

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JARI MCPHERSON, JERALD SAMS, §
and DANIEL MARTINEZ, §
Plaintiffs, §

v. §

Case No. 1:20-cv-01223-DAE

TEXAS DEPARTMENT OF PUBLIC §
SAFETY, and Director Steven C. McCraw, §
in his official capacity, §
Defendants. §

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE EZRA:

Defendant Texas Department of Public Safety (“DPS”) moves for summary judgment on all claims. This case is essentially three different lawsuits crammed into one, with different stories for each plaintiff. The common thread is that each plaintiff is a well-regarded employee who at some point made an error in judgment, and thus they have had a harder time competing for a promotion. The plaintiffs, however, blame race discrimination and retaliation, and claim they are subject to a hostile working environment.

Plaintiffs’ evidence does not meet the high standard to show a hostile working environment, and they cannot show they were “clearly better qualified” for the promotions they did not receive. Accordingly, this case warrants summary judgment.

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I. INTRODUCTION

Special Agent Jari McPherson, Trooper Jerald Sams, and Lieutenant Daniel Martinez are highly respected employees at DPS who, at some point, made some errors in judgment. McPherson was caught lying to his supervisor, Captain Steven Schwartz, about picking up his daughter from school in his state-issued vehicle. Martinez was caught lying by omission to Captain Heather Krueger about removing fuses from a vehicle in an incident that almost ended in Martinez’s arrest. Sams was counseled for poor communication and leadership, including using terms like “cracker.”

Unsurprisingly, these errors in judgment made their attempts to transfer or promote more challenging—but they are now suing DPS for race discrimination and retaliation because they did not get the positions they wanted. McPherson and Sams are black, while Martinez is Hispanic.

All three Plaintiffs are currently employed and are generally not complaining of their current treatment. McPherson transferred to his desired 7C2 unit where he no longer complains of discrimination, and he recently received a Regional Director’s Award. Sams was promoted to Senior Corporal working in Capitol security detail, and is not complaining about his current supervisors. Martinez completed his two-year commitment working in Austin and transferred back “home” to El Paso in November 2022.

Thus, the claims at issue are summarized below:

Claims	Alleged conduct	Why dismissal warranted
McPherson’s race discrimination & retaliation claims (Counts I and II)	Not transferred to desired 7C2 unit; not allowed to drive DPS vehicle outside 50 mile limit	Not “adverse employment actions;” no evidence motivated by race or retaliation
Sams’ race discrimination & retaliation claims (Counts I, II, IV, and V)	Not promoted to Sergeant	Not “clearly more qualified” than other candidates

Martinez's race discrimination & retaliation claims (Counts I, II, IV, and V)	Not promoted to Captain	Not "clearly more qualified" than other candidates
Racially hostile work environment (Count III)	General criticism; joking text messages	Standard for actionable harassment not met
Martinez's denial of accommodation claim under ADA (Count VI)	Not granted a hardship transfer back to El Paso in 2020	Time barred; was not a disability accommodation request
Martinez's retaliation claim under ADA (Count VII)	Not promoted to Captain	Not "clearly more qualified" than other candidates
"Retaliatory hostile work environment" (Count VIII)	General criticism	No such claim recognized; Standard for actionable harassment not met

This should be a straightforward promotion denial case (or in the case of McPherson, a unit transfer denial). But DPS anticipates that Plaintiffs will seek to avoid summary judgment by padding the summary judgment record with extensive factual details about time-barred claims occurring long before they filed EEOC Charges of Discrimination, as summarized below.

Plaintiff	Charge Date	300-Day Cutoff	Time-barred Issues
McPherson	July 11, 2020 (Dkt. #46 at p. 49)	September 15, 2019	<ul style="list-style-type: none"> • 2018 facial hair issues in Temple • 2018 discipline in Temple
Sams	July 25, 2019 (Dkt. #46 at p. 41)	September 28, 2018	<ul style="list-style-type: none"> • 2017 disputes with Nieronow • 2017 demotion from corporal
Martinez	April 1, 2022 (Dkt. #46, at p. 55)	June 5, 2021	<ul style="list-style-type: none"> • 2020 "segregation" allegations • 2020 hardship transfer denial

As this Court previously ruled (Dkt. #45 at 10), while these time-barred issues can be used as background evidence for a "continuing violation" theory, any claim based on them should be (or already has been) dismissed. Because these time-barred issues are discrete acts involving different managers, Plaintiffs cannot use these past issues to bootstrap their weak timely claims.

II. STATEMENT OF ISSUES AND STANDARD OF REVIEW

The issues to be decided are:

- 1) whether certain discrimination claims are time-barred and discrete, non-repeating incidents that do not support a “continuing violation” theory;
- 2) whether job criticism, unit assignments, and other complaints are “ordinary tribulations of the workplace” or actionable harassment;
- 3) whether the legitimate reasons for workload increase during the George Floyd riots was pretext for discrimination or retaliation;
- 4) whether Sams and Martinez can show they were “clearly better qualified” for the promotions they did not receive; and
- 5) whether Martinez can show a valid disability discrimination claim under the ADA.

These issues are reviewed by the Rule 56 summary judgment standard. FED. R. CIV. P. 56(c). The court reviews the evidence and inferences drawn from that evidence in the light most favorable to the non-moving party. *Wade v. Hewlett-Packard Dev. Co. LP Short Term Disability Plan*, 493 F.3d 533, 537 (5th Cir. 2007). Where the non-moving party is the plaintiff and, therefore, bears the burden of proof at trial, that party must present affirmative evidence sufficient to establish the existence of each element of her case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Mere conclusory allegations are insufficient to defeat summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996).

III. STATEMENT OF FACTS

A. **McPherson was disciplined for lying in Temple, then first transferred to Unit 7C1 in Austin before eventually transferring to Unit 7C2.**

McPherson first worked in the Criminal Investigation Division (“CID”) at DPS in Temple in 2018. **Appx. 5**, at 10:13-24. Beginning in May 2018, McPherson’s direct supervisor reported up the chain to Captain Steven Schwartz ongoing concerns about McPherson’s weekly time reports claiming work time for his personal activities. **Appx. 42**. On October 11, 2018, Schwartz met with

McPherson about these concerns, including an incident where McPherson picked up his daughter from school during work hours. **Appx. 43.** During the meeting (which was recorded), Schwartz asked McPherson if he transported his daughter in a state vehicle, and McPherson stated “nope.” *Id.* McPherson claimed he drove home, changed vehicles, dropped his daughter off at the doctor, then changed back to his state vehicle and returned to work. *Id.* Schwartz felt that McPherson was very defensive and untruthful during the discussion. *Id.*

Schwartz later obtained school surveillance video, which showed McPherson picking up his daughter in his state issued vehicle. **Appx. 44.** McPherson’s untruthfulness caused Schwartz great concern over McPherson’s credibility, integrity, and professionalism, and he filed a complaint against McPherson in November 2018. **Appx. 45.** DPS’s Office of the Inspector General (“OIG”) investigated the complaint, and sustained the allegations McPherson used a state vehicle for personal business, and was “less than forthcoming when questioned” about it. **Appx. 189** (OIG findings). As a result, McPherson had a “C-1 sustained complaint” (named after the C-1 form that is used). **Appx. 19**, at 69:6-14.

McPherson made a voluntary transfer to Region VII in Austin in October 2019, where Captain Mark Koenig initially assigned him to Unit 7C1. **Appx. 157** (Koenig), ¶ 2. Unit 7C1 had criminal investigation duties, while Unit 7C2 was responsible for counter-surveillance around the Capitol area, and Unit 7C3 was responsible for vulnerability assessments of state buildings. *Id.* Each unit had roughly five agents, and the racial composition of these units varied over time. For example, Unit 7C2 was at one point headed by Lt. Maurice Fisher, (a black male), and then later it was headed by Lt. Chris Hanson (a white male). At no point were these units racially “segregated” as Plaintiffs claim—as another example, Victor Bibilonisambolin (a white Italian male) was in Unit

7C1, while Mario Reyes (a Hispanic male) was in Unit 7C2. *Id.* Captain Koenig considered Unit 7C1 an “elite” squad of investigators, where agents could work on important cases that would help them with promotions in their careers. *Id.*

McPherson requested to be placed in Unit 7C2, but agents do not get to choose which unit they are assigned. *Id.* ¶ 3. Koenig assigned McPherson to Unit 7C1 because there was a vacancy there and Koenig wanted to make sure McPherson had proper CID investigation training. While Koenig prefers to start new employees in Unit 7C1 for training, there was an occasion when two new agents started at the same time. As a result, a new agent named Nate Head (a white male) was initially assigned to Unit 7C2 to share the training load. *Id.*

During the George Floyd riots in summer 2020, all units were required to work counter-surveillance duty around the Capitol. McPherson distinguished himself in his counter-surveillance work, and in July or August 2020, Koenig transferred McPherson to Unit 7C2. **Appx. 158**, ¶ 5. McPherson does not claim his new supervisors in Unit 7C2 discriminated or retaliated against him. **Appx. 10**, at 32:22-34:8. McPherson flourished in his new role, and in 2022 he received a Regional Director’s Award for his undercover work. **Appx. 38** at 145:20-24.

Despite only being eligible to transfer to Austin if he resided within 50-miles of his duty-station, McPherson complains that he was not allowed to drive a state-issued vehicle more than 50 miles back to his residence. Dkt. #46, ¶ 54. McPherson testified he and Captain Koenig agreed on an arrangement where McPherson could park his DPS vehicle at a DPS firing range within the 50-mile radius. **Appx. 7** at 19:10-21; *see also* **Appx. 158**, ¶ 6. Then later in January or February 2020, Regional Director Dwight Mathis overruled Koenig’s interpretation of the policy, stating that McPherson would need to use his own vehicle. **Appx. 7** at 20:14-22:13. Mathis is black, and

McPherson does not claim that Mathis racially discriminated against him. *Id.* at 21:9-16. McPherson testified he is currently in compliance with DPS' 50 mile-radius policy. **Appx. 6**, at 14:4-15:8.

B. Sams complains about his Captain reading a text from a black friend, and not getting a promotion to Sergeant.

Underscoring how dissimilar the various Plaintiffs' claims are, while McPherson was in CID, Sams was in the Texas Highway Patrol—a different division of DPS with a different chain of command. **Appx. 51**, 15:9-16:6. Sams served in the Mounted Patrol Unit starting in 2014. *Id.* The Mounted Patrol Unit was started in 2014 with Corporal David Davenport and Lieutenant Micki Sheffler. *Id.* at 16:20-23. Davenport then voluntarily left the Mounted Patrol Unit to avoid having to relinquish his Corporal rank with his prior unit. **Appx. 52**, at 18:2-20.

Sams was promoted to Corporal, supervising other troopers, including a white trooper named Mariola Nieronow. **Appx. 81** (OIG Memo). Nieronow filed a complaint against Sams on March 23, 2017, alleging he engaged in unprofessional conduct and discriminated against her because of her race and disability. *Id.* OIG investigated Nieronow's complaint, and on August 22, 2017, she was told that her allegations had not been sustained. *Id.* Nieronow subsequently met with OIG about its findings, and a second review was done by OIG, resulting in an October 6, 2017 OIG memo. *Id.*

The second review did not find that Sams discriminated against Nieronow, but it found some concerns with Sams's leadership. **Appx. 99-100**. Among other issues, Sams had used the term "cracker" with his subordinates, had not developed proper standard operating procedures for the Mount Patrol Unit, and had not documented issues with his subordinates. **Appx. 79**, ¶ 3. The second review was provided to Ron Joy, Chief of the Highway Patrol. Based on the leadership

and communications concerns documented in the second review, Joy demoted Sams back to Senior Trooper on October 31, 2017. *Id.*

Sams later applied for the position of Sergeant in the Mounted Patrol in September 2018. **Appx. 103**, ¶ 2. Captain Jeremiah Richards chaired the September 27-28, 2018 interview board, and the board selected Davenport as the most qualified because he had more leadership experience as a Corporal, and was involved in the formation of the Mounted Patrol Unit. *Id.* Davenport was promoted to Sergeant, but he left in 2019. **Appx. 80**, ¶ 5. The Sergeant vacancy was then filled through a transfer by an existing Sergeant, Natee Wong, so there was not a promotion opportunity in 2019. *Id.*

In May 2019, long after the promotions decision had been made, Sams filed complaints against Nieronow and Richards. He complained that Nieronow sent him a racially offensive text message with an image of a gorilla. **Appx. 112, 116**. Nieronow provided an affidavit explaining the message was sent on June 5, 2016, that it was a meme about Harambe the gorilla, and that it was not related to race. **Appx. 112**.

Sams complained that Richards took a photo of Sams while he was trimming a horse's hooves, texted the photo to a black friend, and read his friend's response, "I have never seen a black man doing that before." **Appx. 107** (OIG Report). This interaction happened on October 9, 2017, but Sams did not complain about it until May 2019. **Appx. 103**, ¶ 3. Richards was unaware at the time his conduct was racially offensive, but he accepted his discipline for unprofessional conduct and did not repeat any such conduct. **Appx. 104**, ¶ 5. He was unaware Sams took issue with the interaction until Sams filed his May 2019 complaint. **Appx. 103**, ¶ 3.

Sams also complains about an incident in 2020 where he was criticized for shaking hands

in an unprofessional matter with Sergeant Nathan Fox. **Appx. 72**, at 99:9-100:23. When they met in the hallway, Sams attempted to “give him a dab” while Fox extended his hand to shake Sams’s hand. *Id.* at 99:9-16. Sams asked him, “What are you doing?” and Fox said, “I’m going to shake your hand the professional way.” *Id.*

Sams later in 2020 clashed with a co-worker, a certified horse trainer named Jessica Springer, who thought that Sams’s use of a bullwhip was treating horses improperly. **Appx. 69**, at 87:1-88:21. In April 2020 Sams left the Mounted Patrol Unit for the Capitol security detail unit, where he is not claiming he is being discriminated or retaliated against. **Appx. 58**, at 42:14-43:12. Instead he was promoted to Senior Corporal in March 2021. **Appx. 53**, at 23:3-11.

C. Martinez engaged in misconduct in El Paso, transferred to Austin, and then was denied a hardship transfer back to El Paso.

Martinez is Hispanic and is a disabled veteran. **Appx. 145**, ¶ 95:14-18. He was promoted to a CID Lieutenant in El Paso in December 2015. **Appx. 128**, at 29:15-20. On September 30, 2018, Martinez exhibited a serious error in judgment resulting in serious discipline. **Appx. 162** (disciplinary action). While off-duty, despite being instructed by the El Paso County Sherriff’s Office (“EPCSO”) not to remove community property subject to a divorce proceeding, Martinez assisted his friend in the intentionally disabling a vehicle by removing the vehicle’s fuses. *Id.*

Martinez’s friend and co-worker, Oscar Hernandez, had been arrested by the EPCSO for domestic violence on September 29, 2018. **Appx. 163**. On September 30, 2018, Martinez and Hernandez engaged in a “contentious” incident with an EPCSO deputy, where Martinez refused to identify himself. **Appx. 164**. Hernandez attempted to take more potential community property than was authorized—namely a vehicle in the garage. **Appx. 176**. The EPCSO deputy directed that the vehicle was to be left alone. Martinez then assisted Hernandez in disabling the vehicle by

removing the fuses. *Id.* Captain Heather Krueger was called to the scene, and she asked Martinez if they did something to the battery or engine to disable the vehicle. **Appx. 160**, ¶ 2. Martinez denied it. When Krueger later learned that Martinez had disabled the vehicle, she felt that Martinez had lied to her by omission by not informing her they had removed the vehicle's fuse. *Id.*

Another Lieutenant, Lt. Gabriel Nava, was also present at the incident, but he did not physically participate in disabling the vehicle. *Id.* ¶ 3. Both Nava and Martinez received sustained C-1 investigations and were disciplined for their conduct. *Id.*

After the investigation, in October 2019 Martinez made a voluntary transfer to Austin to get a fresh start. **Appx. 129**, at 33:7-14. He was assigned to lead Unit 7C1. *Id.* Martinez was considered a hard worker with a good attitude. **Appx. 158**, ¶ 8. All three units were required to assist with counter-surveillance around the Texas Capitol during the George Floyd riots in 2020. *Id.* ¶ 7. Captain Mark Koenig conveyed to Martinez that investigation work should be scaled back while all the units were prioritizing counter-surveillance in summer 2020. *Id.* Koenig had Martinez and the other Lieutenants agree on a work schedule for their units. *Id.*

During these riots, on June 2020, Martinez reported to Koenig and then to DPS's EEO officer that his agents felt there was a workload imbalance. **Appx. 186**. Koenig testified that there was no work imbalance. **Appx. 158**, ¶ 7. But Koenig did notice that Martinez would volunteer his unit for additional investigation work and projects, including weekend duty. Koenig had to reign in Martinez and instruct him to focus just on Capitol area investigations. *Id.* ¶ 8.

When voluntarily transferring to Austin, Martinez made a two-year commitment to stay at his new duty station. **Appx. 129**, at 33:19-22. In December 2020, Martinez requested a "hardship transfer" exception to the two-year commitment. **Appx. 178**. He gave family difficulties stemming

from the relocation away from relatives as the main reason for seeing the transfer. *Id.* He also mentioned that he was dealing with back issues, and he wanted assistance from his El Paso family for a potential back surgery. **Appx. 179.** Martinez later ended up having the back surgery in Austin, where it was mostly paid for by the VA. **Appx. 151,** at 118:1-9.

Martinez's hardship transfer request was denied because the CID leadership in El Paso believed that Martinez's actions with the September 30, 2018 incident "strained" the relationship with DPS's local law enforcement partners. **Appx. 181.** The El Paso leadership did not believe that Martinez "could effectively work in the El Paso area due to the strained relationships caused from the incident." *Id.* But Martinez was offered an alternative, to transfer back to El Paso with a demotion so that he would no longer be in a leadership role. Martinez refused that option. **Appx. 151,** at 119:1:15.

Martinez applied for promotion to Captain twice. In 2020, neither he nor Nava were promoted, in part due to their involvement in the September 30, 2018 incident. **Appx. 191,** ¶ 2. Both Martinez and Nava applied again in November 2021. This time, Nava made a point in the interview to highlight how he recognized his error in judgment, how he had grown, and had used his error as a teaching moment for others. *Id.* ¶ 3, *see also* **Appx. 160,** ¶ 4. In contrast, Martinez simply indicated something to the effect that the incident happened, but it did not define him. *Id.* Nava was ranked higher than Martinez, and was promoted to Captain. *Id.*

Martinez completed his two-year commitment in Austin, and he transferred in December 2022 back to El Paso, which he considers "home." **Appx. 130,** at 35:4-13.

IV. ARGUMENT

A. Many of Plaintiffs' claims are time-barred and discrete incidents that do not support a "continuing violation" theory.

Well-established law requires that Title VII plaintiffs file a charge of discrimination within 300 days of the alleged violation. 42 U.S.C. § 2000e-5(e)(1); *Prince-Rivers v. Fed. Express Ground*, 731 F. App'x 298, 301 (5th Cir. 2018) (affirming dismissal where plaintiff filed charge 329 days after termination). While the "continuing violation" doctrine may allow plaintiffs to use untimely allegations to help show a hostile working environment, it does not apply to discrete acts such as disciplinary actions. *Frank v. Xerox Corp.*, 347 F.3d 130, 136 (5th Cir. 2003) (doctrine does not apply to "separate and varied acts and decisions that occurred at different times"); *Lopez v. Kempthorne*, 684 F.Supp.2d 827, 860 (S.D. Tex. 2010) (plaintiff "must show an organized scheme").

Accordingly, to the extent Plaintiffs are basing disparate treatment claims (Counts I, IV, and VI) or retaliation claims (Counts II and V) on conduct prior to the 300-day cutoff, such claims should be dismissed. To the extent Plaintiffs are basing their hostile working environment claims (Counts III and VIII) on untimely allegations, those allegations are discrete acts by different actors.

For example, McPherson untimely complains about Captain Schwartz in 2018 not letting him grow facial hair—but after transferring to Austin he had no issues with facial hair. **Appx. 19**, at 67:9-68:6. He complains about Captain Schwartz and the C-1 allegations against him that were sustained against him. **Appx. 189**. But McPherson was never put on discipline by Captain Koenig in Austin. **Appx. 14**, at 46:1-4.

Similarly, Sams was demoted in 2017, and has not since been demoted—he was instead promoted to Senior Corporal in March 2021. **Appx. 52**, at 21:1-6. Martinez untimely complains of

being denied a hardship transfer in 2020, but he was able to transfer to El Paso in 2022 when his two-year commitment ended. **Appx. 130**, at 35:4-13.

Because Plaintiffs' evidence does not "show an organized scheme," the continuing violation doctrine is inapplicable here. *Lopez*, 684 F.Supp.2d at 860.

B. Plaintiffs' evidence does not meet the "demanding" standard for showing a hostile working environment.

Focusing on the timely allegations, Plaintiffs' harassment allegations amount to the "ordinary tribulations of the workplace" that fail to amount to a hostile working environment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). The Supreme Court emphasized that the "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.'" *Id.* at 788.

A plaintiff asserting a Title VII hostile-work-environment claim against his employer must show that: (1) he is a member of a protected class; (2) he was the victim of uninvited harassment; (3) the harassment was **based on race**; (4) the harassment affected a "term, condition, or privilege" of her employment; and (5) his employer knew or should have known of the harassment, and **failed to take remedial action**. *Harvill v. Westward Commc'ns, LLC*, 433 F.3d 428, 434 (5th Cir. 2005).

Here, while McPherson complains of Chris Hanson's unprofessional text messages, they were not sent to McPherson, and when someone complained about them, DPS took remedial action and disciplined Hanson. **Appx. 192**, ¶ 6. Moreover, as all three Plaintiffs have had long, successful careers at DPS, "sporadic use of abusive language" or other unprofessional conduct fails to show a hostile working environment. *Faragher*, 524 U.S. at 788; see also *Peterson v. Linear Controls, Inc.*, 2019 WL 476044, at *3 (5th Cir. Feb. 6, 2019) (rejecting claim premised on 10 days

of harassment after six years of employment); *Watkins v. Recreation and Park Comm'n for the City of Baton Rouge*, 594 F. App'x 838, 841 (5th Cir. 2014) (rejecting claim premised on three instances of racially charged language and symbols over eight-year employment).

Further, Plaintiff can put forward no evidence showing any alleged harassing conduct was in fact due to their race. *See Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 652 (5th Cir. 2012) (“A wide range of behaviors can make a workplace uncivil, but these plaintiffs must show as one of the factors for their Title VII claim that the events were based on race.”).

Finally, while Plaintiffs assert a “retaliatory hostile work environment” (Count VIII), the Fifth Circuit has not recognized such a claim. *Montgomery-Smith v. George*, 810 F. App'x 252, 258 (5th Cir. 2020) (“we have not recognized a retaliatory hostile work environment claim”).

C. The alleged workload imbalance and unit transfer denials are not “adverse employment actions,” and in any event, there is no evidence of pretext.

To be actionable, an adverse employment decision must be a “tangible employment action that constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). The temporary increase in workload during the George Floyd riots and the delay in permitting McPherson to transfer to his desired unit do not amount to an actionable adverse employment decision. *See Lopez*, 684 F.Supp.2d at 856. Notably, McPherson acknowledges that the pay was the same for Unit 7C1 as Unit 7C2, and he received no reduction in pay at any relevant point. **Appx. 48**, at 48:4-9; **Appx. 26** at 94:7-11.

Plaintiffs contend that during the George Floyd riots in summer 2020—when all units were required to work counter-surveillance duties around the Capitol—Unit 7C1 had a disproportionate

workload. While Plaintiffs may subjectively believe that they worked harder during this time, there is no evidence beyond their subjective belief this was the case. The work schedule was made with the input and agreement of the three Lieutenants, and approved by Captain Koenig. **Appx. 158**, ¶ 7. Koenig denies that the assigned workload was unequal. *Id.* Martinez explained that the workload was unequal because 7C1 still had to cover its normal investigation duties in addition to working counter-surveillance, which he saw as 7C2's responsibility. **Appx. 139**, at 70:17-71:5. But Koenig conveyed to Martinez that such investigation work should be scaled back while all the units were prioritizing counter-surveillance in summer 2020. **Appx. 158**, ¶ 7. The riot-related work schedules ended after a couple of months in July or August 2020. *Id.*

Moreover, Plaintiffs lack evidence showing that DPS's explanations for the workload increase and the initial assignment of McPherson to Unit 7C1 were mere pretext. *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007) ("the plaintiff must rebut each nondiscriminatory or nonretaliatory reason articulated by the employer"). In the end, the Court is left "with [Plaintiffs'] subjective belief that the decision[s were] discriminatory, which is insufficient to create an inference of pretext." *Goring v. Bd. of Sup'rs of La. State Univ.*, 414 F. App'x. 630, 632 (5th Cir. 2011). Summary judgment is appropriate here.

D. Plaintiffs cannot show they were "clearly better qualified" for the promotions they did not receive.

In the context of the promotion attempts, "choosing some other candidate because he is the best-qualified individual for the job is generally a legitimate, nondiscriminatory reason for an adverse employment action." *Patrick v. Ridge*, 394 F.3d 311, 319 (5th Cir. 2004). Sams and Martinez lacks evidence beyond their own subjective beliefs that this asserted legitimate basis was mere pretext for discrimination or retaliation.

Plaintiffs lack evidence showing that they were “clearly better qualified” for the promotions they did not receive. *See Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 882 (5th Cir. 2003) (finding no pretext). To show they were “clearly better qualified” and raise a fact question, Sams and Martinez “must present evidence from which a jury could conclude that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.” *See Moss v. BMC Software, Inc.*, 610 F.3d 917, 923 (5th Cir. 2010) (quotation marks and citation omitted).

“Showing that two candidates are similarly qualified does not establish pretext under this standard.” *Price v. Fed. Exp. Corp.*, 283 F.3d 715, 723 (5th Cir. 2002). “In order to establish pretext by showing the losing candidate has superior qualifications, the losing candidate’s qualifications must leap from the record and cry out to all who would listen that he was vastly—or even clearly—more qualified for the subject job.” *Id.* The reason this bar is so high is because “[u]nless the qualifications are so widely disparate that no reasonable employer would have made the same decision ... differences in qualification are generally not probative evidence of discrimination.” *Murchison v. Cleco Corp.*, 544 F. App’x. 556, 560 (5th Cir. 2013) (per curiam).

Here, the evidence from Captain Jeremiah Richards (who chaired the interview board for Sams’s promotion attempt) showed that Davenport was more qualified because he had more leadership experience as a Corporal and was involved in the formation of the Mounted Patrol Unit. Appx. 193, ¶ 2. Similarly, the evidence from Chief Floyd Goodwin and Captain Heather Krueger (who participated in the interview board for Martinez’s promotion attempt) showed that Nava was a more qualified candidate because he accepted responsibility for his error in judgment, grew from it, and used it as a teaching tool for others. Appx 160, ¶ 4; Appx. 191, ¶ 3.

E. Martinez' ADA claims are barred for multiple reasons.

Because DPS has sovereign immunity to ADA claims, both of the ADA claims are only directed at Steven McCraw in his official capacity as Director. Dkt. #46, at ¶ 1. However, Steven McCraw was never served, has filed no answer, and has otherwise not made an appearance in this case. Accordingly, the ADA claims should now be dismissed.

This Court previously dismissed both of Martinez's ADA claims for failing to state a viable claim. Dkt. #45, at 18-22. Martinez replead adding some additional detail, but Martinez still fails to state a viable claim for the same reasons the Court previously dismissed the two claims. He does provide allegations (or evidence) that would allow the Court to evaluate his limitations or what a reasonable accommodation could be. "[I]t is incumbent upon the ADA plaintiff to assert not only a disability, but also any limitation resulting therefrom." *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996); *Choi v Univ. of Tex. Health Science Ctr*, 633 F. App'x. 214, 216 (5th Cir. 2015) (affirming Rule 12(b)(6) dismissal for failure to allege resulting limitations due to disability).

Even considering the failure to accommodate claim on its merits, Martinez cannot show he had a disability that required accommodation for him to do his job. Martinez acknowledges that as of January 6, 2016, Martinez was released to work "full duty" with "no restrictions." **Appx. 182.** Moreover, his "hardship transfer" request on its face was not a request for a disability accommodation, but a request to accommodate family issues. **Appx. 178-79.** The Fifth Circuit has explained that courts "will not attribute extra-sensory perception to [an employer]", and that the effected employee has a duty to show that he properly requested a disability accommodation. *Burch v. City of Nacogdoches*, 174 F.3d 615, 620 (5th Cir. 1999).

In any event, Martinez admits that he was able to get his back surgery in Austin. **Appx. 151**, at 118:1-9. Transfer back to El Paso was not a “reasonable accommodation” in light of the concerns from El Paso chain of command about how Martinez could not “effectively work in the El Paso area due to the strained relationships caused from the incident that [Martinez] incited with one of the Department’s law enforcement partners.” **Appx. 181**.

To the extent that Martinez asserts ADA retaliation in the form of his promotion denial, his failure to show he was “clearly better qualified” is addressed above. Accordingly, all of Martinez’s ADA claims should be dismissed.

V. CONCLUSION

For the reasons stated, the Court should dismiss all of Plaintiffs’ claims with prejudice.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served to all counsel via CM/ECF, on this the 12th day of May 2023.

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