IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

EARL STONE, *et al.*, *

Plaintiffs, *

Case No.: GJH-17-353

v. *

TOWN OF CHEVERLY, MARYLAND, *et al.,* *

Defendants. *

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*

JOSEPH FROHLICH, *

Plaintiff, *

Case No.: GJH-16-2592

v. *

TOWN OF CHEVERLY, MARYLAND, *et al.,* *

Defendants. *

MEMORANDUM OPINION

If accepted as true, the facts alleged in the complaints filed by Plaintiffs Earl Stone, Ed Gizinski and Joseph Frohlich (collectively, "Plaintiffs") describe a troubling pattern of discrimination and retaliation by the Town of Cheverly, Maryland ("the Town"), the Cheverly Police Department ("the Police Department"), Chief of Police Harry Robshaw ("Chief Robshaw"), Town Administrator David Warrington ("Administrator Warrington") and Sergeant

Jarod Towers ("Sergeant Towers"). ECF No. 2.[1] A myriad of federal and state claims exist for the purpose of allowing plaintiffs to pursue appropriate remedies for the type of conduct alleged. But the remedies come with specific requirements that must be met before a plaintiff can pursue them in federal court. Many of those requirements have not been met by these Plaintiffs. Because Plaintiffs failed to provide timely notice of their potential state claims and did not exhaust their administrative remedies before bringing many of their federal claims, the majority of Plaintiffs claims will be dismissed. The Plaintiffs' age discrimination claims and one conspiracy claim will survive.

Specifically, pending before the Court are Defendants' Motion to Dismiss, or Alternatively, for Summary Judgment, ECF No. 19,[2] Defendants' Motion to Strike portions of the affidavits submitted by Plaintiffs in support of their Opposition to Defendants' Motion, ECF No. 25, and Plaintiffs' Motion for Discovery, ECF No. 26. A hearing was held regarding these motions on June 20, 2017. Loc. R. 105.6 (D. Md. 2016). For the following reasons, Defendants' Motion to Dismiss, or Alternatively, for Summary Judgment, is granted, in part, and denied, in part. Frohlich and Stone's federal age discrimination claims and Stone and Gizinski's federal claims alleging conspiracy to interfere with a witness testifying in court will proceed into discovery. Defendants' Motion to Strike is denied.[3] Plaintiffs' Motion for Discovery is granted, in part and denied, in part.

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[1]Frohlich filed his complaint separately and does not pursue any claims against Sergeant Towers. *See Frohlich v. Town of Cheverly*, No. 16-2592, ECF No. 2 (D. Md. 2016). After a conference call with the parties on February 16, 2017, the Court ordered that the two cases be consolidated for motions practice and discovery. ECF No. 18.

[2] For clarity, the Court will cite to "ECF No. _" for documents in the Stone/Gizinski case and "ECF No. _ (Case No. 16-2592)" for documents in Frohlich's case.

[3] In sum, Defendants' Motion to Strike addresses a variety of statements made in Plaintiffs' affidavits and requests that they be stricken as conclusory or inadmissible hearsay. The Court does not see the need to address these requests statement by statement but notes, first, that most of the statements objected to relate to claims that are now being dismissed and, second, to the extent statements contain conclusory statements or information that would otherwise be inadmissible, the Court has not relied on them.

I. BACKGROUND[4]

Until July 1, 2014, Frohlich served as the second in command of the Police Department, ECF No. 2 (Case No. 16-2592) ¶ 21, and was their oldest employee at the time of his discharge. *Id.* ¶ 2. Stone was employed by the Police Department as a Corporal until his termination in April 2015. ECF No. 2 ¶ 1. At the time of his discharge, he was their oldest patrol officer. *Id.* ¶ 2. Gizinski was also a Corporal in the Police Department when he was discharged in April 2015, and served as a union representative for the Fraternal Order of the Police ("FOP"). *Id.* ¶ 46.

According to Stone and Gizinski, from 2008 through the present, Chief Robshaw and Administrator Warrington retaliated against employees of the Town who engaged in protected activity. *Id.* ¶ 48. Specifically, Chief Robshaw made regular statements at staff meetings, threatening to punish anyone who reported unfair or unlawful practices. *Id.* ¶ 49. For example, Chief Robshaw said, "if you challenge me, I will win, I will stack the trial board and fire you," *id.* ¶ 54, promising that if officers complained, he would "make sure you never do police work again." *Id.* Another time with respect to officer complaints, Chief Robshaw said "[f]uck you, fuck the [Fraternal Order of Police], fuck your attorney, fuck anyone who tries to fuck with me." *Id.* ¶ 52. Stone and Gizinski allege that the Mayor and Town Council have known of this conduct since 2008 and have not taken adequate measures to stop it. *Id.* ¶ 48.

During their time with the Police Department, Plaintiffs worked with another officer, named Francis Schmidt.[5] *Id.* ¶ 23. In December 2009, Chief Robshaw became intoxicated and "shoved a pool cue" under Schmidt's wife's skirt at a Christmas party. *Id.* ¶ 56.[6] After the pool

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[4] Unless stated otherwise, all facts are taken from the complaints filed by the Plaintiffs and are accepted as true.

[5] Schmidt's own claims against the Police Department are pending before this Court in a separate litigation. The details have been discussed extensively in an opinion issued in that case. *See Schmidt v. Town of Cheverly, MD.*, 212 F. Supp. 3d 573 (D. Md. 2016) (hereinafter, "*Schmidt*").

[6] The Court notes that the dates alleged in this case occasionally vary from the dates alleged for the same event in the *Schmidt* case. For purposes of this Motion, the Court will refer to the dates alleged in the instant complaints unless noted otherwise.

cue incident, Chief Robshaw, in the presence of Frohlich and others, repeatedly referred to Schmidt as a problem that they needed to "get rid of." *Id.* ¶ 58.

On September 29, 2011, Schmidt suffered a hernia while at work, which rendered him unable to work. ECF No. 2 (Case No. 16-2592) ¶¶ 35, 36. In early October 2011, Schmidt requested sufficient leave to allow for his medical treatment and filed a claim for workers compensation benefits. *Id.* ¶ 36. On or near October 5, 2011, Administrator Warrington and Chief Robshaw decided to terminate Schmidt. *Id.* ¶ 37. Robshaw communicated that decision to Gizinski and stated "I'm giving you a heads up since you're the FOP representative: Schmidt's trying to file Workers Comp. so we're going to fire him." *Id.* ¶ 39. Additionally, sometime in 2011, before Officer Schmidt returned from disability leave, Chief Robshaw told Frohlich "[f]ind some way to get rid of that mother fucker," to which Stone, who was also present, responded "Chief what did he do? Why do you want to get rid of him, he comes in does his job, why do you want to fire him[?]" ECF No. 2 ¶ 78. Chief Robshaw replied, "I just don't like that mother fucker." *Id.*

On November 18, 2011, Schmidt's wife filed a "Charge of Discrimination" against Chief Robshaw and the Town. ECF No. 2 (Case No. 16-2592) ¶ 40. On November 29, 2011, Schmidt filed his own Charge of Discrimination, asserting discrimination and retaliation. *Id.* Around December 5, 2011, Administrator Warrington and Chief Robshaw launched an investigation into whether or not Schmidt was involved in and failed to report a hit and run accident involving his police vehicle. *Id.* ¶¶ 41-42. According to the Complaint, Defendant knew or should have known that Schmidt had not been involved in a hit and run accident. *Id.* ¶ 43. Schmidt was informed of the investigation immediately upon his return from disability leave. *Id.* ¶ 42.

Frohlich alleges that he "repeated and consistently" opposed the "false" investigation into Schmidt. *Id.* ¶ 44. For example, when Chief Robshaw told him that he intended to open internal investigations into Schmidt, Stone and Gizinski, Frohlich exclaimed "[t]hat's retaliation!" *Id.* ¶ 34; 106. Defendants also cancelled interviews that Frohlich had scheduled with the Prince George's County Human Rights investigator. *Id.* ¶ 107.

In accordance with the Law Enforcement Officers' Bill of Rights ("LEOBR "), a trial board was held in July 2012 on the charges against Schmidt. ECF No. 2 ¶¶ 25, 31. Stone and Gizinski allege that they testified truthfully on behalf of Schmidt at this proceeding. *Id.* ¶ 31. Schmidt was found not guilty of the alleged hit and run accident and not guilty of failing to report it. ECF No. 2 (Case No. 16-2592) ¶¶ 52, 53. The trial board did find Schmidt guilty of a minor infraction and recommended a 40 hour suspension and fine, but Chief Robshaw imposed a more severe punishment and terminated Schmidt. *Id.* ¶ 54. In the fall of 2013, the Circuit Court for Prince George's County ordered Schmidt's reinstatement and, in January 2014, Schmidt returned to the police force. *Id.* ¶¶ 47, 56.

In February 2014, the Police Department held a second LEOBR hearing. ECF No. 2 ¶ 62. Again, Stone and Gizinski testified in support of Schmidt. *Id.* Frohlich also testified "in defense of Ofc. Schmidt." ECF No. 2 (Case No. 16-2592) ¶ 57. At the second trial, Schmidt was cleared of "all major allegations." *Id.* ¶ 58. However, in January 2015, Schmidt was terminated by Chief Robshaw for "alleged performance deficiencies." ECF No. 2 ¶ 62. [7] In the present case before the Court, Frohlich, Stone and Gizinski contend that they were subject to retaliation because of

[7] In addition to being inconsistent with dates established in the *Schmidt* litigation, the order of events in the individual complaints are at times not placed in logical order given the dates allged and thus are hard to follow. *See, e.g.*, ECF No. 2 (Case No. 16-2592) ¶¶ 48-56 (discussing the second trial board in February *2014*, followed by Schmidt's termination on August 28, *2012*). In sum, it appears that Schmidt faced a trial board, was terminated and then reinstated only to face a second trial board and a second termination.

their support for Schmidt in these proceedings. *Id.* ¶¶ 31, 170, 178; ECF No. 2 (Case No. 16-2592) ¶¶ 33, 57, 59.

Stone and Gizinski also submitted affidavits to this Court in support of Schmidt's lawsuit. ECF No. 2 ¶ 107; *see also* ECF Nos. 19-78 and 19-76. The affidavits were signed on November 26, 2013 but were not filed with the Court until December 15, 2013. *See Schmidt v. Town of Cheverly, MD.*, No. 13-3282, ECF Nos. 18-4 & 18-5 (D. Md. filed Dec. 15, 2013). In late November or early December, "someone" informed Chief Robshaw and Administrator Warrington of the affidavits. ECF No. 2 ¶ 108.

All three Plaintiffs allege that because of their support of Schmidt, Chief Robshaw retaliated against them, taking actions that ultimately led to their termination from the Police Department. With respect to Stone and Gizinski, they claim that together, Chief Robshaw, Administrator Warrington and Sergeant Towers conspired to retaliate against them for their support of Schmidt by subjecting them to false internal affairs investigations. *Id.* ¶¶ 117, 118. For example, they allege that Sergeant Towers told an unnamed Prince George's County Police Officer that he would "do anything it takes to get rid of Francis [Schmidt], Earl [Stone] and Ed [Gizinski]." *Id.* ¶ 72. Then, in early 2014, Chief Robshaw, Administrator Warrington and Sergeant Towers placed GPS devices on Stone and Gizinski's police cars without their knowledge. *Id.* ¶ 111. Around January 30, 2014, Gizinski and Stone were informed that they were under investigation. *Id.* ¶ 61. The GPS records obtained from the devices placed on their patrol cars were used as the basis to fire Stone and Gizinski for inaccurately filling out their daily duty logs, which listed the officer's locations during the day. *Id.* ¶ 112.

On or about August 6, 2014, Stone and Gizinski had their police powers suspended, *id.* ¶ 67, and subsequently, in April 2015, both were terminated from the Police Department. *Id.* ¶¶ 46,

47. However, other officers, such as Sergeant Lamb, who submitted inaccurate duty logs were never disciplined or fired. *Id.* ¶ 112. Stone also alleges that after he was discharged, he was replaced by a younger officer. *Id.* ¶ 120.

Even after their termination, Chief Robshaw took further retaliatory action against Stone and Gizinski by filing false reports with the Maryland training commission and placing both of them on the "Brady" list[8] "effectively prevent[ing] them from ever again being employed as police officers." *Id.* ¶ 69. Prior to supporting Schmidt, Stone and Gizinski had excellent reviews and were never issued a written warning regarding their job performance. *Id.* ¶ 126.

Similarly, Frohlich claims that after he testified in support of Schmidt, Chief Robshaw and Administrator Warrington formulated a plan to retaliate against him by eliminating his position and firing him. ECF No. 2 (Case No. 16-2592) ¶ 59. First, Chief Robshaw stopped consulting with him and reassigned his job duties to two other officers, Sergeant Towers and Sergeant Lamb. *Id.* ¶ 110. Next, Chief Robshaw and Administrator Warrington pitched an idea to the Town Council to eliminate his position, using cost-savings as a pre-textual excuse to conceal their discriminatory motives. *Id.* ¶ 60. Frohlich claims that Defendant's claimed budgetary rationale was inconsistent with the Town's expenditures on new vehicles, equipment and raises for younger personnel. *Id.* ¶ 63.

Frohlich was 62 at the time of his termination. *Id.* ¶ 88. Although not given Frohlich's job title, a younger officer was effectively promoted to his position because the younger officer took over responsibility for Frohlich's job duties and was given a rate of pay equivalent to that of Frohlich prior to his termination. *Id.* ¶ 60.

[8] Although not explained, the Court presumes this refers to a list of officers who have negative findings in their background that would require disclosure to defense counsel in any case in which they made an arrest.

During his employment with the Town, Frohlich had excellent performance reviews and was never issued a written warning regarding his job performance. *Id.* ¶ 68. After his departure, Chief Robshaw openly stated that Frohlich's position had been terminated because of his support for Schmidt at the trial board and his support for Schmidt, Stone and Gizinski's EEOC complaints. *Id.* ¶ 135.[9] Specifically, Chief Robshaw stated to an unnamed police officer, "I wish Joe would have picked the right side…[w]hy did he align with those guys?...I could have saved him if he was not aligned with those guys." *Id.* ¶ 134.

All three Plaintiffs claim that Chief Robshaw arbitrarily imposes discipline on the officers under his command, and that people who oppose him are subjected to internal investigation or brought up on charges before administrative trial boards. ECF No. 2 (Case No. 16-2592) ¶ 64; ECF No. 2 ¶ 121. In contrast, officers who have not opposed or reported the unlawful conduct by the Defendants have engaged in serious misconduct and have not been disciplined. *Id.* For example, when Frohlich asked Chief Robshaw if there was going to be an investigation into claims that another officer, Sergeant Lamb, had been involved in a hit and run accident and had been driving under the influence, Chief Robshaw said "[l]et it go, there isn't going to be an investigation." ECF No. 2 (Case No. 16-2592) ¶ 66; ECF No. 2 ¶ 123. Sergeant Lamb was also never investigated for arriving late to work and leaving early to avoid traffic over the Bay Bridge, despite the fact that these allegations could be verified by looking at his EZ Pass. ECF No. 2 ¶ 124. In addition, Cheverly Police Department officers who engaged in disorderly conduct in Ocean City, Maryland in the spring of 2016 were never investigated or disciplined. ECF No. 2 (Case No. 16-2592) ¶ 65; ECF No. 2. ¶ 122. Finally, Stone and Gizinski also allege that an unnamed person heard Administrator Warrington bragging that the Town is

[9] Notably, this allegation does not fit with the timeline provided by Plaintiffs since Frohlich was terminated before Stone and Gizinski filed their EEOC complaints.

immune from EEOC charges because of his relationship with the Executive Director of Prince George's Human Relations Commission. *Id.* ¶ 127.

On January 13, 2015, Frohlich filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination based on age and retaliation. ECF No. 2 (Case No. 16-2592) ¶ 71; ECF No. 19-10. In his charge, Frohlich stated that in February 2014, he was "called as a witness to testify in a Title VII retaliation lawsuit filed by Office[r] Francis Schmidt" and that afterwards, Chief Robshaw began reassigning his duties to others. ECF No. 19-10. He further stated that on June 30, 2014, he was terminated for budgetary reasons but that he believed that the reason was pre-textual to conceal discriminatory motives. *Id.*

Stone and Gizinski filed their Charges of Discrimination with the EEOC shortly thereafter, on April 27, 2015 and May 23, 2015, respectively. ECF Nos. 19-74 and 19-73. In his charge, Stone stated that after participating on behalf of Schmidt in a retaliation discrimination case in November 2013, he was subjected to an escalating series of adverse employment actions which culminated in his discharge. ECF No. 19-74. Stone stated that this treatment was in retaliation for his protected activity in violation of Title VII and that he was removed from his position as a firearm instructor and replaced by a younger officer due to his age, which was 54 at the time of his replacement. *Id.*

Gizinski made similar claims in his EEOC charge, stating that "[o]n or about December 2013," he engaged in protected activity when he supplied an affidavit in support of Officer Schmidt's Title VII lawsuit. ECF No. 19-73. As with Stone, Gizinski claimed that in retaliation for his support of Schmidt, he was subject to harassment and was investigated for falsifying duty

logs and insubordination. *Id.* Gizinski was suspended on August 6, 2014 and then discharged on April 7, 2015. *Id.*

On December 4, 2015, Frohlich notified the Town that he sought to bring tort and statutory claims against them. ECF No. 2 (Case No. 16-2592) ¶ 69; *see also* ECF No. 19-80. The EEOC issued a right to sue letter on March 25, 2016 and Frohlich timely filed this case in the Circuit Court for Prince George's County alleging violations of both federal and state law. *Id.* ¶¶ 74-75. Specifically, Frohlich brought the following six claims against Defendants: Age Discrimination in Violation of Federal, State and Local law (Count One); EEO Retaliation in Violation of Federal, State and Local law (Count Two); Wrongful Discharge (Count Three); First Amendment Retaliation (Count Four); Conspiracy (Count Five) and Negligent Retention/Supervision (Count Six). *Id.* On July 15, 2016, Defendants removed the case to this Court, ECF No. 1 (Case No. 16-2592), and on July 22, 2016, they filed a Motion to Dismiss or, in the Alternative, for Summary Judgment as to all claims. ECF No. 14. (Case No. 16-2592).

On October 10, 2016, Stone and Gizinski notified the Town of their claims "once it became clear" that they would not be rehired. ECF No. 2 ¶ 128; *see also* ECF No. 19-81. They state that the town was on "actual notice" of their claims because of the "pattern and practice of violating Plaintiffs' rights" and because their claims arise out of the same pattern and practice of misconduct in the prior lawsuits brought by Officers Schmidt and Frohlich. ECF No. 2 ¶ 129. Gizinski states that he never received a right to sue letter from the EEOC, though one was received by Gizinski's counsel on or about July 26, 2016. *Id.* ¶ 137. Stone states that he requested a right to sue letter but the EEOC has not yet issued one. *Id.* ¶ 142.

Stone and Gizinski timely filed this case with the Circuit Court for Prince George's County on October 21, 2016. *Id.* ¶ 138. As with Frohlich, Stone and Gizinski allege violations of

federal, state and local law. Specifically, they brought the following ten claims: Age Discrimination in Violation of Federal, State and Local Law (Count One – as to Stone only); EEO Retaliation in Violation of Federal, State and Local Law (Count Two); Wrongful Discharge (Count Three); Statutory LEOBR violation (Count Four); First Amendment Retaliation and Unlawful Search and Seizure (Count Five); Conspiracy to Violate Civil Rights in Violation of Federal and State Law (Counts Six & Seven); Negligent Retention/Supervision (Count Eight); Defamation (Count Nine); Intentional Infliction of Emotional Distress (Count Ten). *Id.*

On February 6, 2017, Defendants removed the case to this Court, ECF No. 1, and, on February 13, 2017, filed a Motion to Dismiss, or in the Alternative, for Summary Judgment. ECF No. 15. After a conference call with the parties on February 16, 2017, the Court ordered that the cases filed by Frohlich, Stone and Gizinski be consolidated for motions practice and discovery. ECF No. 18. On March 28, 2017, Defendants filed a combined Motion to Dismiss, or Alternatively, for Summary Judgment, ECF No. 19, which is now fully briefed. ECF Nos. 23 & 24. Defendants also filed a Motion to Strike portions of the affidavits submitted by Frohlich, Stone and Gizinski in support of their Opposition to Defendant's motion, ECF No. 25, which is now fully briefed. ECF Nos. 29 & 31. On May 26, 2017, Plaintiffs filed a consolidated motion for discovery, ECF No. 26, which Defendants responded to on June 9, 2017. ECF No. 30. Pursuant to Local Rule 105.6, a hearing was held regarding these motions on June 20, 2017. ECF No. 32.

II. STANDARD OF REVIEW

A. Motion to Dismiss

To survive a motion to dismiss invoking Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly,* 550 U.S. at 555) ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

Fed. R. Civ. P. 12(b)(6)'s purpose "is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Presley v. City of Charlottesville,* 464 F.3d 480, 483 (4th Cir. 2006) (citation and internal quotation marks omitted). When deciding a motion to dismiss under Rule 12(b)(6), a court "must accept as true all of the factual allegations contained in the complaint," and must "draw all reasonable inferences [from those facts] in favor of the plaintiff." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.,* 637 F.3d 435, 440 (4th Cir. 2011) (citations and internal quotation marks omitted). The Court need not, however, accept unsupported legal allegations, *see Revene v. Charles County Comm'rs,* 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, *Papasan v. Allain,* 478 U.S. 265, 286 (1986), or conclusory factual allegations devoid of any reference to actual events. *United Black Firefighters of Norfolk v. Hirst,* 604 F.2d 844, 847 (4th Cir. 1979).

B. Converting Motion to Dismiss to Motion for Summary Judgment

Defendants' motion is styled as a Motion to Dismiss or, in the Alternative, for Summary Judgment. If the Court considers materials outside the pleadings, the Court must treat a motion to

dismiss as one for summary judgment. Fed. R. Civ. P. 12(d). When the Court treats a motion to dismiss as a motion for summary judgment, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." *Id.* When the moving party styles its motion as a "Motion to Dismiss or, in the Alternative, for Summary Judgment," as is the case here, and attaches additional materials to its motion, the nonmoving party is, of course, aware that materials outside the pleadings are before the Court, and the Court can treat the motion as one for summary judgment. *See Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 260-61 (4th Cir. 1998). Further, the Court is not prohibited from granting a motion for summary judgment before the commencement of discovery. *See* Fed. R. Civ. P. 56(a) (stating that the court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" without distinguishing pre-or post-discovery).

However, summary judgment should not be granted if the nonmoving party has not had the opportunity to discover information that is essential to his opposition to the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, (1987). If the nonmoving party feels that the motion is premature, that party can invoke Fed. R. Civ. Pro. 56(d). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Under Rule 56(d), the Court may deny a motion for summary judgment if the non-movant shows through an affidavit that, for specified reasons, he or she cannot properly present facts, currently unavailable to him or her, that are essential to justify an opposition. Fed. R. Civ. Pro. 56(d). Plaintiffs have invoked Rule 56(d) in this case by filing an appropriate motion with an attached affidavit. ECF No. 26.

C. Motion for Summary Judgment

Summary judgment is appropriate if "materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . ,

admissions, interrogatory answers, or other materials," Fed. R. Civ. P. 56(c), show that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex*, 477 U.S. at 322. The party moving for summary judgment bears the burden of demonstrating that no genuine dispute exists as to material facts. *Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987). If the moving party demonstrates that there is no evidence to support the nonmoving party's case, the burden shifts to the nonmoving party to identify specific facts showing that there is a genuine issue for trial. *See Celotex*, 477 U.S. at 322-23. A material fact is one that "might affect the outcome of the suit under the governing law." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001) (quoting *Anderson*, 477 U.S. at 248). A dispute of material fact is only genuine if sufficient evidence favoring the nonmoving party exists for the trier of fact to return a verdict for that party. *Anderson*, 477 U.S. at 248. However, the nonmoving party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1986). When ruling on a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

III. DISCUSSION

A. Claims Against the Police Department and the Individuals Defendants in their Official Capacities

Before addressing Plaintiffs' individual claims, there are two threshold issues with respect to the named defendants in this case. First, Defendants argue that the Cheverly Police Department lacks legal identity, and thus is not capable of being sued. ECF No. 19-3 at 36. They are correct. Under Maryland law, local police departments are agents of the State and not treated as separate legal entities. *See Hines v. French*, 157 Md. App. 536, 573 (2004) (citation omitted);

see also Taylor v. Leggett, 2017 U.S. Dist. LEXIS 36972, at *6 (D. Md. Mar. 15, 2017). As such, any claims made against the Cheverly Police Department are, in effect, claims against the Town of Cheverly and naming the Cheverly Police Department as a separate defendant is improper. *See Hines*, 157 Md. App. at 573. Thus, all claims against the Cheverly Police Department are dismissed.

Similarly, although not raised by the Defendants, Plaintiffs' claims against individual defendants, Chief Robshaw, Administrator Warrington and Sergeant Towers in their official capacities will also be dismissed as duplicative of their claim against the Town. *See Kirby v. City Of Elizabeth City, N. Carolina*, 388 F.3d 440, 452 n.10 (4th Cir. 2004) ("Official capacity suits generally represent but another way of pleading an action against the entity of which the officer is an agent....") (citation omitted); *see also Love-Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004) (affirming dismissal of § 1983 claim against Superintendent in his official capacity as duplicative of a cognizable claim against the Board of Education). Therefore, Plaintiffs' claims may only proceed against the Town of Cheverly and the individual defendants, Chief Robshaw, Administrator Warrington and Sergeant Towers, in their individual capacities. The Court will first address Plaintiffs' claims arising under state and local law before turning to their federal claims.

B. State Law Claims[10]

Together, Plaintiffs bring the following state law claims: (1) wrongful discharge; (2) statutory LEOBR violation; (3) conspiracy; (4) defamation; (5) intentional infliction of emotional distress; and (6) negligent retention/supervision. They also bring the state and local analogs of their age discrimination and EEOC retaliation claims. As explained below, all of these

[10] The state law claims appear in the following counts: Counts One, Two, Three, Four, Six, Eight, Nine and Ten (ECF No. 2); Counts One, Two, Three, Five and Six (ECF No. 2 (Case No. 16-2592)).

claims are barred by the Local Government Tort Claims Act ("LGTCA") because Plaintiffs did not strictly or substantially comply with the LGTCA's statutory notice requirements and did not demonstrate good cause for their failure to comply.

Section 5–304(b) of the LGTCA provides that "an action for unliquidated damages may not be brought against a local government or its employees unless the notice of the claim required by this section is given within 180 days after the injury." Md. Code, Cts. & Jud. Proc. § 5–304(b).[11] This notice requirement has long been a condition precedent to a claimant's right to maintain a tort action for damages against a local government under Maryland law, *Grubbs v. Prince George's Cnty.*, 267 Md. 318, 320-21 (1972), and failure to comply with it will bar such tort claims. *See Renn v. Bd. of Comm'rs,* 352 F. Supp. 2d 599, 602 (D. Md. 2005). Thus, "[c]ompliance with the notice provision should be alleged in the complaint as a substantive element of the cause of action." *Id.*

Here, Frohlich's notice of complaint was sent to the Defendants on December 4, 2015, which was 17 months after his termination on July 1, 2014. ECF No. 2 (Case No. 16-2592) ¶¶ 69, 92; ECF No. 19-80 at 1. Gizinski and Stone's written notice, attached to Defendants' Motion, is dated October 10, 2016, which is more than a year after they were terminated in April 2015. ECF No. 19-81 at 1. Thus, all three Plaintiffs failed to comply with the notice requirement. Nonetheless, Plaintiffs argue that the fact that they submitted notice at all, coupled with the fact that the Town knew of the officers' grievances, show that they substantially complied with the statute. But "[s]ubstantial compliance requires 'requisite and *timely* notice of facts and circumstances giving rise to the claim.'" *Wilbon v. Hunsicker*, 172 Md. App. 181, 200 (2006) (emphasis in the original) (citation omitted) (holding that letter sent between a month and six

[11] Effective October 1, 2015, the LGTCA was amended to increase the notice period from 180 days to one year. *See* 2015 Md. Laws, Ch. 131 (H.B. 113). However, this change only applied prospectively and thus did not affect causes of actions, such as those in this case, which accrued prior to the bill's effective date. *Id.*

weeks beyond the 180-day period was not in substantial compliance with the statute); *see also Johnson v. Baltimore Cty.*, Md., No. 11-CV-3616, 2012 WL 2577783, at *21 (D. Md. July 3, 2012) (finding that notice sent 12 days after statutory deadline was not in substantial compliance with statute). Further, Defendants' knowledge of the "*possibility* of a future lawsuit," based on an officer's grievance, is not the same as having knowledge of actual litigation. *See Wilbon,* 172 Md. App. at 205 (recognizing that not all investigations or disputes lead to lawsuits) (emphasis in the original). Therefore, the Court finds that Plaintiffs did not substantially comply with the LGTCA.

Thus, Plaintiffs are left to argue that any "slight[] delay[]" in filing their notice should be excused pursuant to the "good cause" exception codified in § 5-304(d) of the LGTCA. *See* ECF No. 23 at 57. Section 5-304(d) provides that the notice requirement of the LGTCA may be waived for good cause and lack of prejudice to the defendant. *See* Md. Code, Cts. & Jud. Proc. § 5-304(d) ("[U]nless the defendant can affirmatively show that its defense has been prejudiced by lack of required notice, upon motion and for good cause shown the court may entertain the suit even though the required notice was not given."). However, no acceptable excuse has been given for why Plaintiffs did not prosecute their claim "with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances." *Wilbon*, 172 Md. App. at 205. At the motions hearing, counsel for Plaintiff speculated that Plaintiffs may have been ignorant of the statutory notice requirement prior to retaining counsel. However, no declarations were submitted by Plaintiffs to that effect and even if the Court were to accept this representation, ignorance of the LGTCA notice requirement does not excuse formal compliance; Plaintiffs should have investigated it on their own or promptly sought an attorney. *Bibum v. Prince George's Cty.*, 85 F. Supp. 2d 557, 565-66 (D. Md. 2000) ("[t]hat [Plaintiff] simply did

not know about the formal notice requirement of the LGTCA does not constitute good cause for his failure to comply.").[12] Here, as in *Bibum*, Plaintiffs, while aware of the existence of a claim, chose to sit on their rights. *Id.* at n. 7. Because substantial justice would not be achieved by waiving the notice requirement under these circumstances, the Court declines to exercise its discretion to do so. *See Moore v. Norouzi*, 371 Md. 154, 183 (2002) ("The purpose of [the waiver] is, after all, to allow the court to achieve 'substantial justice under varying circumstances.'")(citation omitted). Thus, Plaintiffs' claims under state and local law are dismissed.

C. Federal Law Claims

1. Equal Employment Opportunity Commission (EEOC) Retaliation[13]

In Count Two of their respective Complaints, Plaintiffs allege that they were retaliated against for engaging in protected activity and for opposing practices made unlawful by the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). Specifically, they each claim that the retaliation was the result of their respective efforts to support Schmidt in his litigation against the Defendants. For the reasons that follow, these claims shall be dismissed.

The ADA, ADEA and Title VII all require a plaintiff to "exhaust [their] administrative remedies by filing a charge with the EEOC before pursuing a suit in federal court." *Sydnor v. Fairfax Cty.*, 681 F.3d 591, 593 (4th Cir. 2012) (ADA and Title VII lawsuits); *see also Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 301 (4th Cir. 2009) (ADEA lawsuits). Failure to exhaust

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[12] Although the Maryland Court of Appeals has listed "ignorance of the law" as a factor some courts in other jurisdictions have considered when determining good cause, the Court of Appeals has not held that it was a proper consideration in Maryland. *See Heron v. Strader*, 361 Md. 258, 272 (2000). In *Williams v. Montgomery County* the Maryland Court of Special Appeals specifically rejected ignorance of the law as good cause. *Id.* at n.13; *see also Williams v. Montgomery County*, 123 Md. App. 119, 134 (1998).

[13] Frohlich states his claim as "EEO Reprisal" rather than "EEO Retaliation," however, the claims are identical and will thus be evaluated under the same framework.

administrative remedies deprives the Court of subject matter jurisdiction. *Jones*, 551 F.3d at 300. "The scope of a plaintiff's right to file a federal lawsuit is determined by the charge's contents." *Sydnor*, 681 F.3d at 593 (quoting *Jones*, 551 F.3d at 300)). Thus, a plaintiff "fails to exhaust [their] administrative remedies where ... [their] administrative charges reference different time frames, actors, and discriminatory conduct than the central factual allegations in [their] formal suit." *Sydnor*, 681 F.3d at 593 (4th Cir. 2012) (citing *Chacko v. Patuxent Inst.*, 429 F.3d 505, 506 (4th Cir. 2005)). A plaintiff's claim "generally will be barred if [their] charge alleges discrimination on one basis-such as race-and [they] introduce[] another basis in formal litigation-such as sex." *Chacko*, 429 F.3d at 509.

Far from a "formality to be rushed through," the exhaustion requirement is "an integral part of the Title VII [ADA, and ADEA] enforcement scheme[s]." *Sydnor*, 681 F.3d at 593 (quoting *Chacko*, 429 F.3d at 510). At the same time, however, exhaustion requirements should not "erect insurmountable barriers to litigation out of overly technical concerns," particularly where "laypersons, rather than lawyers, are expected to initiate the process." *Sydnor*, 681 F.3d at 594 (citing *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008)). Accordingly, if a plaintiff's claims in their complaint are "reasonably related to [their] EEOC charge and can be expected to follow from a reasonable administrative investigation," they "may advance such claims in [their] subsequent civil suit." *Sydnor*, 681 F.3d at 594 (quoting *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 247 (4th Cir. 2000)).

Here, each of Plaintiffs' EEOC charges claim retaliation but only discuss retaliation for supporting Schmidt's Title VII claim. ECF Nos. 19-10; 19-73 and 19-74. Specifically, Stone's EEOC charge states the retaliation was for his November 2013 "participat[ion] on behalf of Francis Schmidt in a retaliation case . . . in violation of Title VII," ECF No. 19-74 at 1;

Gizinski's EEOC charge claims that the retaliation was based on the fact that he "supplied an affidavit in support of my fellow officer's Francis Schmidt's . . . . Title VII lawsuit," ECF No. 19-73 at 1; and Frohlich claims that the retaliation he suffered was because he "was called as a witness to testify in a Title VII retaliation lawsuit filed by Officer Francis Schmidt," ECF No. 19-10. There are no factual allegations in any of Plaintiffs' EEOC charges to suggest that they were retaliated against for opposing conduct made unlawful by the ADA or ADEA or that they were supporting another individual in opposing such conduct.[14] Based on a reading of the EEOC charge, their employer would have only been placed on notice that Plaintiffs were complaining of being retaliated against for supporting Schmidt's Title VII claim. Because "a plaintiff fails to exhaust his administrative remedies where. . . his administrative charges reference different. . . discriminatory conduct than the central factual allegations in his formal suit," *Sydnor*, 681 F.3d at 593 (citation omitted), these claims must be dismissed leaving only the Title VII related claim in Count Two.

Frohlich's Title VII retaliation claim faces an additional procedural hurdle, however. Defendants argue that his claim must be dismissed because the action mentioned in Frohlich's EEOC charge that sparked the alleged retaliation never occurred, and, thus, cannot serve as a basis for a claim of discrimination. ECF No. 19-3 at 34. In his EEOC charge, Frohlich says he was retaliated against because he was called as a witness in February 2014 to testify in a Title VII retaliation lawsuit filed by Schmidt. ECF No. 19-10. Defendants are correct that Frohlich has

[14] In an abundance of caution, because the affidavits submitted by Stone and Gizinski in support of Schmidt would likely have been considered as part of a reasonable administrative investigation into their EEOC charges, the Court has also reviewed and considered them. *See Sydnor*, 681 F.3d at 594 ("so long as a plaintiff's claims in [their] complaint are reasonably related to [their] EEOC charge and can be expected to follow from a reasonable administrative investigation [they] may advance such claims in [their] subsequent civil suit.") (internal citation omitted). The affidavits both focus on the allegations supporting Schmidt's Title VII claim, his worker's compensation claim and a potential FMLA claim. ECF No. 19-78; ECF No. 19-76. Neither appear to be in support of an ADA or ADEA claim. To the extent that their respective Complaints also alleged that Stone, Gizinski and Frolich were retaliated against for supporting each other, that is also not mentioned in their EEOC charges.

not testified in Schmidt's Title VII retaliation lawsuit, which this Court is also presiding over, nor did he submit an affidavit in support of Schmidt's lawsuit. However, in February 2014, Frohlich did testify at Schmidt's LEOBR hearing, which he claims Chief Robshaw initiated in retaliation for Schmidt's Title VII claim. ECF No. 2 ¶¶ 47-50. Because exhaustion requirements should not "erect insurmountable barriers to litigation out of overly technical concerns," the Court could infer that Frohlich mistakenly referred to his participation in Schmidt's February 2014 trial board hearing as a "Title VII lawsuit."

But even if the Court determined that Frohlich exhausted his administrative remedies as to his Title VII claim, his claim would fail on the merits, as do those of Stone and Gizinski. Title VII prohibits employment discrimination based on "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a), and its anti-retaliation provision serves to "prevent[ ] an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63, (2006); 42 U.S.C. § 2000e-3(a). To properly state a prima facie claim of retaliation under Title VII, a plaintiff must demonstrate three elements: "(1) he engaged in a protected activity, (2) his employer acted adversely against him, and (3) the protected activity was causally connected to the adverse action." *Clarke v. DynCorp Int'l LLC*, 962 F. Supp. 2d 781, 789 (D. Md. 2013) (citations omitted).

Plaintiffs' primary allegations are that they were discriminated against because they supported Schmidt in his Title VII claim. Because, under these circumstances, Plaintiffs participation in Schmidt's suit was not protected activity, these claims fail and must be dismissed.

Title VII's retaliation provision protects employees who oppose "not only employment actions actually unlawful under Title VII but also employment actions [he or] she reasonably believes to be unlawful." *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 282 (4th Cir. 2015). In *Schmidt*, this Court held that Schmidt did not engage in protected activity when he supported his wife's Title VII sexual discrimination claim against Chief Robshaw because it was not reasonable for him to believe that his wife, who was not an employee of the Police Department or Chief Robshaw, suffered a Title VII harm. *See Schmidt v. Town of Cheverly, MD.*, 212 F. Supp. 3d 573, 579 (D. Md. 2016).[15] The question before the Court here is whether it was reasonable for Plaintiffs to believe that they engaged in protected activity by defending Schmidt, who was not engaged in protected activity himself. The Court holds that it was not. If the initial steps Schmidt took were not protected activity under Title VII, than neither are the steps Plaintiffs took to defend him. "While an employee does not have to prove an actual violation of Title VII, the opposed conduct must fairly fall within the protection of Title VII to sustain a claim of unlawful retaliation." *Reece v. Pocatello/Chubbuck Sch. Dist. No. 25,* 713 F. Supp. 2d 1222, 1233 (D. Idaho 2010) (internal citation omitted). Here, there are no allegations that Plaintiffs opposed conduct that would fall within Title VII's protection against employment discrimination based on "race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a), or an employer's efforts to infer with those rights. *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 63. Thus, Plaintiffs have failed to allege that they were engaged in protected activity and Defendants' Motion to Dismiss will be granted with respect to these claims.

[15] Taking the facts alleged in the Complaint as true, the events described could, of course, constitute sexual assault. However, that is not the issue before the Court.

2. Age Discrimination Claims

In Count One of their respective Complaints, Stone and Frohlich allege that they were discriminated against because of their age in violation of the ADEA. Specifically, Stone and Frohlich both claim that they were terminated from their positions because of their age and replaced with younger individuals.[16] ECF No. 2 ¶¶ 144-164; ECF No. 2 (Case No. 16-2592) ¶¶ 79-99.

As discussed above, the ADEA requires that, prior to bringing suit, an individual must exhaust their administrative remedies. *See Jones*, 551 F.3d at 301. Here, both Stone and Frohlich included their claims of age discrimination in their EEOC charges. Thus, they have exhausted their administrative remedies and the Court must determine whether or not they have alleged a prima facie case of discrimination.

An employee establishes a prima facie case under the ADEA if they allege facts showing that: (1) they were in the age group protected by the ADEA; (2) they suffered an adverse employment action; (3) they were performing their job on a level that met their employer's legitimate expectations at the time of the adverse action; and (4) their position remained open or was filled by a similarly qualified person outside the protected class. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004), *abrogated on other grounds by Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517. If a plaintiff can establish the above elements, the burden then shifts to the employer to articulate "a legitimate, non-discriminatory reason for the termination." *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 513-14 (4th Cir. 2006). "If the employer meets this burden, 'the presumption of discrimination created by the prima facie case disappears from the case' and the plaintiff must prove that the 'proffered justification is

[16] In his EEOC charge, Stone additionally claims that he lost his position as a firearm instructor because of his age. However, despite the fact that Defendants have addressed it, this allegation was not included in the Complaint and is thus not before the Court.

pretextual.'" *Id.* (citation omitted). There does not appear to be a debate regarding the first three elements of Frohlich's claim; in their motion, Defendants only challenge Frohlich's failure to establish the fourth element of his claim, arguing that Frohlich cannot establish a prima facie case of ADEA discrimination because his position is neither open nor filled; rather the position has been frozen because it lacked funding from the Town. ECF No. 19-3 at 40.

However, at the motions hearing, Defendants conceded that Frohlich has sufficiently alleged facts that could establish the fourth element by alleging that even though his specific position remained open, he was effectively replaced by a younger individual. In his Complaint, Frohlich alleges that after he was discharged, a younger officer was effectively promoted to his position because the younger officer took over responsibility for Frohlich's job duties and was given a rate of pay equivalent to that of Frohlich prior to his termination. ECF No. 2 (Case No. 16-2592) ¶¶ 60, 88. Thus, Frohlich has stated a claim sufficient to withstand a Motion to Dismiss.

Seeking to convert their Motion to Dismiss into a pre-discovery Motion for Summary Judgment, Defendants have submitted evidence that they contend demonstrates that Frohlich was removed for budgetary reasons, thus providing them with a legitimate non-discriminatory reason for his termination and establishing that the position remains unfilled. However, Plaintiffs have moved for discovery pursuant to Federal Rule of Civil Procedure 56(d) and attached an affidavit from Frohlich claiming that discovery will demonstrate that the budgetary issues were a pre-text for a discriminatory firing, specifically painting to potential witnesses who could negate this justification. ECF No. 26-1 ¶¶ 36, 37. Because the allegations in the Complaint are sufficient to state a claim, the Court will deny the Motion to Dismiss and because there are potentially

relevant facts unavailable to Plaintiffs without discovery, the Court will grant, in part, Plaintiffs' Motion for Discovery as it relates to Frohlich's age discrimination claim.

Turning next to Stone's claim of age discrimination, Defendants argue that they are entitled to summary judgment because Stone was under internal investigation during the relevant time period, and, thus, he cannot demonstrate that he was meeting the Town's legitimate expectations at the time of his discharge. Stone argues that he was meeting his employer's expectations, saying that he had been employed for nine years without ever being issued a written warning. ECF No. 2 ¶ 126. He contends that the internal investigation was a pretext, *id.* ¶ 118, and, alternatively, that other employees who had engaged in misconduct were not discharged. *Id.* ¶ 155. In Frohlich's affidavit, submitted as an attachment to the Plaintiffs' combined motion, it is alleged that discovery will demonstrate this fact. ECF No. 26-1 ¶¶ 31, 47-48.

As with Frohlich, because Stone has alleged a claim of age discrimination sufficient to survive a motion to dismiss, the Court will deny the Motion to Dismiss and grant Plaintiffs' Motion for Discovery on this issue.

3. 1983 Claims

In Counts Four and Five of their respective Complaints, Plaintiffs bring claims pursuant to 42 U.S.C. § 1983, alleging violations of their First and Fourth Amendment rights. To establish an action under § 1983, Plaintiff must show proof of conduct "committed by a person acting under color of state law" that "deprived [him] of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Avery v. Burke Cty.*, 660 F.2d 111, 115 (4th Cir. 1981) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)). With respect to their First Amendment claim, all three Plaintiffs allege that they were terminated because of their

constitutionally protected speech. In response, Defendants argue that Plaintiffs' speech was not protected because they were speaking as employees rather than private citizens. Further, even if Plaintiffs' speech was protected, Defendants claim that Plaintiffs' interest in speaking upon a matter of public concern is outweighed by the government's interest in providing effective and efficient service to the public. Finally, they argue that Plaintiffs speech was not a substantial or motivating factor in Chief Robshaw's decision to terminate their employment.

In addition to their First Amendment retaliation claim, Stone and Gizinski allege that Defendants violated their Fourth Amendment rights when they placed GPS trackers on their squad cars without a search warrant. Defendants argue that because the police vehicles were owned by the Town rather than Stone and Gizinski, there was no need for Defendants to acquire a search warrant prior to searching them.

For the reasons that follow, the Court will grant Defendants' Motion to Dismiss as to Plaintiffs' First Amendment Retaliation and Fourth Amendment claims.

4. First Amendment Retaliation

In order for a government employee to establish a First Amendment retaliation claim, they must demonstrate that (1) they were speaking as a citizen upon a matter of public concern rather than as an employee about a matter of personal interest; (2) their interest in speaking upon the matter of public concern outweighed the government's interest in managing the working environment; and (3) their speech was a substantial factor in their termination decision. *Brooks v. Arthur*, 685 F.3d 367, 371 (4th Cir. 2012) (internal citations and quotation marks omitted). The first two elements present questions of law whereas the final element presents a question of fact. *Id.* To determine whether speech is a matter of public concern, courts examine "the content,

form, and context of the speech at issue in light of the entire record." *Kirby v. City Of Elizabeth City, N. Carolina*, 388 F.3d 440, 446 (4th Cir. 2004).

Here, Plaintiffs' claims fail because they do not establish that they were speaking as citizens on matters of public rather than private concern. At the heart of each statement are simple employment grievances that do not rise to the level of constitutional violations.

There are three categories of speech that Plaintiffs' rely upon: (1) Frohlich, Stone and Gizinski's support of Schmidt at LEOBR hearings in 2012 and 2014; (2) Frohlich and Stone's comments to Chief Robshaw opposing his conduct towards Schmidt; and (3) the affidavits that Stone and Gizinski submitted to this Court in 2013 in support of Schmidt's lawsuit.

Plaintiffs' trial board testimony is not protected speech because there is no evidence that their testimony was on a topic of interest to the public. *Kirby*, 388 F.3d at 447. The first LEOBR hearing focused on Schmidt's alleged failure to report that he had been in an accident where his patrol car was damaged. ECF No. 2 (Case No. 16-2592) ¶¶ 41-43. Stone and Gizinski state only that they testified "truthfully" in support of Schmidt. ECF No. 2 ¶¶ 31, 195. Frohlich merely states that he testified "in defense of Ofc. Schmidt." ECF No. 2 (Case No. 16-2592) ¶ 56. Looking at the context, a private disciplinary hearing, and the limited information provided regarding the content of the speech, there is no evidence that the officers sought to further public debate on any issue; instead the testimony sought to further the interest of one individual, Officer Schmidt. *Kirby,* 388 F.3d 440, 446 (4th Cir. 2004) (citing *Arvinger v. Mayor of Baltimore,* 862 F. 2d. 75, 79 (4th Cir. 1988)). [17]

[17] Seeking to convert their motion into a motion for summary judgment, Defendants attached full transcripts of Plaintiffs' testimony at these proceedings to their motion. *See* ECF Nos. 19-5 & 19-7. Although the Court did not consider them in reaching its decision, a review of the testimony only reinforces the fact that Plaintiffs were speaking on matters of private rather than public concern.

Similarly, the form of Frohlich and Stone's comments to the Chief opposing his treatment of Schmidt, such as Frohlich exclaiming "[t]hat's retaliation!," ECF No. 2 (Case No. 16-2592) ¶¶ 34,106, in 2013 when Chief Robshaw told him he intended to investigate Schmidt, or Stone asking "why do you want to get rid of [Schmidt,] he comes in does his job, why do you want to fire him[?], " ECF No 2. ¶ 78, are akin to their expressing their disapproval of Chief Robshaw's decision-making through an internal grievance procedure, which the Supreme Court has held in many cases is not a matter of public concern. *Borough of Duryea, Pa. v. Guarnieri,* 564 U.S. 379, 398–99 (2011) ("A petition filed with an employer using an internal grievance procedure in many cases will not seek to communicate to the public or to advance a political or social point of view beyond the employment context."). The content of Frohlich's speech is perhaps a closer call but again, when viewed in the light of the entire record, what he is protesting is a workplace dispute, alleging retaliatory actions taken by the Chief in response to Schmidt, Stone and Gizinski's support of Schmidt's wife's allegations about what occurred at an office Christmas party. These allegations are distinct from what the Fourth Circuit has said is a matter of public concern, like an officer's allegation that high ranking law enforcement officers falsified police reports. *See Durham v. Jones,* 737 F.3d 291, 303 (4th Cir. 2013).

The same analysis demonstrates that the affidavits submitted by Stone and Gizinski are also not constitutionally protected speech. Stone and Gizinski state that their affidavits discuss Chief Robshaw's "retaliatory animus towards Ofc. Schmidt." ECF No. 2 ¶ 237. This demonstrates that what Stone and Gizinski were speaking about was a private personnel issue rather than a matter of public concern. As the Supreme Court said in *Borough of Duryea, Pa. v. Guarnieri,* "[o]f course in one sense the public may always be interested in how government officers are performing their duties. But…that will not always suffice to show a matter of public

filling out their duty logs. *Id.* ¶ 112. Under the special needs doctrine, warrantless searches involving public employees are justified for work-related reasons. *See Francis v. Giacomelli*, 588 F.3d 186, 194 (4th. Cir. 2009) (citing *O'Connor v. Ortega*, 480 U.S. 709, 723-26 (1987)). In *Francis*, plaintiffs, also public employees, alleged that their Fourth Amendment rights were violated when the police department, under the direction of their Mayor, seized their personal property without a search warrant. *Id.* The court held that plaintiffs' allegations did not state a plausible claim for relief because the facts alleged suggested that the searches were taken in furtherance of an employment action, the firing of one of the plaintiffs, rather than a law-enforcement effort. *Id.* Here, as in *Francis,* the search, in this case the placement of the GPS tracking device on Stone and Gizinski's squad cars, was to reveal suspected employee misconduct rather than to launch a criminal investigation. ECF No. 2 ¶ 269. Because a warrantless search under these circumstances does not violate the Fourth Amendment, the Court will grant Defendants' Motion to Dismiss this claim.

6. 42 U.S.C. 1985

Finally, in Count Seven of Stone and Gizinski's Complaint they allege violations of 42 U.S.C. § 1985. Section 1985 includes two sub-sections, § 1985(2) and (3) and Plaintiffs appear to allege claims under both sections.

Section 1985(3) creates a private cause of action where "two or more persons. . . conspire . . . for the purposes of depriving, either directly or indirectly, any person. . . of the equal protection of the law, or of equal privileges and immunities under the law." In order to establish a claim under § 1985(3), the plaintiff must prove:

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury

> to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

A Society Without A Name v. Virginia, 655 F.3d 342, 346 (4th Cir. 2011) (citing *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995)). "Moreover, the plaintiff 'must show an agreement or a meeting of the minds by [the] defendants to violate the [plaintiff's] constitutional rights.'" *Id.* at 346 (citing *Simmons*, 47 F.3d at 1377) (alteration in the original). Although Stone and Gizinski alleged that Defendants' actions violated their First, Fourth and Fourteenth Amendment rights, the Court has found their actions, even if true as alleged, did not violate constitutional rights. Because Defendants' actions did not impact Plaintiffs' constitutional rights, Plaintiffs' claim that Defendants' conspired to violate those very same rights also fails. Thus, the Court will grant Defendants' Motion to Dismiss as to this claim.

There would be a different analysis for Plaintiffs' claims under 42 U.S.C. § 1985(2), which provides a cause of action for conspiracy to interfere, via force, intimidation or threat, a party or witness from attending or testifying in either federal or state court. However, Defendants only address Plaintiffs' claims under 1985(3) and do not address Plaintiffs' claims under 1985(2). Thus, those claims survive.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss, or Alternatively, for Summary Judgment, is granted, in part, and denied, in part. Frohlich and Stone's federal age discrimination claims and Stone and Gizinski's federal claims alleging conspiracy to interfere with a witness testifying in court will proceed and all other claims are dismissed. Defendants' Motion to Strike

is denied. Plaintiffs' Motion for Discovery is granted, in part and denied, in part. A separate Order follows.

Dated: September 5, 2017

GEORGE J. HAZEL
United States District Judge