. CW argues that it cannot be held liable since there is not sufficient evidence that shows that CW failed to respond to complaints about the alleged harassment. CW asserts that it cannot be held liable for Schiavone's alleged misconduct even if he were considered to have been Roby's supervisor. An employer is "vicariously liable for hostile environment harassment perpetrated by a supervisor." *Cerros v. Steel Technologies, Inc., 398 F.3d 944, 951 (7th Cir. 2005)*(citing *Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998)* and *Faragher v. City of Boca Raton, 524 U.S. 775, 787, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)*). However, if the employee that was harassed [*6] by the supervisor did not suffer a tangible employment action, the employer can raise an affirmative defense known as the *Ellerth/Faragher* affirmative defense. *Id.*; *Jackson v. County of Racine, 474 F.3d 493, 502 (7th Cir. 2007)*(referring to the *"Ellerth/Faragher* affirmative defense"); *McPherson v. City of Waukegan, 379 F.3d 430, 440 (7th Cir. 2004)*(indicating that if no tangible action was taken by the employer, the employer can raise the *Ellerth/Faragher* affirmative defense). For the *Ellerth/Faragher* affirmative defense, the defendant employer must establish: (1) "'that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and'" (2) "'that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.'" *Cerros, 398 F.3d at 951-52* (quoting *Ellerth, 524 U.S. at 754*).

A. Tangible Employment Action

Roby argues that CW cannot raise the *Ellerth/Faragher* affirmative defense because CW took a tangible employment action against her. A tangible employment action can constitute actions such as "'discharge, demotion, or undesirable reassignment' . . . ." [*7] *Jackson, 474 F.3d at 501* (quoting *Hill v. American General Finance, Inc., 218 F.3d 639, 643 (7th Cir. 2000)*).

1. Termination of Employment

Roby first contends that she suffered a tangible employment action because she was discharged from her employment and her employment was allegedly terminated by CW in January 2006. (Compl. Par. 14); (SAF Par. 25-26). However, CW points to evidence that indicates that Roby's employment was not terminated in

January 2006 and that she actually abandoned her employment. We first note that in some of Roby's filings she actually concedes that she was never officially fired by CW in January 2006 and Roby's position is that she was instead constructively discharged. (R SF Par. 60). For example, in response to CW's assertion in its statement of facts that Roby quit her job, Roby responds that "[i]t is denied that Roby quit working" and that "rather, she was effectively taken off schedule [sic] and constructively discharged. . . ." (R SF Par. 60). Thus, Roby's own filings contradict her assertion that CW fired her in January 2006 and forced Roby to quit working at CW.

Also, Roby's own deposition testimony indicates that CW did not terminate her employment in [*8] January 2006. For example, Roby admitted that no one at CW ever communicated to her that she was fired or that her employment had been terminated. (Roby Dep. 104). Roby also contends that she had some confusion concerning her status as being on or off the work schedule, but she admitted at her deposition that she understood it to be "some sort of leave," as opposed to being permanently terminated. (Roby Dep. 104). Roby testified during her deposition that she was so upset with her situation at work that she "didn't want to go to work anymore," which indicates she was not fired by CW. (Roby Dep. 76). When asked if she told anyone that she quit her job, she replied only that she did not remember. (Roby Dep. 105). In describing her departure from CW, Roby did not state that she was fired or forced to leave CW but instead stated: "I did leave." (Roby Dep. 105).

In addition, CW has pointed to undisputed evidence that shows that Roby's employment was not terminated by CW in January 2006. It is undisputed that Roby spoke with Human Resources Manager, Sarah Sack ("Sack") in early January 2006 and that Roby informed Sack that Roby had retained a lawyer to pursue a suit against CW. (R SF Par. [*9] 65). CW also contends that Sack told Roby at that juncture that Roby was on the work schedule. (SF Par. 65). Roby contends that Sack never told Roby that Roby was on the work schedule, but in support of her denial, Roby cites only to page 60 of her deposition transcript. (R SF Par. 65). We note that Roby indicates on page 61 of her deposition transcript that she does not recall "anyone inviting [her] back." (Roby Dep. 60-61). Roby does not, however, offer any testimony at that point in her deposition or in the portion cited by Roby that contradicts the fact that Sack told Roby that Roby was on the work schedule. Therefore, such fact is deemed undisputed pursuant to *Local Rule 56.1. See Martino v. MCI Communications Servs., Inc., 2008 U.S. Dist. LEXIS 41496, 2008 WL 2157170, at *1 (N.D. Ill. 2008)*(stating that a "Court may disregard statements and responses that do not properly cite to the record"); *Dent v. Bestfoods, 2003 U.S. Dist. LEXIS 14871, 2003 WL 22025008, at *1 n.1 (N.D. Ill. 2003)*(indicating that a denial is improper if the denial is not accompanied by specific references to admissible evidence or portions of the record representing admissible evidence).

CW also asserts in Paragraph 67 ("Paragraph 67") of its statement of material [*10] facts that Heaton "continued to place Roby on the weekly store schedules for her regular working hours through the end of January 2006," and that after January 2006, "Roby remained on the weekly store schedules, though scheduled 'off' until at least early March 2006." (SF Par. 67). CW has in fact attached copies of the CW work schedules during the period that show that Roby was listed on certain shifts at CW. (CW Ex. J). Roby responds to Paragraph 67 by indicating that she "denie[s]" that she was listed on the work schedules, but the basis for her denial is only that she allegedly was informed that she was not scheduled to work and would be listed as "off." (R SF Par. 67). As indicated above, it is undisputed that Sack told Roby that she was on the work schedule. Also, Roby's evasive answer to Paragraph 67 that she was not told that she was scheduled to work and was listed as "off" does not offer a basis to contest CW's assertion that Roby was listed on the work schedules and the facts in Paragraph 67 are therefore deemed to be undisputed. *See Martino, 2008 U.S. Dist. LEXIS 41496, 2008 WL 2157170, at *1* (stating that "[t]he requirements for responses under *Local Rule 56.1* are 'not satisfied by evasive denials [*11] that do not fairly meet the substance of the material facts asserted'")(quoting in part *Bordelon v. Chicago Sch. Reform Bd. of Trs., 233 F.3d 524, 527 (7th Cir. 2000)); Jankovich v. Exelon Corp., 2003 U.S. Dist. LEXIS 1466, 2003 WL 260714, at *5 (N.D. Ill. 2003)*(stating a denial of a statement of fact that is evasive and does not directly oppose the assertion is improper and thus the contested fact is deemed admitted pursuant to *Local Rule 56.1*).

CW also asserts that after January 2006, CW "continued to pay Roby her regular wages through early February 2006, as if she were working." (SF Par. 68). Roby admits that those facts are true. (R SF Par. 68). Roby also admits that she did not know of any other employee that had been paid even though the employee had not been coming to work. (R SF Par. 68). CW also presents evidence that shows that Roby was kept as an "active" status on the payroll system at least through September 2007, which left open the door for her return. (SF Par. 70). Thus, although Roby argues that her employment had been terminated in January 2006, she admits that she did not know for certain whether her employment had been terminated. She also admits that she did not want to work at CW anymore, [*12] that she is unsure if she told others that she quit, and that she left CW. It is also undisputed that Roby was told that she was on the work schedules, that she was listed on certain shifts on the

work schedules after she spoke to Sack in January 2006, and that Roby was being paid for such hours. In opposition to the undisputed evidence pointed to by CW, showing that it did not terminate Roby's employment in January 2006, Roby offers nothing more that her own self-serving assertions concerning her subjective understanding of the situation. We recognize that self-serving testimony by a plaintiff can at times create genuine disputes as to material facts, if, for example, such testimony relates to what the plaintiff saw or heard or plaintiff's personal knowledge. *Paz v. Wauconda Healthcare and Rehabilitation Centre, LLC, 464 F.3d 659, 664-65 (7th Cir. 2006)*. However, self-serving beliefs by a plaintiff cannot create genuine disputes where the beliefs are not premised on a personal knowledge or any legitimate basis. *See Central Mfg., Inc. v. Brett, 492 F.3d 876, 883 (7th Cir. 2007)*(stating that "[i]t is unfathomable that a company claiming to have engaged in thousands of dollars of sales [*13] of a product for more than a decade would be unable to produce even a single purchase order or invoice as proof" and that "[s]elf-serving deposition testimony is not enough to defeat a motion for summary judgment"); *Williams v. Seniff, 342 F.3d 774, 785 (7th Cir. 2003)*(stating that "[a]lthough a nonmoving party's own deposition may constitute affirmative evidence to defeat summary judgment, conclusory statements in the deposition do not create an issue of fact"); *Payne v. Pauley, 337 F.3d 767, 772 (7th Cir. 2003)*(indicating that self-serving statements must be based on personal knowledge and "although personal knowledge may include reasonable inferences, those inferences must be 'grounded in observation or other first-hand personal experience" and "[t]hey must not be flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience'")(quoting in part *Visser v. Packer Eng'g Assoc., 924 F.2d 655, 659 (7th Cir. 1991))*. Roby's assertion that in light of what she observed in January 2006, she "took [that] to mean that she was fired," is not sufficient to create a genuine dispute as to whether CW fired her in January 2006. (Ans. SJ 10). Nor has Roby [*14] pointed to other evidence that would be sufficient to indicate that her employment was terminated in January 2006. Therefore, based on the undisputed record there is not sufficient evidence to conclude that CW terminated Roby's employment in January 2006.

2. Constructive Discharge

Roby, apparently recognizing the lack of evidence to support her contention that her employment was terminated in January 2006, argues that even if CW did not terminate her employment, she was constructively discharged. (Ans. SJ 10). In order for a plaintiff "to show that a hostile work environment resulted in her constructive discharge," the plaintiff "must not only demonstrate that a hostile work environment existed but also that the abusive working environment was so intolerable that her resignation was an appropriate response." *McPherson, 379 F.3d at 440*. An employee can be deemed to be constructively discharged only in a situation "'in which the working conditions have made remaining with this employer simply intolerable.'" *Id.* (quoting *Lindale v. Tokheim Corp., 145 F.3d 953, 955 (7th Cir. 1998))*.

Roby points to evidence that she contends shows that she was subjected to a hostile work environment. However, [*15] for a constructive discharge, the working conditions for the plaintiff "'must be even more egregious than the high standard for hostile work environment because . . . an employee is expected to remain employed while seeking redress.'" *Id.* (quoting *Robinson, 351 F.3d at 336*). Roby contends that there is evidence that Schiavone sexually harassed her, that she was taunted by Schiavone after she complained about him. (Ans. SJ 10). Roby contends that she felt intimidated and threatened by her situation at work. However, Roby has not pointed to sufficient evidence that, even if true, could be considered intolerable. Roby does not, for instance, indicate that Schiavone made any physical threats to her or threatened her employment. Roby merely contends, for example, that she was taunted by Schiavone and that he stared at her.

Roby also contends that her work environment was harsh because she was forced to "continually work in close proximity with" Schiavone. (Ans SJ 10). However, the undisputed facts do not support Roby's assertion. It is undisputed that Schiavone was a Service Manager. (R SF Par. 13). It is also undisputed that Schiavone had a variety of responsibilities as a Service Manager [*16] that would have required him to perform tasks that were not in close proximity to the person of Roby. (R SF Par. 18). Roby has failed in turn to point to sufficient evidence that would support her contention that she "continually work[ed] in close proximity" with Schiavone. (Ans. SJ 10). Roby's allegations concerning harassment involve only a few isolated incidents and such allegations do not illustrate that Schiavone was continually working alongside Roby.

Roby also argues that "she did not feel comfortable working at Camping World anymore," (Ans. SJ 10), but as indicated above, an employee is not constructively discharged merely because she no longer feels comfortable with her workplace. Rather, the conditions must be "simply intolerable." *McPherson, 379 F.3d at 440*. Even when considering the evidence in the record in its totality, Roby has not shown that her work conditions were that harsh. Although Roby no longer works for CW, the undisputed evidence clearly shows that after CW had addressed the alleged harassment, Roby was given every opportunity to continue working and instead abandoned

her job. Thus, there is not sufficient evidence to conclude that Roby was constructively discharged, [*17] and based on the above, there is not sufficient evidence that shows that CW took a tangible employment action against Roby. CW can therefore raise the *Ellerth/Faragher* affirmative defense.

B. Exercise of Reasonable Care by CW

CW argues that the undisputed evidence shows that it exercised reasonable care in preventing and correcting the alleged harassing behavior by Schiavone towards Roby. An employer is not deemed to possess knowledge of the sexual harassment of the plaintiff until "'the employee makes a concerted effort to inform the employer that a problem exists.'" *McPherson, 379 F.3d at 441* (quoting in part *Silk v. City of Chicago, 194 F.3d 788, 807 (7th Cir. 1999))*; *Cerros, 398 F.3d at 952* (stating that "[a]t bottom, the employer's knowledge of the misconduct is what is critical, not how the employer came to have that knowledge" and that "[t]he relevant inquiry is therefore whether the employee adequately alerted her employer to the harassment"). The Seventh Circuit has indicated that an employer can meet its burden to exercise reasonable care in preventing and correcting harassing behavior by showing that "[a]s soon as [the employer] learned that [the harasser] had sexually harassed [*18] [the plaintiff], the [employer] acted immediately to investigate, correct and prevent future recurrences of [the harasser's] behavior." *McPherson, 379 F.3d at 441.*

According to Roby's own version of events, in early November 2005, she was having a conversation with Laura Phillips ("Phillips") and Roby was telling Phillips about Schiavone's alleged harassment. (R SF Par. 20). Roby contends that Phillips was encouraging Roby to report Schiavone's alleged misconduct to Karl Ziarko ("Ziarko") and Heaton, and that when Ziarko and Heaton overheard Roby's comments, and became involved in the conversation, Roby complained to them about Schiavone. (R SF Par. 20). Roby admits that Ziarko then asked Roby to follow him and Heaton to the office to discuss her comments and that they did discuss Roby's complaints about Schiavone. (R SF Par. 20-21).

Roby also acknowledges that after she told Ziarko about the alleged harassment by Schiavone, Ziarko immediately contacted CW's Human Resources Department and relayed Roby's allegations to Sack. (R SF Par. 28). Roby argues that Ziarko's response was not timely because Roby's contends that Ziarko was aware of Schiavone's inappropriate conduct towards Roby [*19] at an earlier time. (R SF Par. 21, 28). Roby contends that Christopher Gartzke ("Gartzke") made a comment to Ziarko prior to November 2005. (R SF Par. 21, 28).

Gartzke indicated during his deposition and Roby confirmed during her deposition, that Gartzke told Ziarko that Schiavone "was either going to lose his job or his wife because he wanted to be with" Roby. (Roby Dep. 65);(Gart. Dep. 15-17). However, even if Gartzke had relayed the comment to Ziarko, the comment was not such that Ziarko should have been aware of unlawful harassment by Schiavone. Schiavone's comment indicated nothing more than that there was a romantic interest. Also, the alleged representation to Ziarko did not come from Roby. Roby does not contend that she complained to Ziarko before November 2005. Rather the comment amounted to nothing more than gossip by another employee at CW that was neither the alleged harasser nor the victim. It was a comment from a third party, and the comment did not indicate whether the person commenting actually observed Schiavone engage in any harassing conduct towards Roby. We also note that Roby has not shown that such information would be admissible evidence and not barred as hearsay. [*20] *See Hemsworth v. Quotesmith.Com, Inc., 476 F.3d 487, 490 (7th Cir. 2007)*(stating that "[t]he evidence relied upon in defending a motion for summary judgment must be competent evidence of a type otherwise admissible at trial"); *Fed. R. Evid. 801.* Thus, Roby has not pointed to evidence that shows that Ziarko knew about the alleged harassment before November 2005 and failed to act immediately.

CW asserts that when Ziarko reported the alleged harassment to Sack in November 2005, Sack immediately began an investigation. Roby denies that fact and gives as her reason for her denial that there is no written procedure or guidelines as to how to conduct an investigation. (R SF Par. 30). Roby, however, fails to contest the fact that Sack did immediately begin some type of an investigation. It is undisputed that Sack conducted an investigation and concluded that Schiavone had not engaged in conduct that rose to the level of unlawful harassment. (R SF Par. 43-44). CW has provided documentation, that shows that Schiavone received a stern written warning. (SF Par. 45). CW also points to evidence that shows that Schiavone was forced to undergo anti-harassment training and re-review the anti-harassment [*21] policy at CW ("Harassment Policy"). (SF Par. 46). CW also points to evidence that shows that it was conveyed to Schiavone that if he retaliated against Roby or there were further harassment problems, he would likely face termination. (SF Par. 47). Roby believes that the warning could not have been stern and that Schiavone could not have faced possible termination since there were further incidents. According to Roby, Schiavone taunted Roby and continued to harass Roby after the warning. (R SF Par. 45, 47). However, whether Schiavone actually took the warnings seriously is not the relevant issue. The relevant issue for the purposes of deter-

mining whether CW exercised reasonable care to address and prevent the harassment is the action taken by CW, and CW has shown that it did take reasonable steps to correct the problem. CW has also pointed to evidence that shows that CW took steps to make Roby's work environment as comfortable as possible and that efforts were made to ensure that Roby would not be scheduled to work alone with Schiavone. (SF Par. 42). CW points to evidence that, due to the small number of employees in the area of CW where Roby worked, and Schiavone's position, it was [*22] not feasible to create schedules during which Roby and Schiavone never worked at the same time. (SF Par. 42).

It is also undisputed that CW admonished its employees to maintain confidentiality concerning the investigation of Roby's allegations of harassment. (R SF Par. 50). Roby disputes that fact, but only argues that some supervisors did not follow the admonishment. (R SF Par. 50). Roby acknowledges that in late December 2005, she complained to Ziarko and Heaton that Donnie Brown ("Brown") and Gartzke were discussing her allegations of harassment. (R SF Par. 51-52). Roby admits that Sack investigated her complaints about Schiavone. (R SF Par. 53). Roby also admits that although CW concluded that Brown was not aware of Roby's complaint, CW terminated Gartzke's employment due to his breach of confidentiality. (R SF Par. 53-55). Roby also acknowledges that Sack took steps to investigate Roby's assertions that Schiavone was taunting her or staring at her. (R SF Par. 56). Based upon the above, CW has pointed to sufficient evidence that shows that CW, upon learning of the allegations of harassment by Schiavone, actively took steps to address the problem and exercised reasonable care in [*23] preventing and correcting the harassing behavior.

C. Failure by Roby to Take Advantage of Corrective Opportunities

CW also contends that Roby failed to take advantage of the corrective opportunities available to her to address the alleged harassment by Schiavone. Roby admits that CW had the Harassment Policy and that, upon hiring, all employees at CW received a copy of the Harassment Policy. (R SF Par. 7). Roby also admits that she signed an acknowledgment that she received a copy of the Harassment Policy, that she understood the Harassment Policy, and that she agreed to abide by the Harassment Policy. (R SF Par. 15). Thus, both Roby and Schiavone received the Harassment Policy explaining that CW does not condone sexual harassment and that such harassment should be reported. Despite the existence of the Harassment Policy, as explained above, Roby admits that CW management only learned of the alleged harassment by Schiavone when Ziarko overheard Roby's conversation about Schiavone. Roby did not take the first step to complain to management. Rather, the undisputed evidence shows that Ziarko took the initiative and had Roby come to his office so he could address the situation.

It is undisputed [*24] that the Harassment Policy contains a provision stating that employees are required to immediately report any harassment. (R SF Par. 6). Roby states in response only that she disputes that CW follows the policy. (R SF Par. 6). CW asserts that although Roby contends that she suffered harassment as early as June 2005, (SF Par. 17, 26-27), Roby did not immediately notify CW of the alleged harassment as is provided in the Harassment Policy. (SF Par. 17). Roby denies that she made her first complaint in November 2005, contending that Gartzke made a reference about her situation to Ziarko in the fall of 2005. (R SF Par. 17). However, as is explained above, that statement was not a complaint about harassment and Roby has not shown that Gartzke's alleged comment would be admissible. Also, it is undisputed that under the terms of the Harassment Policy, Roby, who had been aware of the harassment, was obligated to report it immediately. Nothing absolved Roby of that responsibility even if another employee had made references to it when speaking to Ziarko.

Roby in fact admits that, before November 2005, she knew that she was being harassed and purposefully did not report it. (Ans. SJ 13). Roby [*25] states that she did not report it because she needed her job and at that point the harassment had only been verbal. (Ans. SJ 13). However, CW cannot be held responsible for such harassment if it was never informed of the harassment. Also, had Roby informed CW of the early oral harassment, CW might have been able to take steps sooner and prevent the following alleged physical harassment.

Roby also contends that in September 2005, after she returned from maternity leave, Schiavone stood too close behind her. (Roby Dep. 46). However, although Roby recalled the incident during her deposition, it is undisputed that Roby never informed CW management of the alleged incident while she was employed at CW. (R SF Par. 60); (Roby Dep. 46). Thus, Roby failed to properly alert CW of the September 2005 incident.

The allegations against Schiavone involve conduct that has absolutely no place in the workplace and is reprehensible. The question remains, however, whether Roby properly notified such conduct to CW management. The undisputed evidence, clearly shows that Roby failed to immediately notify CW of the alleged harassment against her even though such notification is required in the Harassment Policy. [*26] The undisputed evidence thus shows that Roby, despite being instructed as to and cognizant of the Harassment Policy, never took advantage of the Harassment Policy and failed to

properly inform CW management of the harassment. The undisputed evidence shows that the management at CW only learned of the alleged harassment by Schiavone when Ziarko overheard comments made by Roby. Thus, the undisputed evidence clearly shows that Roby unreasonably failed to notify management to allow CW management to address the alleged harassment by Schiavone. Based on the above, no reasonable trier of fact could find in favor of Roby relating to the hostile work environment claim and we grant CW's motion for summary judgment on the hostile work environment claim.

II. Title VII Retaliation Claim

CW moves for summary judgment on the Title VII retaliation claim. Title VII prohibits employers from "discriminat[ing] against" an employee, because she has "opposed any practice made an unlawful employment practice by" Title VII. *42 U.S.C. § 2000e-3(a)*. A plaintiff can prove a retaliation claim under either the direct method of proof or the indirect method of proof. *Tomanovich v. City of Indianapolis, 457 F.3d 656, 662-63 (7th Cir. 2006)*.

A. [*27] Direct Method of Proof

Under the direct method of proof, a plaintiff is required to either (1) "'present direct evidence (evidence that establishes without resort to inferences from circumstantial evidence) that [s]he engaged in protected activity (filing a charge of discrimination) and *as a result* suffered the adverse employment action of which [s]he complains'" or (2) present sufficient indirect evidence that creates a "'convincing mosaic of circumstantial evidence.'" *Sylvester v. SOS Children's Villages Illinois, Inc., 453 F.3d 900, 902 (7th Cir. 2006)*(quoting in part *Stone v. City of Indianapolis Public Utilities Division, 281 F.3d 640, 644 (7th Cir. 2002)* and *East-Miller v. Lake County Highway Dept., 421 F.3d 558, 564 (7th Cir. 2005))*(emphasis in original).

In the instant action, Roby argues that she can proceed under the indirect method of proof and does not argue that she can proceed under the direct method of proof. (Ans. SJ 14). Roby fails to identify sufficient evidence that could indicate that she was constructively discharged or that CW took any adverse actions against Roby because she complained about harassment by Schiavone. Rather the undisputed evidence clearly illustrates [*28] the reasonable efforts by CW to correct the problem and accommodate Roby for further employment at CW. The totality of the evidence does not establish a convincing mosaic of retaliation. Thus, Roby cannot proceed under the direct method of proof.

B. Indirect Method of Proof

Roby contends that she can proceed under the indirect method of proof. Under the indirect method of proof for a Title VII retaliation claim, the plaintiff must establish a *prima facie* case of retaliation by showing that: "(1) she engaged in statutorily protected activity; (2) she suffered a materially adverse action; (3) she met her employer's legitimate expectations, i.e., she was performing her job satisfactorily; and (4) she was treated less favorably than some similarly situated employee who did not engage in statutorily protected activity." *Argyropoulos v. City of Alton, 539 F.3d 724, 2008 WL 3905891, at *6 (7th Cir. 2008)*(quoting *Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)* and *Robinson v. Shell Oil Co., 519 U.S. 337, 346, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)* for the proposition that "[t]he anti-retaliation provision operates to 'prevent employer interference with unfettered access to Title VII's remedial mechanisms . . . by prohibiting [*29] employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, or their employers'").

1. Failure to Address Legitimate Non-Discriminatory Reason/Pretext

Roby's arguments as to her Title VII retaliation claim on their face fail to show that she can defeat CW's motion for summary judgment under the indirect method of proof. Roby argues in her answer to the motion for summary judgment only that Roby has pointed to sufficient evidence to establish a *prima facie* case of Title VII retaliation. (Ans. SJ 14). However, Roby fails to provide any arguments or supporting law relating to the legitimate non-discriminatory reason/pretext analysis. (Ans. SJ 14-15). If a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to provide a "legitimate, non-discriminatory reason for the adverse employment action." *Atanus v. Perry, 520 F.3d 662, 677 (7th Cir. 2008)*. Once the defendant provides such a reason, the burden shifts back to the plaintiff to "demonstrate that the employer's reason is pretextual." *Id.*

In the instant action, there is no evidence that CW took "adverse" action against Roby. CW also contends that it made every effort [*30] to address Roby's concerns about the alleged harassment, and continued to employ Roby and listed her on the work schedule, but CW had no option but to ultimately terminate Roby's employment because Roby decided to abandon her job. Roby fails to provide any argument or even supporting law regarding whether CW's reason is a pretext. In addition, to the extent that Roby indicated in her deposition and argues in her answer to the instant motion that she did not understand that she was not fired in January 2006 or that the situation was "confusing," (Ans. SJ 10), or that there was other confusion relating to her harassment complaints, such evidence does not show that CW's rea-

son was a pretext for unlawful retaliation. *See Sublett v. John Wiley & Sons, Inc., 463 F.3d 731, 737 (7th Cir. 2006)*(stating that "[p]retext is a 'lie, specifically a phony reason for some action'")(quoting in part *Russell v. Acme-Evans, Co., 51 F.3d 64, 68 (7th Cir. 1995))*. Roby has not pointed to sufficient evidence that shows that CW's explanation for its actions were motivated by a retaliatory purpose, are unworthy of credence, or that the reason was a lie. *See Giannopoulos v. Brach & Brock Confections, Inc., 109 F.3d 406, 410-11 (7th Cir. 1997)*(stating [*31] that the courts "do not sit as a kind of 'super-personnel department' weighing the prudence of employment decisions made by firms charged with employment discrimination" and that "[t]hus, when an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not [a court's] province to decide whether that reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination"). Thus, even if we were to accept Roby's arguments concerning her *prima facie* case, Roby fails to show that she can prevail under the indirect method of proof on her retaliation claim.

2. *Prima Facie* Case of Title VII Retaliation

We also note that even if Roby had adequately addressed the legitimate non-discriminatory reason/pretext analysis, Roby did not point to sufficient evidence to establish a *prima facie* case. As indicated above, Roby did not point to sufficient evidence that shows that CW terminated her employment in January 2006 or that Roby was constructively discharged. Roby also contends that after she complained about Schiavone, he would stare at her, taunt her, and told her nothing would happen to him because he is a "Mason." (R [*32] SF Par. 56). However, Roby has not shown that such conduct even if true could support the adverse action element of her *prima facie* case. Roby has not pointed to sufficient evidence that shows that any action taken against Roby could be deemed an adverse action to support her retaliation claim. In addition, Roby fails to establish a *prima facie* case because she fails to provide details explaining why the other employees that she contends were treated differently were similarly situated to Roby. *See Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 791 (7th Cir. 2007)*(stating that for the similarly situated analysis courts should consider factors such as "whether the employees 1) had the same job description; 2) were subject to the same standards; 3) were subject to the same supervisor; and 4) had comparable experience, education, and other qualifications"). Therefore, based on the above, we grant CW's motion for summary judgment on the Title VII retaliation claim.

CONCLUSION

Based on the foregoing analysis, we grant CW's motion for summary judgment in its entirety.

/s/ Samuel Der-Yeghiayan

Samuel Der-Yeghiayan

United States District Court Judge

Dated: September 11, 2008