For Opinion See 2004 WL 835620, 2004 WL 726110, 2004 WL 434210, 2002 WL 31478261

United States District Court, N.D. Illinois.
John McGEE and Thomas Malone, Plaintiffs,
v.
ILLINOIS DEPARTMENT OF TRANSPORTATION, John Kos, Dennis Mahoney and Kenneth Chlebicki, Defendants.
No. 02 C 277.
August 7, 2003.

Defendant's Motion for Summary Judgment

Magistrate Judge Schenkier.
NOW COME Defendants, Illinois Department of Transportation (“IDOT” ¶ (“Kos”), Dennis Mahoney (“Mahoney”) and Kenneth Chlebicki (“Chlebicki”), by and through their attorney, LISA MADIGAN, Attorney General of the State of Illinois, and pursuant to Federal Rule of Civil Procedure 56, move this Honorable Court for the entry of summary judgment in their favor on all counts on the grounds that there are no genuine issues of material fact and Defendant is entitled to the entry of judgment in its favor as a matter of law.

In support of its Motion, Defendants state as follows:
1. There is no direct evidence of discrimination or retaliation;
2. Plaintiffs cannot establish a *prima facie* case of discrimination or retaliation as neither Plaintiff suffered an adverse employment action, Mr. McGee was not meeting his employers expectations, neither Plaintiff can show that he was treated less favorably than similarly situated non-minority employees, and Defendants had legitimate non-discriminatory and non-retaliatory reasons for their actions which Plaintiff cannot show were pretexts for harassment or retaliation;
3. Plaintiffs cannot demonstrate that they were subjected to a hostile work environment, as there was no severe or pervasive harassment which rendered the environment “hellish;”
4. Plaintiffs cannot establish a prima facie case against Defendants Kos, Mahoney or Chlebicki under either §1981 or §1983, which require the same burden for Plaintiffs as the Title VII claims, including demonstrating that the Defendants intentionally discriminated against Plaintiffs;
5. Defendant Kos did not have the requisite personal involvement required under Section 1983 to be held liable for damages; and
6. Defendants Kos, Mahoney and Chlebicki are entitled to qualified immunity from damages in this action as their conduct was objectively reasonable and did not violate clearly established constitutional rights.

Defendants attach in support their Local Rule 56.1 Statement of Facts, supporting

exhibits, and their Memorandum in Support of their Motion for Summary Judgment.

WHEREFORE, Defendants Illinois Department of Transportation, John Kos, Dennis Mahoney and Kenneth Chlebicki pray that this Honorable Court enter judgment in their favor and against Plaintiffs John McGee and Thomas Malone on all counts as a matter of law.

DEFENDANT'S RULE 56.1 STATEMENT OF FACS

Introduction

1. Plaintiffs Thomas Malone and John McGee bring this action against Defendants Illinois Department of Transportation, John Kos, District Engineer for District One, Kenneth Chlebicki, Yard Technician for the Stevenson Yard and Dennis Mahoney, Yard Technician for the Kennedy Yard, pursuant to Title VII, 42 U.S.C. §§1981 and 1983, alleging that they were discriminated against because of their race and retaliated against because of their affiliation with the consent decree entered in the case *Massie v. IDOT* (Exhibit A-Complaint, ¶ 35, 41,47, 54).

2. Jurisdiction in this matter is proper in the Northern District of Illinois. (Ex. A-Complaint, ¶ 13).

Parties

3. Plaintiff Thomas Malone is an African-American IDOT employee who was promoted to the position of Heavy Construction Equipment Operator in the Kennedy Yard on September 16, 2000, as a result of the Massie v. IDOT Consent Decree. (Ex. A-Complaint, ¶21)

4. Plaintiff John McGee is an African-American former IDOT employee who was promoted to the position of Lead Worker in the Stevenson Yard on October 5, 2000, as a result of the Massie v. IDOT Consent Decree. (Ex. A-Complaint, ¶14)

5. Defendant John Kos is, and was at all relevant times, the District Engineer for District One of the Illinois Department of Transportation. (Ex. A-Complaint, ¶10)

6. Defendant Kenneth Chlebicki is, and was at all relevant times, the Yard Technician for the Stevenson Maintenance Yard of the Illinois Department of Transportation. (Ex. A-Complaint, ¶8)

7. Defendant Dennis Mahoney is, and was at all relevant times, the Yard Technician for the Kennedy Maintenance Yard of the Illinois Department of Transportation. (Ex. A-Complaint, 119)

Organization of IDOT

8. The Illinois Department of Transportation is headed by the Secretary of Transportation. (Ex. B-Affidavit of Giovanni Fulgenzi ¶5)

9. The Kennedy and Stevenson Yards are “Maintenance Yards,” and are under IDOT's Bureau of Maintenance. (Ex. B-Fulgenzi Aff. ¶ 2, Exhibit C-Affidavit of Jacek Tyszkiewicz ¶ 9)

10. Maintenance Yards differ in their work assignments depending on the tasks each Yard is responsible for performing. For example, the Kennedy and Stevenson Yards are “expressway” yards, which are responsible for maintaining the road and roadside of expressway routes. The main duties of expressway yards are litter pickup, pothole patching, sewer cleaning, mowing, snow removal and other pavement maintenance. In contrast, non-expressway yards may have responsibilities that differ significantly from expressway yards. Non-expressway yards have more varied responsibilities, including roadside maintenance, shoulder maintenance and more sewer repair. (Ex. B-Fulgenzi Aff. ¶41, Ex. C-Tyszkiewicz Aff. ¶ 12-12, 14-16)

11. Maintenance Yards also differ in the number of personnel assigned to each Yard. Such differences include variation in the number of Highway Maintainers (“HM”), Heavy Construction Equipment Operators (“HCEO”) and Lead Worker (“LW”) positions in each particular yard. (Ex. B-Fulgenzi Aff. ¶42, Ex. C-Tyszkiewicz Aff. ¶17)

12. The chain of command during the relevant time period from the Secretary to the Maintenance Yards was as follows: from the Secretary to the Assistant Secretary, Deputy Secretary, through the Division of Highways, down to the District Engineer for District One, through Operations and the Bureau of Maintenance, to the Bureau Chief, Area Operations Engineer and to the Yard Technician. (Ex. B-Fulgenzi Aff. ¶6, Exhibit D-Affidavit of John Kos ¶4, 6)

13. The highest position at a maintenance yard is the Yard Technician, who is directly supervised by the Area Operations Engineer in charge of that particular yard. (Ex. C-Tyszkiewicz Aff. ¶18)

14. Directly below the Technician is the Lead Lead Worker.[FN1] (Ex. C-Tyszkiewicz Aff. ¶19)

> FN1. Not all Maintenance yards have a Lead Lead Worker, in which case the Lead Worker is directly below the Yard Technician. (Ex. C-Tyszkiewicz Aff. ¶19)

15. Directly below the Lead Lead Worker is the Lead Worker (in some yards, there is more than one Lead Worker). (Ex. C-Tyszkiewicz Aff. ¶20)

16. Other workers at the Maintenance Yards are Highway Maintainers (HMs), Heavy Construction Equipment Operators (HCEOs), storekeepers and mechanics. (Ex. C-Tyszkiewicz Aff. ¶21)

IDOT Anti-Discrimination/Retaliation Policies

17. IDOT's Personnel Policies Manual contains provisions which prohibit IDOT employees from engaging in any conduct which would be a violation of state or federal laws, including the Illinois Human Rights Act or the federal Civil Rights Act. (Ex. B-Fulgenzi Aff. ¶ 27, Ex. D-Kos Aff. ¶ 19)

Anti-Harassment/Retaliation Provisions and Training Pursuant to Massie Decree

18. In addition to the existing anti-harassment, anti-discrimination and anti-retaliation policies at IDOT, the *Massie* consent decree mandated that IDOT conduct additional diversity and anti-retaliation training of certain IDOT employees. (Exhibit E-*Massie v. IDOT* Settlement and Consent Decree, Section IX, Part C, p. 21-22)

19. IDOT complied with the Massie decree requirements and held mandatory training for management and non-union Maintenance personnel (which includes Yard Technicians) which emphasized the non-retaliation and equal treatment provisions of the decree. (Ex. B-Fulgenzi Aff. ¶ 29, Ex. E-*Massie* Decree, Section IX, Part C, p. 21-22)

20. IDOT also conducted mandatory diversity training for all union employees, (Lead Lead Workers, Lead Workers, HCEOs and HMs). (Ex. B-Fulgenzi Aff. ¶ 30)

21. This training was conducted by an independent organization hired by IDOT, and emphasized anti-harassment, anti-retaliation and anti-discrimination issues. (Ex. B-Fulgenzi Aff. ¶ 31)

22. Additional meetings were also held in June and August, 2001, attended by District 1 management personnel, yard technicians and union employees, which reinforced the non-discrimination and non-retaliation provisions contained both in IDOT's Personnel Policies Manual and the *Massie* decree. (Ex. B-Fulgenzi Aff. ¶ 32-33, Ex. D-Kos Aff. ¶ 34-35)

Procedure for Transfer to Different Maintenance Yard

23. If an employee wishes to transfer from their current yard to another yard, the employee submits a transfer request to the IDOT central office in Springfield, Illinois. (Ex. B-Fulgenzi Aff. ¶ 21, 23)

24. Transfers are governed by an agreement with the Teamsters union. (Ex. B-Fulgenzi Aff. ¶ 22)

25. According to the Union agreement, an employee may only submit one transfer request during any twelve-month period. (Ex. B-Fulgenzi Aff. ¶ 24)

26. During the time that a valid transfer request is on file with the central office, no other transfer requests will be considered. (Ex. B-Fulgenzi Aff. ¶ 25)

27. A transfer can only be approved if there is a vacancy in the same job title

(LLW, LW, HCEO or HM) in the requested yard. (Ex. B-Fulgenzi Aff. ¶ 26)

Duties of John Kos, District Engineer, District One

17. Defendant John Kos is the District Engineer for District One, which includes Cook County. (Ex. D-Kos Aff. ¶ 1, 2)

28. Defendant Kos reports to the Director of Highways of IDOT. (Ex. D-Kos Aff. ¶ 4)

29. The following positions report directly to Defendant Kos:
a. Engineer of Program Development,
b. Engineer of Project Implementation,
c. Engineer of Operations,
d. Administrative Services Manager,
e. Executive Assistant to the District Engineer,
f. District 1 Public Information Manager,
g. District EEO/Labor Compliance Officer.
(Ex. D-Kos Aff. ¶ 4)

30. Yard Technicians do not report directly to Defendant Kos. (Ex. D-Kos Aff. ¶ 6)

31. Area Operations Engineers, the direct supervisors of Yard Technicians do not report directly to Defendant Kos. (Ex. D-Kos Aff. ¶ 6)

32. Defendant Kos does not have any direct involvement in the disciplinary process for discipline of IDOT employees. (Ex. D-Kos Aff. ¶ 7)

33. Defendant Kos does not have any direct involvement in the investigation of internal complaints of civil rights violations made by IDOT employees. (Ex. D-Kos Aff. ¶ 10)

34. Defendant Kos has never had any involvement in the IDOT Civil Rights Committee. (Ex. D-Kos Aff. ¶ 12)

Duties of Yard Technicians-Kennedy and Stevenson Yards

35. Yard Technicians for the Kennedy and Stevenson Yards are responsible for overseeing the maintenance and repair of the Kennedy and Stevenson expressways, respectively. (Ex. C-Tyszkiewicz Aff. ¶22, Exhibit G-Affidavit of Dennis Mahoney ¶3, Exhibit I-Affidavit of Kenneth Chlebicki ¶3)

36. Yard technicians are responsible for determining what tasks are to be completed by the yard employees. (Ex. C-Tyszkiewicz Aff. ¶23, Ex. I-Chlebicki Aff. ¶32)

37. Job assignments (the particular tasks which are to be performed) may be given either by the Technician or designated by the Technician to a subordinate, usually

the Lead Lead Worker. (Ex. C-Tyszkiewicz Aff. ¶24)

38. Crew assignments (which personnel is assigned to which Lead Worker or crew leader) may be made by the Technician or designated by the Technician to a subordinate (the Lead or Lead Lead Worker). (Ex. C-Tyszkiewicz Aff. ¶25)

39. The Lead Lead Worker and Lead Workers of each Yard report directly to the Yard Technician. (Ex. C-Tyszkiewicz Aff. ¶26, 27)

40. The Lead Worker also reports directly to the Lead Lead Worker. (Ex. C-Tyszkiewicz Aff. ¶27)

41. Technicians do not have any authority or input into the hiring process. (Ex. C-Tyszkiewicz Aff. ¶28, Exhibit F-Deposition of Dennis Mahoney p. 12, 15, Exhibit H-Deposition of Kenneth Chlebicki p. 16)

42. Technicians do not have the authority to impose discipline. (Ex. B-Fulgenzi Aff. ¶ 37, Ex. C-Tyszkiewicz Aff. ¶29, Ex. G-Mahoney Aff. ¶7, Ex. H-Chlebicki Dep., p. 77-79,).

43. Yard Technicians only have the authority to issue a Report of Rule Infraction to an employee, but do not determine whether discipline will be issued. (Ex. B-Fulgenzi Aff. ¶ 11 11-20, 37, 38)

44. Yard Technicians also do not have any authority or input in determining the level of discipline issued to yard employees. (Ex. B-Fulgenzi Aff. ¶ 38)

45. Technicians do not have the authority to terminate employees. (Ex. B-Fulgenzi Aff. ¶ 37, Ex. C-Tyszkiewicz Aff. ¶30 Ex. G-Mahoney Aff. ¶16, Ex. H-Chlebicki Dep., p. 78-79)

46. Technicians do not have any authority over requests of their yard employees to transfer to other maintenance yards. (Ex. B-Fulgenzi Aff. ¶ 39, Ex. C-Tyszkiewicz Aff. ¶31, Ex. F-Mahoney Dep., p. 15, Ex. I-Chlebicki Aff. ¶8)

Kennedy Yard Assignments

47. Dennis Mahoney, as Yard Technician, generally determines the tasks which are to be performed by the yard employees. (Ex. F-Mahoney Dep., p. 16)

48. In the Kennedy Yard, the Lead or Lead Lead Worker generally decide which employees are on their respective crews. (Ex. F-Mahoney Dep., p. 16, 20)

49. In the Kennedy Yard, the Lead or Lead Lead Worker generally determines what employees in his crew are assigned specific assignments. (Ex. F-Mahoney Dep., p. 16)

50. In some instances, when a task requires a level of specialization or expert-

ise, Mahoney assigns specific personnel to perform those tasks. (Ex. F-Mahoney Dep., p. 16, 20)

Stevenson Yard Assignments

51. Chlebicki and Lead Lead Worker Petrie had the authority, and did decide who was on what crew and what work would be done. (Exhibit M-Deposition of John McGee, p. 371-374)

52. Chlebicki typically determines what jobs need to be completed by the yard employees. (Ex. I-Chlebicki Aff. ¶32)

53. Chlebicki usually discusses the jobs with the Lead Lead Worker, who makes the crew assignments, determining what employees will be on which crew, usually with the input of the Lead Worker. (Ex. I-Chlebicki Aff. ¶33)

Duties of Lead Lead Workers

54. Lead Lead Workers are responsible for leading their own crew of workers. (Ex. C-Tyszkiewicz Aff. ¶33)

55. Lead Lead Workers are also responsible for ensuring that the various work assignments are completed, including the work assigned to crews other than their own. (Ex. C-Tyszkiewicz Aff. ¶34, 35)

56. In ensuring that assignments are satisfactorily completed, Lead Lead Workers routinely monitor the work of all crews, including crews which are led by the Lead Worker. (Ex. C-Tyszkiewicz Aff. ¶35)

Duties of Lead Workers

57. Lead Workers are responsible for directing a crew of HMs and HCEOs and ensuring that the work assigned to the crew is completed. (Ex. C-Tyszkiewicz Aff. ¶38)

58. Lead Workers are responsible for their crew and the equipment used by the crew. (Ex. C-Tyszkiewicz Aff. ¶39)

59. Lead Workers are responsible not only for leading a crew of HMs and HCEO's but are also responsible for the same duties as the crew members, including but not limited to litter pickup, pothole patching, sewer cleaning, snow removal and all other duties regularly performed by HMs and HCEOs. (Ex. C-Tyszkiewicz Aff. ¶41)

60. A Lead Worker should spend approximately ten percent (10%) of his time on ‘planning and supervision’ as coded in the time sheets used by IDOT. (Ex. C-Tyszkiewicz Aff. ¶42)

61. The primary planning and supervising a Lead Worker is responsible for is organizing his crew and planning the use of equipment, materials, traffic control and safety procedures prior to beginning a job. (Ex. C-Tyszkiewicz Aff. ¶43)

62. A Lead Worker should spend the majority of his time working with his crew. (Ex. C-Tyszkiewicz Aff. ¶44)

63. When a Lead Worker leading a crew needs additional equipment, the preferred practice is for the Lead Worker to contact the yard, and request that the equipment be brought out to the job site. (Ex. C-Tyszkiewicz Aff. ¶45)

64. This practice is preferred as it allows the Lead Worker to remain with and work with the crew to ensure the crew is completing the assigned task. (Ex. C-Tyszkiewicz Aff. ¶46)

Duties of HCEOs

65. HCEO's are responsible for all Highway maintainer duties, as well as responsible for the operation of heavy construction equipment when needed. (Ex. C-Tyszkiewicz Aff. ¶47)

66. Equipment operated by HCEOs includes endloaders, skidsters, rollers, blowers and other heavy equipment. (Ex. C-Tyszkiewicz Aff. ¶48)

67. HCEO's, when not needed to operate heavy equipment, are responsible for the same duties as HMs, including but not limited to litter pickup, pothole patching, sewer repair and snow removal. (Ex. C-Tyszkiewicz Aff. ¶49)

Duties of Highway Maintainers

68. Highway Maintainers are essentially the labor force of each yard. (Ex. C-Tyszkiewicz Aff. ¶50)

69. HMs are responsible for the physical labor involved in highway maintenance, including but not limited to litter pickup, pothole patching, snow removal and sewer cleaning. (Ex. C-Tyszkiewicz Aff. ¶51)

IDOT Investigations of Complaints Pursuant to the Massie Consent Decree

70. According to the consent decree entered in the case of *Massie v. IDOT,* IDOT was to investigate, with the Monitor's assistance, complaints of retaliation and harassment by individuals promoted under the consent decree. (Ex. E-*Massie* Decree, Part IX, Section E, p. 23)

71. The Monitor was class attorney in the *Massie* case, and is also the attorney for Plaintiffs in the present case. (Ex. A-Complaint, Ex. E-*Massie* Decree p. 4)

72. IDOT and the Monitor, with the Court's approval, created a schedule to govern the investigation process for complaints made under the decree. (Exhibit Q-Investigation Schedule, *Massie v. IDOT*)

73. The investigation schedule provided that the Monitor would have the ability to

make recommendations with respect to investigations of complaints under the *Massie* decree, including recommendations with respect to the initial plan for the investigation, recommendations for additional investigation into complaints and recommendations to be submitted to the Civil Rights Committee at the conclusion of the investigation. (Ex. Q-Investigation Schedule ¶3, 7, 11, 12)

74. The Investigation Schedule also provided that if the Civil Rights Committee determined that live witness would be called at a *Massie* Civil Rights Committee meeting, the Monitor could be present at the meeting. (Ex. Q-Investigation Schedule 15)

75. IDOT also created a special committee of investigators to investigate only complaints brought under the decree (the "Investigation Committee"). (Ex. D-Kos Aff. ¶ 32)

76. The Investigation Committee consisted of Sandi Brown, the EEOC Civil Rights Officer for District 1, Malcolm Erickson, Assistant Chief Counsel for IDOT, and James Stumpner, Area Operations Engineer for the IDOT Bureau of Maintenance. (Ex. D-Kos Aff. ¶ 33)

77. The Investigation Committee was responsible only for fact-finding, not for making any determinations as to credibility. (Exhibit L-Deposition of Sandi Brown p. 49)

78. The IDOT Civil Rights Committee hears all internal civil rights complaints by IDOT employees statewide. (Ex. B-Fulgenzi Aff. ¶44)

79. The IDOT Civil Rights Committee was created prior to the *Massie* Consent Decree, and its' guidelines and procedures are contained in the IDOT Personnel Policies Manual, which is distributed to all IDOT employees. (Ex. B-Fulgenzi Aff. ¶ 45, Exhibit J-Affidavit of J. Randle Schick ¶ 3)

80. The Civil Rights Committee is composed of one representative from the District involved, a representative from IDOT Chief Counsel's Office and a representative from the IDOT Office of Finance and Administration. (Ex. B-Fulgenzi Aff. ¶ 46, Exhibit J- Schick Aff. ¶6)

81. Once the Committee makes a recommendation, the recommendation goes to the Director of Finance and Administration, who makes the final decision on whether discipline against an employee is warranted. (Ex. B-Fulgenzi Aff. ¶ 47)

Thomas Malone

Employment at IDOT-Stevenson Yard

82. Thomas Malone began his employment at IDOT as a Highway Maintainer on August 16, 1994 in the Stevenson Yard. (Exhibit K-Deposition of Thomas Malone, p. 7)

83. The Lead Workers at the Stevenson included John Petrie, who later became Lead Lead Worker. (Ex. K-Malone Dep., p. 16)

84. After Petrie was promoted to Lead Lead Worker, the Lead Worker position was filled by acting workers; either Nicholas Janeteas or John Bracha. (Ex. K-Malone Dep., p. 20)

85. Plaintiff Malone never had any problems working with any LW, including Janeteas or Bracha. (Ex. K-Malone Dep., p. 17)

86. Plaintiff Malone remained at the Stevenson Yard until 1998, when he requested a transfer to the Alsip Yard. (Ex. K-Malone Dep., p. 26-27)

87. Malone's transfer request was due to his desire to work in a yard which did not service expressways, not because of any issues with the Lead Worker, Lead Lead Worker or Technician, Kenneth Chlebicki. (Ex. K-Malone Dep., p. 27)

Employment at IDOT-Alsip Yard

88. Plaintiff Malone was employed as a Highway Maintainer at the Alsip Yard from October 1998 until his promotion and transfer in September 2000. (Ex. K-Malone Dep., p. 26, 30)

89. During his employment at the Alsip Yard, Malone never requested to act as HCEO or LW. (Ex. K-Malone Dep., p. 33)

Prior Experience as HCEO

90. Plaintiff Malone acted as an HCEO for one two-month period during his employment at the Stevenson Yard, during the snow and ice season from October 1996 to April 1997.[FN2] (Ex. K-Malone Dep., p. 21-22)

FN2. This was prior to the Rotation Policy established under the *Massie* consent decree.

91. Plaintiff Malone asked the Technician, Kenneth Chlebicki, if he could act as HCEO, and was allowed to do so with no problem. (Ex. K-Malone Dep., p. 24-25)

92. During the period that Malone acted as HCEO, the only equipment he used was the end-loader and the roller. (Ex. K-Malone Dep., p. 9, 12-14)

93. This was the only time prior to his promotion that Plaintiff Malone either requested an “acting” HCEO position or worked as an HCEO. (Ex. K-Malone Dep., p. 33)

Promotion to HCEO under Massie

94. Plaintiff Malone never applied for a promotion to either the HCEO or LW positions prior to the *Massie* promotions. (Ex. K-Malone Dep., p.. 33)

95. Plaintiff Malone applied for all promotions offered under the *Massie* decree, and did not have a preference with respect to yard assignment. (Ex. K-Malone Dep., p. 45)

96. When notified that he received the HCEO position at the Kennedy Yard in September 2000, Malone accepted the position, and did not inquire about the other positions available under the *Massie* decree. (Ex. K-Malone Dep., p. 48)

Training for HCEO Position

97. Mr. Malone received the following training for his position as HCEO: (1) the mechanic showed him how to operate the end loader; (2) he was sent to the Alsip Yard where four individuals were instructing HCEOs on how to operate various pieces of equipment; and (3) John Gabor (the other HCEO at the Kennedy Yard) gave him instruction. (Ex, K-Malone Dep., p. 49-51, Ex. F-Mahoney Dep., p. 60)

98. Mr. Malone never asked for any additional help with any of the equipment at the Kennedy Yard. (Ex. K-Malone Dep., p. 51)

Employment at IDOT-Kennedy Yard

General Yard Responsibilities

99. The main assignments in the Kennedy Yard are pothole patching, grass cutting, litter picking, snow removal and the evicting of homeless persons under the bridges of the expressway. (Ex. K-Malone Dep., p. 52, Ex. G-Mahoney Aff. ¶__)

100. Homeless eviction is a routine year-round activity which is assigned to crews numerous times each week. (Ex. K-Malone Dep., p. 53, Ex. F-Mahoney Dep., p. 22)

101. The Kennedy Yard performs the most homeless eviction due to the location of the expressway. (Ex. C-Tyszkiewicz Aff. ¶ 13)

102. Large groups are typically assigned to do homeless eviction. (Ex. F-Mahoney Dep., p. 24, 65)

103. The Kennedy Yard had two permanent HCEOs: Plaintiff Malone and John Gabor, a white male, who had been an HCEO at the Kennedy Yard since 1975. (Ex. B-Fulgenzi Aff. ¶ 56)

Malone's Alleged Instances of Harassment/Retaliation

#1: Use of Snowblower

104. During a snow and ice callout in 2000, Plaintiff Malone was called out for duty from his home, and was required to use a shovel to remove snow by hand from the reversible lane gates of the expressway while other personnel used two snowblowers attached to trucks. (Ex. K-Malone Dep., p. 54, 58-59)

105. Other employees, including non-minority employees, were also required to shovel snow from the reversible lane gates by hand on this occasion. (Ex. G-Mahoney Aff. ¶18)

106. A snowblower is a six cubic foot (6' x 6' x 6') piece of equipment that is attached to a front endloader and operated through a series of more than a dozen controls. (Ex. G-Mahoney Aff. ¶14-15)

107. Snowblowers are only used during heavy storms on the Kennedy expressway. (Ex. K-Malone Dep., p. 73)

108. The Kennedy Yard has only two snowblowers for use in heavy storms. (Ex. K-Malone Dep., p. 61)

109. When Mr. Malone arrived at the site, the two snowblowers were already out on the road. (Ex. K-Malone Dep., p. 63)

110. The snowblowers were being operated by Clarence Miller, an “acting” Lead Worker in the Kennedy Yard, and Eric Pineda, an “acting” HCEO from the Landscape Yard.[FN3] (Ex. K-Malone Dep., p. 62)

FN3. During Snow and Ice Season, the Landscape Yard is consolidated with the Kennedy Yard for snow and ice assignments and call-outs. (Ex. G-Mahoney Aff ¶20)

111. When Mr. Malone arrived at the site, he was told to grab a shovel by the Lead Lead Worker, Frank Torrez, who advised Malone that Mr. Mahoney had made all of the assignments. (Ex. K-Malone Dep., p. 64-65)

112. Mr. Torrez never indicated why Mahoney had made the assignments in that way. (Ex. K-Malone Dep., p. 83)

113. Later that evening, Malone claims that he asked Mr. Mahoney if he would have a chance to operate the snowblower, and Mahoney advised him that he would have to start like everyone else with a shovel in his hand. (Ex. K-Malone Dep., p. 54)

114. Malone never said anything else to Mr. Mahoney regarding this incident. (Ex. K-Malone Dep., p. 75)

115. Prior to this incident, Plaintiff Malone had never operated a snowblower. (Ex. K-Malone Dep., p. 72)

116. Both Clarence Miller and Eric Pineda had experience operating snowblowers prior to this occasion. (Ex. G-Mahoney Aff. ¶19, 20)

117. Plaintiff Malone felt, as the permanent HCEO, he should have been operating one of the snowblowers. (Ex. K-Malone Dep., p. 66)

118. Plaintiff Malone has no factual basis to demonstrate that he was not given a snowblower because of his race or because of his promotion under the *Massie* decree. (Ex. K-Malone Dep., p. 70-71)

119. Plaintiff Malone believes that he was not given a snowblower either in retaliation for his promotion, or because [Mahoney] "figured I didn't have enough experience to operate it." (Ex. K-Malone Dep., p. 67)

120. This occurrence was the only instance in which Malone was asked to shovel snow by hand. (Ex. K-Malone Dep., p. 72)

121. This occurrence was the only instance in which another employee was using a snowblower while Malone was present. (Ex. K-Malone Dep., p. 72)

122. Malone never filed a grievance about this incident. (Ex. K-Malone Dep., p. 80)

123. Malone didn't complain to anyone outside the yard about the incident. (Ex. K-Malone Dep., p. 80)

#2: Damage to Truck at Truck Bay Entrance

124. Between April 2001 and October 2001, while pulling his crew cab (pickup truck) into a truck bay at the yard, Malone hit a pole at the side of the bay entrance. (Ex. K-Malone Dep., p. 86)

125. After the accident, Malone inspected the truck, and observed damage to the steps on the side of the truck. (Ex. K-Malone Dep., p. 89)

126. That same day, Malone told Mahoney that he hit the pole, and told him the only damage was to the steps. (Ex. K-Malone Dep., p. 89)

127. Mahoney inspected the truck, and later told Malone that he had caused other damage, including damage to the exhaust pipe. (Ex. K-Malone Dep., p. 91)

128. Malone again looked at the truck, and agreed with Mahoney's assessment of the damage. (Ex. K-Malone Dep., p. 92)

129. Mahoney did not write-up Malone for this incident. (Ex. K-Malone Dep., p. 92)

130. Mahoney attributed this accident to Malone's inexperience as an HCEO, and assumed that his safety would improve as he gained more experience. (Ex. G-Mahoney Aff. ¶23)

131. Malone received no discipline for this incident. (Ex. K-Malone Dep., p. 95, Ex. F-Mahoney Dep., p. 102)

132. Malone believes that something regarding this incident was put in his file, although he has no factual basis for that belief. (Ex. K-Malone Dep., p. 109-110)

133. Malone believes this incident was made part of his file because it was mentioned by Mahoney after he had another accident which resulted in damage to equipment. (Ex. K-Malone Dep., p. 93-94)

134. Malone's personnel file does not contain any report regarding this incident. (Ex. B-Fulgenzi Aff. ¶87, 88)

135. Malone does not believe he was treated unfairly with respect to this incident, and does not believe that this incident was one of harassment or retaliation. (Ex. K-Malone Dep., p. 99)

#3: Salt Dome Accident

136. During his first snow and ice season at the Kennedy Yard, between October 2000 and April 2001, Malone was stacking salt in the salt dome with the end loader. (Ex. K-Malone Dep., p. 102)

137. When coming out of the salt dome, Malone failed to lower the bucket on the end loader, and struck the top of the doorway. (Ex. K-Malone Dep., p. 102)

138. Malone admits that it is proper procedure to lower the bucket prior to exiting the salt dome. (Ex. K-Malone Dep., p. 104)

139. Malone did not report this accident to Mahoney right away, but did mention it later that day, telling Mahoney he didn't think he did much damage. (Ex. K-Malone Dep., p. 105, 107, Ex. F-Mahoney Dep., p. 103)

140. Mahoney inspected the damage and observed that the header beam across the top of the entryway, which was a 4 x12 piece of lumber approximately 18-20 feet long had been partially dislodged from the 12 bolts which secured it. The wood of the beam also was split. (Ex. F-Mahoney Dep., p. 104, Ex. G-Mahoney Aff. ¶26)

141. Mahoney had a crew rebuild the entrance, including a new beam across the top of the entrance as soon as the salt dome was emptied at the end of the snow and ice season. (Ex. K-Malone Dep., p. 107-108, Ex. G-Mahoney Aff. ¶27)

142. The entrance to the salt dome had evidence of prior accidents. (Ex. K-Malone Dep., p. 103)

143. Malone was not aware of the extent of the previous damage to the entrance. (Ex. K-Malone Dep., p. 104)

144. Malone was not aware of the extent of the damage after he struck the top beam of the entrance. (Ex. K-Malone Dep., p. 108)

145. Mahoney was aware of the previous damage to the beam, which prior to Malone's accident was not split or partially dislodged from the bolts which secured it. (Ex. G-Mahoney Aff. ¶25)

146. Malone's only basis for believing that this incident was one of discrimination or retaliation is that Mahoney treated him improperly by making a remark that he almost knocked the building down. (Ex. K-Malone Dep., p. 112)

147. Mahoney didn't yell at Malone or seem upset about this incident. (Ex. K-Malone Dep., p. 107)

148. Malone believes that Mahoney assumed that he did all the damage to the beam. (Ex. K-Malone Dep., p. 111)

149. Mahoney admits that the beam had been damaged prior to the incident with Malone. (Ex. F-Mahoney Dep., p. 123, Ex. G-Mahoney Aff. ¶25, 26)

150. Malone was never written up for this incident. (Ex. K-Malone Dep., p. 101, Ex. F-Mahoney Dep., p. 136)

151. Malone never received any discipline for this incident. (Ex. K-Malone Dep., p. 113, Ex. F-Mahoney Dep., p. 102)

152. Mahoney attributed this accident to Malone's inexperience as an HCEO, and assumed that his safety would improve as he gained more experience. (Ex. F-Mahoney Dep., p. 137, Ex. G-Mahoney Aff. ¶29)

153. Malone believes that this incident was entered into his file, although he has no factual basis for that belief. (Ex. K-Malone Dep., p. 113)

154. The only basis for his belief that this incident was entered into his file is that Mahoney brought up the incident after another accident in which Malone caused damage to equipment. (Ex. K-Malone Dep., p. 96)

155. Malone's personnel file does not contain any report regarding this incident. (Ex. F-Mahoney Dep., p. 136, Ex. B-Fulgenzi Affidavit ¶ 87, 88)

156. Malone never complained to any IDOT or union personnel regarding this incident. (Ex. K-Malone Dep., p. 138)

157. Malone did not file a grievance regarding this incident. (Ex. K-Malone Dep., p. 138)

#4: Snowblower Damage

158. On November 1, 2001, Malone was moving a snowblower using the endloader, when the snowblower slipped off and dropped to the ground. (Ex. K-Malone Dep., p. 118-19, Ex. F-Mahoney Dep., p. 95)

159. Mahoney heard the crash of the snowblower, as it shook the floor of the facility when it hit the ground. (Ex. F-Mahoney Dep., p. 123)

160. The proper procedure when moving a snowblower is to first line up the end-

loader with the lift bar of the snowblower, then the HCEO should exit the endloader, secure the snowblower with the safety pins, lock in the snowblower and then proceed with lifting the snowblower with the endloader. (Ex. G-Mahoney Aff. ¶31)

161. Malone had not checked to ensure the snowblower was secure and properly lined up before he picked it up. (Ex. K-Malone Dep., p. 119, Ex. F-Mahoney Dep., p. 95, Exhibit R-Written Statement from Malone-IDOT 06976)

162. Mahoney came out, and told Malone that he didn't have the snowblower locked in. (Ex. K-Malone Dep., p. 122)

163. Mahoney had another employee pick up the snowblower and move it to the mechanic's bay, where it was inspected by Mahoney and one of the mechanics. (Ex. K-Malone Dep., p. 121)

164. After the inspection, Mahoney told Malone that he had damaged the radiator. (Ex. K-Malone Dep., p. 121)

165. Later, Mahoney told Malone that he had damaged the fuel tank as well as the radiator, and that the extensive damage was from Malone dropping the snowblower. (Ex. K-Malone Dep., p. 124, Ex. F-Mahoney Dep., p. 95)

166. The damage to the snowblower required some repairs that could not be completed by the IDOT mechanic and had to be repaired by a private vendor. (Ex. G-Mahoney Aff. ¶34)

167. On November 16, 2001, Malone was issued a Report of Rule Infraction for damage to the snowblower. (Ex. K-Malone Dep., p. 118-119, 131-132, Ex. F-Mahoney Dep., p. 95-96, Mahoney Aff. 36)

168. The delay in issuing the Report of Rule Infraction for the incident was due to absences by both Mr. Malone and Mr. Mahoney and a delay in receiving estimates from outside vendors for repair of the snowblower. (Ex. F-Mahoney Dep., p. 96, Ex. G-Mahoney Aff. ¶36)

169. The Report of Rule Infraction against Malone for the damage to the snowblower was rescinded, and is not reflected in Mr. Malone's personnel file. (Ex. B-Fulgenzi Aff. ¶ 87-88, 94)

170. Other non-minority employees have received disciplinary action as a result of damaging equipment. (Ex. B-Fulgenzi Aff. ¶ 89)

171. Mr. Malone was never disciplined as a result of this incident. (Ex. K-Malone Dep., p. 134)

172. Mr. Malone did not file a grievance as a result of this incident. (Ex. K-Malone Dep., p. 132)

173. Mr. Malone did not complain to anyone at IDOT about this incident. (Ex. K-Malone Dep., p. 139)

174. Mr. Malone felt that Mahoney was looking for something “to get me for.” (Ex. K-Malone Dep., p. 140)

175. Malone's only basis for believing that Mahoney wanted to “get him” because of his race or promotion under the *Massie* decree was Malone's “impression.” (Ex. K-Malone Dep., p. 134)

176. It is Mr. Malone's impression that this incident was discriminatory or retaliatory. (Ex. K-Malone Dep., p. 134)

177. Mr. Malone felt that Mr. Mahoney didn't like him. (Ex. K-Malone Dep., p. 140)

178. Mr. Malone's only basis for believing Mr. Mahoney didn't like him because of his race was that another employee told Malone he heard Mahoney use a racial slur in reference to Malone. (Malone Dep., 141)

179. The alleged racial slur was not made in Mr. Malone's presence. (Ex. K-Malone Dep., p. 142)

180. Mr. Malone never heard Mr. Mahoney make any racial remarks against him or any other African-American. (Ex. K-Malone Dep., p. 142)

181. Mr. Mahoney denies ever using a racial slur against African-Americans, including Mr. Malone. (Ex. F-Mahoney Dep., p. 85-86, 88-89)

182. No employee at the Kennedy Yard had previously brought up Mr. Mahoney's alleged use of racial slurs to Mr. Mahoney's supervisor Area Operations Engineer Mark Jenkins, or Jacek Tyszkiewicz, Bureau Chief for the Bureau of Maintenance, District 1. (Exhibit O-Affidavit of Mark Jenkins ¶7, Ex. C-Tyszkiewicz Aff. ¶ 52)

#5: Different Treatment While Acting Lead Worker

183. Plaintiff Malone was the “acting” Lead Worker between August and September, 2002. (Ex. K-Malone Dep., p. 145)

184. During that time, Malone claims that Mahoney treated him differently than other workers. (Ex. K-Malone Dep., p. 145)

185. Specifically, Malone claims that Mahoney checked up on him after lunch and break times, embarrassed him over the radio by stating that his crew started in the wrong place and told Malone that he should know where his crew is at all times. (Ex. K-Malone Dep., p. 145-146)

186. Plaintiff Malone does not know if Mahoney ever acted that way with other Lead Workers. (Ex. K-Malone Dep., p. 146-147)

187. Malone admits that Mahoney checked on everybody. (Ex. K-Malone Dep., p. 174)

188. As part of his responsibilities as Yard Technician, Mahoney routinely checks on crews, gives instructions over the radio and requires all Lead Workers and acting Lead Workers to know where their crews are at all times. (Ex. G-Mahoney Aff. ¶4, 41-42)

#6: Undesirable Work Assignments

189. Plaintiff Malone claims that he was given undesirable work assignments because of his race. (Ex. K-Malone Dep., p. 151)

190. Specifically, he was assigned to do litter picking and evicting the homeless from underneath the bridges. (Ex. K-Malone Dep., p. 151)

191. All employees at the Kennedy Yard are assigned to do litter picking and homeless eviction. (Ex. F-Mahoney Dep., p. 24, 65-66, Ex. G-Mahoney Aff. ¶11)

192. Litter picking and evicting homeless are part of Mr. Malone's job duties as HCEO. (Ex. C-Tyszkiewicz Aff. ¶53)

193. Malone admits that Mahoney assigns white employees and the other HCEO to evict the homeless and pick litter. (Ex. K-Malone Dep., p. 152, Ex. F-Mahoney Dep., p. 135)

194. Malone was also washing trucks while another employee on the HCEO Rotation List was activated as an “acting” HCEO and operated the endloader. (Ex. K-Malone Dep., p. 159-160, 162-163)

195. It was part of Malone's job duties to maintain the equipment, which includes washing trucks. (Ex. K-Malone Dep., p. 159)

196. Malone believes that the activation of another HCEO at a time when Malone was washing trucks was racially motivated because he believes it was unnecessary to activate another HCEO. (Ex. K-Malone Dep., p. 160-163)

197. Mahoney, as Yard Technician, activates “acting” HCEOs based on the equipment needs of the yard. (Ex. G-Mahoney Aff. ¶44)

198. Mahoney never activated an “acting” HCEO as a means of preventing Malone from using heavy equipment. (Ex. G-Mahoney Aff. ¶45)

199. Plaintiff Malone does not have any factual basis for believing that he was treated differently than other workers in terms of his assignments because of his race or his promotion under *Massie.* (Ex. K-Malone Dep., p. 154)

#7: Mahoney's Criticism/Riding Malone Harder

200. Malone claims that Mahoney criticized his work. (Ex. K-Malone Dep., p.

173-174)

201. As Yard Technician, Mahoney is responsible for the operations of his yard, and routinely critiques the work of his crews. (Ex. G-Mahoney Aff. ¶3, 4, 47)

202. When Malone was using the Vactor machine, he was required to keep a log. (Ex. K-Malone Dep., p. 155)

203. Malone does not know if Mahoney required all persons operating the Vactor to keep a log. (Ex. K-Malone Dep., p. 155)

204. Mahoney requires all Vactor operators to keep a log, including the other non-minority HCEO and "acting" HCEOs. (Ex. G-Mahoney Aff. ¶56)

205. Mahoney accused him of not cleaning out sewers on one occasion. Malone responded that he did clean them, and the matter was dropped. (Ex. K-Malone Dep., p. 154-157)

206. Mahoney questioned Malone about the sewers because he personally observed that some of the sewers which had been designated as cleaned by Malone, in fact had cobwebs across the sewer lids, which would not have been present had the sewers been cleaned. (Ex. G-Mahoney Aff. ¶48-51)

207. No discipline was issued as a result of the sewer cleaning issue. (Ex. K-Malone Dep., p. 164)

208. Malone does not know if Mahoney ever accused other employees of not cleaning out sewers and admits that he has no basis for believing that he was singled out on this occasion. (Ex. K-Malone Dep., p. 157)

209. Mahoney has questioned other workers, including the other non-minority HCEO John Gabor, for the same issues regarding sewer cleaning. (Ex. G-Mahoney Aff. ¶52)

210. Mahoney criticized lane closures involving Malone, complaining that there were not enough cones or signs. (Ex. K-Malone Dep., p. 173-174)

211. As Yard Technician, in monitoring the yard crews, Mahoney routinely inspects the safety procedures and lane enclosures used by the crews. (Ex. G-Mahoney Aff. ¶4)

212. When Malone was acting Lead Worker, Mahoney had another employee give Malone a crash course on how to do the paperwork which is required of the Lead Workers. (Ex. K-Malone Dep., p. 172)

213. Other white acting Lead Workers had to complete the same paperwork. (Ex. K-Malone Dep., p. 172)

214. All "acting" Lead Workers are required to fill out the paperwork required of

permanent Lead Workers, and all “acting” Lead Workers are given the same materials to familiarize themselves with this duty, including a packet containing information and codes for the paperwork. (Ex. G-Mahoney Aff. ¶55)

215. Malone felt that Mahoney leaned on him harder than others, but has no basis for that belief. (Ex. K-Malone Dep., p. 174-175)

#8: Rotation List Posting

216. In 2002, Malone did not see the Rotation List for Acting Lead Worker posted for sign up in the locker room. (Ex. K-Malone Dep., p. 175, 180)

217. Malone asked Mahoney where the sign-up list was, and Mahoney informed him that it had already been taken down and sent to IDOT in Schaumburg. (Ex. K-Malone Dep., p. 175-176)

218. Malone called Giovanni Fulgenzi at IDOT in Schaumburg, and was told that the sign-up list was to have been posted for a specified time period, and was then required to be returned Schaumburg. (Ex. K-Malone Dep., p. 181, Ex. B-Fulgenzi Aff. ¶ 95-96)

219. Malone filed a grievance seeking to sign up on the Rotation List for Acting Lead Worker, claiming that he and another employee had never seen the list posted. (Ex. K-Malone Dep., p. 175, Exhibit T, Malone Grievance-IDOT 7002)

220. Other workers from the Kennedy Yard had signed up on the Rotation List during the period Malone claimed to have not seen it. (Ex. B-Fulgenzi Aff. ¶99)

221. Malone's grievance was granted, and he was able to sign up on the Acting Lead Worker Rotation List. (Ex. K-Malone Dep., p. 175, Ex. B-Fulgenzi Aff. ¶101, Ex. T-IDOT 07002)

222. Malone believes that Mahoney intentionally kept him from signing up on the Rotation List. (Ex. K-Malone Dep., p. 176)

223. Malone admits that Mahoney did not have any problem with him signing up on the Rotation List after his grievance was granted. (Ex. K-Malone Dep., p. 182)

224. Malone did not complain about this incident to anyone outside of his telephone call to Giovanni Fulgenzi and filing the grievance. (Ex. K-Malone Dep., p. 184)

Malone's Discipline at Kennedy Yard

225. Malone admits he was never disciplined while employed at the Kennedy Yard. (Ex. K-Malone Dep., p. 164)

226. Malone's personnel file does not contain any Reports of Rule Infraction is-

sued during his employment at the Kennedy Yard. (Ex. B-Fulgenzi Aff. ¶87)

Malone's Complaints to Supervisory Personnel

227. Malone never complained about Mahoney to Mahoney's supervisor, Mark Jenkins. (Ex. K-Malone Dep., p. 183, Ex. O-Jenkins Aff. ¶8)

228. Malone never spoke about Mahoney to anyone at IDOT in Schaumburg other than Giovanni Fulgenzi. (Ex. K-Malone Dep., p. 184)

229. The only times Malone recalls complaining to Mr. Fulgenzi was in regard to the Rotation List sign up. (Ex. K-Malone Dep., p. 184-188)

230. Malone did not tell Mr. Fulgenzi that he believed Mahoney was retaliating against him. (Ex. K-Malone Dep., p. 187-88, Ex. B-Fulgenzi Aff. ¶ 102)

231. Malone never spoke to John Kos. (Ex. K-Malone Dep., p. 187)

232. Malone does not think that anyone else at IDOT retaliated against him. (Ex. K-Malone Dep., p. 190)

Malone's Transfer from the Kennedy

233. On July 18, 2001, Malone sent a letter requesting that he be transferred to the Dan Ryan Yard. (Ex. K-Malone Dep., p. 191, Exhibit S-IDOT 02572)

234. In this letter, Plaintiff Malone states that the reason he is requesting the transfer is that the Dan Ryan Yard is closer to his home than the Stevenson Yard. (Ex. S-IDOT 02572)

235. Mr. Malone further explained that during the snow and ice season, he was called at home to come to the Stevenson Yard, but due to the distance from his home, he “was over an hour late getting there.” (Ex. S-IDOT 02572)

236. Malone states with respect to the tardiness during the snow and ice callout, “I was allowed to work but technically I could have been sent back home.” (Ex. S-IDOT 02572)

237. At no point in his letter does Malone state that he wishes to transfer because of harassment, discrimination or retaliation by Mr. Mahoney. (Ex. S-IDOT 02572)

238. Mr. Malone does not mention Mr. Mahoney in his letter requesting a transfer. (Ex. S-IDOT 02572)

239. Mr. Malone was transferred to the Dan Ryan Yard as an HCEO in October 2002. (Ex. K-Malone Dep., p. 191)

Malone's Complaint Under the Massie Decree

240. Malone's complaints about his employment at the Kennedy Yard were brought to IDOT's attention through a letter sent to IDOT's attorney by the Monitor of the *Massie* Consent Decree on May 15, 2001. (Exhibit U, Written Complaint on Behalf of Thomas Malone)

241. In that letter, Malone claimed that he experienced “harassment, retaliation and hostility from Yard Technician Dennis Mahoney from the beginning of his tenure as HCEO to the present day. Specifically, “Mr. Mahoney routinely blames Mr. Malone for problems that he did not cause, like damage to equipment. Mr. Mahoney required Mr. Malone to shovel snow by hand during the winter season, despite the fact that snowblowers were available and other workers were using them. Mr. Mahoney treats Mr. Malone with disdain and disrespect on a daily basis and has stated openly that he does not like members of minority groups. Mr. Mahoney also retaliates against non-class members who associate with Mr. Malone.” (Ex. U)[FN4]

FN4. Plaintiff Malone's complaint under the *Massie* decree is made a part of Defendants' 56.1 Statement of Facts for the sole purpose of demonstrating what allegations were made to IDOT, and what steps IDOT took in investigating those claims. Defendants do not waive any objections to this Exhibit for purposes of trial, including hearsay objections.

IDOT's Investigation of Malone's Complaint Under the Massie Decree[FN5]

FN5. The investigation of Plaintiffs complaints under the *Massie* decree is included in this 56.1 for the purpose of showing what steps were taken in the investigation of Plaintiff's complaint. Defendants do not waive any objections to these materials for purposes of trial, including hearsay objections.

242. Based on the complaints of Mr. Malone, IDOT conducted an investigation of Mr. Malone's claims. (Dep. of Sandi Brown 181-182)

243. The Civil Rights Committee was provided with the investigative reports prepared by the *Massie* ‘Investigation Committee’ in response to Malone's complaints which included follow-up investigation at the request of the Monitor. (Ex. J-Schick Aff. ¶9, Ex. B-Fulgenzi Aff. ¶ 57)

244. These Investigation Reports included summaries of interviews of Malone and Dennis Mahoney, the Kennedy Yard Yard Technician, as well as summaries of interviews of other Kennedy Yard employees and work assignment reports. (Ex. B-Fulgenzi Aff. ¶ 58)

245. The Civil Rights Committee also received the Monitor's recommendations for Malone's complaint. (Ex. B-Fulgenzi Aff. ¶ 59, Ex. J-Schick Aff. ¶9)

246. The members of the IDOT Civil Rights Committee for Malone's case were: Giovanni Fulgenzi, Personnel Services Manager-District 1, J. Randle Schick, Assistant Chief Counsel and James Allen, Deputy Director of Office and Finance and Adminis-

tration. (Ex. B-Fulgenzi Aff. ¶ 48-49, Ex. J-Schick Aff. ¶8)

247. The IDOT Civil Rights Committee determined that they would question certain witnesses with respect to Malone's case, and therefore the Monitor was allowed to be present for the Civil Rights Committee Meeting held on November 15, 2001, although the Monitor was not present during the Committee's deliberation. (Ex. B-Fulgenzi Aff. ¶ 51-53, Ex. J-Schick Aff. ¶11)

248. The Civil Rights Committee addressed Malone's claims that he was given undesirable work assignments, was required to shovel snow by hand, was blamed by Mr. Mahoney for damage to equipment that he did not cause and the general treatment of Malone by Mahoney. (Ex. B-Fulgenzi Aff. ¶60, Ex. J-Schick Aff. 1113)

249. During the Civil Rights Committee meeting on November 15, 2001, the Committee heard from Thomas Malone, Dean Bakos, Frank Torrez and Henry Santiago. (Ex. B-Fulgenzi Aff. ¶61, Ex. J-Schick Aff. ¶12)

250. During the Civil Rights Committee meeting on November 15, 2001, Frank Torrez and Dean Bakos claimed to have heard Dennis Mahoney make racial slurs on occasion. (Ex. B-Fulgenzi Aff. ¶67)

251. Mr. Malone informed the Civil Rights Committee that he had never personally heard Mr. Mahoney make any racially derogatory comments toward him. (Ex. B-Fulgenzi Affidavit ¶66, Ex. J-Schick Aff. ¶15)

252. During his questioning by the Civil Rights Committee, Malone was asked if he felt that he was treated differently than other non-minority employees by Mr. Mahoney. Mr. Malone stated that he did not believe he was treated differently than non-minority employees. Malone further stated that he didn't believe he was treated in a disrespectful manner by Mr. Mahoney. (Ex. B-Fulgenzi Aff. ¶ 62-64, Ex. J-Schick Aff. ¶14)

253. After hearing witness statements, including the in-person statement of Mr. Malone, and examining the investigation reports, the Civil Rights Committee determined that Mr. Malone had not been discriminated or retaliated against by Mr. Mahoney. (Ex. B-Fulgenzi Aff. ¶70, Ex. J-Schick Aff. ¶15)

254. Some witnesses that appeared before the Committee provided statements which were not included in the Investigation Reports that claimed that Mahoney used racial slurs in the Kennedy Yard and which were in contradiction to other statements in the investigative report. (Ex. B-Fulgenzi Aff. ¶71, Ex. J-Schick Aff. ¶16)

255. Due to the fact that Mr. Mahoney was not present before the Committee to address these statements, the Committee decided to expand the investigation to further examine the conflicting allegations of racial slurs in the Kennedy Yard. (Ex. B-Fulgenzi Aff. ¶71, Ex. J-Schick Aff. ¶16)

256. The Committee also decided to postpone issuing its final recommendation on Malone's complaints until the expanded investigation was complete. (Ex. B-Fulgenzi Aff. ¶76, Ex. J-Schick Aff. ¶17)

257. The expanded investigation revealed that the vast majority of employees had never heard any racial slurs used by Mr. Mahoney and did not observe Mahoney treat minority employees any differently than non-minority employees. (Ex. J-Schick Aff. ¶18-19)

258. No Civil Rights Committee meeting was held on the expanded Kennedy Yard investigation due to the present lawsuit. (Ex. B-Fulgenzi Aff. ¶73, Ex. J-Schick Aff. ¶21)

John McGee

Employment at IDOT-Bishop Ford Yard

259. John McGee began his employment with IDOT at the Bishop Ford Yard as a Highway Maintainer on July 19, 1979. (Ex. M-McGee Dep., p. 7, 9)

260. McGee remained at the Bishop Ford Yard until his promotion to Lead Worker in October, 2000. (Ex. M-McGee Dep., p. 10-11)

Prior Experience as HCEO and Lead Worker

261. While employed as a Highway Maintainer at the Bishop Ford Yard, McGee “acted” as both HCEO and Lead Worker on numerous occasions. (Ex. M-McGee Dep., p. 17-24)

Promotion to Lead Worker Under Massie

262. McGee applied for the Lead Worker positions at the Harvey and Stevenson Yards under the *Massie* decree. (Ex. M-McGee Dep., p. 71-72)

263. McGee was promoted to the Lead Worker position at the Stevenson Yard in October, 2000. (Ex. M-McGee Dep., p. 78-79)

264. As Lead Worker, McGee was responsible for overseeing the work of his crew, and was responsible for both the crew and the equipment used. (Ex. M-McGee Dep., p. 258).

Stevenson Yard-General Yard Responsibilities

265. The main jobs at the Stevenson Yard are litter pickup (paper picking), tree trimming, pothole patching, sewer cleaning and snow removal. (Ex. M-McGee Dep., p. 87-88, Ex. I-Chlebicki Aff. ¶4)

McGee's Training

266. McGee was sent to two leadership training sessions as a result of his promo-

tion. (Ex. M-McGee Dep., p. 82)

267. The leadership training was required of all Lead Workers. (Ex. M-McGee Dep., p. 82, 552)

McGee's Alleged Instances of Harassment/Retaliation

#1: Not Given Workspace/Not Introduced at Yard/Not Shown Area

268. McGee claims that he was retaliated or discriminated against because he was not initially introduced to the Stevenson Yard employees by Chlebicki when he first arrived. (Ex. M-McGee Dep., p. 121-122)

269. The timekeeper, Phyllis Giacalone, asked Chlebicki why he hadn't introduced McGee. (Ex. M-McGee Dep., p. 125, 130)

270. Chlebicki then held a brief meeting with the yard personnel where he introduced McGee as the new Lead Worker. (Ex. M-McGee Dep., p. 126)

271. McGee is not aware of what kind of introduction is typically given by Chlebicki for new employees at the yard. (Ex. M-McGee Dep., p. 128-129)

272. McGee does not know why Defendant Chlebicki did not introduce him to the yard employees. (Ex. M-McGee Dep., p. 130)

273. McGee did not complain about his lack of introduction to anyone at IDOT until he brought it up in conjunction with another complaint approximately four months after he assumed the Lead Worker position at the Stevenson yard. (Ex. M-McGee Dep., p. 136-139)

274. McGee claims that he was harassed and retaliated against because when he arrived at the Stevenson Yard, he was not given the proper resources to do his job; namely an office, desk, or telephone and was not given access to the yard's computer. (McGee's Response to Defendants' Interrogatories, Ex. N, #5, Ex. M-McGee Dep., p. 450, 454, 460)

275. McGee claimed that his was retaliatory and discriminatory because the Lead Lead Worker, John Petrie had an office, and Lead Workers in other yards had offices. (Ex. N-McGee Interrogatory Responses, #5, Ex. M-McGee Dep., p.459-61)

276. McGee initially had to share the office with the Lead Lead Worker, John Petrie and the timekeeper. (Ex. M-McGee Dep., p. 101-102, 117-18)

277. McGee was told that there wasn't a Lead Worker office prior to his arrival and that the previous Lead Worker shared the room with the Lead Lead Worker, John Petrie. (Ex. M-McGee Dep., p. 117-118)

278. McGee is not aware of how the previous Lead Worker operated at the yard, and

whether or not the previous Lead Worker had his own desk or facilities. (Ex. M-McGee Dep., p. 119)

279. Previous Lead Workers at the yard shared the Lead Lead Worker office in the same way as McGee initially did. (Ex. I-Chlebicki Aff. ¶14)

280. McGee did not complain to anyone about his lack of work space for approximately seven months. (Ex. M-McGee Dep., p. 182-183)

281. McGee complained to his attorneys that he didn't have a proper workspace, and an extra room was converted to be his office. (Ex. M-McGee Dep., p. 115)

282. McGee received his office right after he started complaining about the lack of work space. (Ex. M-McGee Dep., p. 182-183)

283. The space designated for McGee's office had previously been used for radio communications, work overflow and also held lockers for temporary snow and ice employees. (Ex. I-Chlebicki Aff. ¶18)

284. McGee was never told by Mr. Chlebicki, Petrie or anyone else why he didn't have his own desk, computer or space, or that it was due to his race or his promotion under the *Massie* decree. (Ex. M-McGee Dep., p. 462)

285. Once McGee received his separate office, someone placed stickers on his door, chair and locker which identified them as “McGee's.” (Ex. N-McGee Interrogatory Responses, Ex. M-McGee Dep., p. 183)

286. McGee is not aware of who put the stickers on his office door and chair, but thinks that Chlebicki had it done. (Ex. M-McGee Dep., p. 367-68, 183)

287. Chlebicki did ask the timekeeper to label McGee's office as the Lead Worker office, and include McGee's name on the door in the same way the Lead Lead Worker's office is labeled. (Ex. I-Chlebicki Aff. ¶20)

288. McGee believes this was an act of discrimination or retaliation, but was never told by anyone that the stickers were placed on his door, chair and locker because of his race or promotion under the *Massie* decree. (Ex. M-McGee Dep., p. 477)

289. The Lead Lead Worker office at the Stevenson Yard has a sticker on the door identifying it as the Lead Lead Worker office and had LLW Petrie's name on the door during the time period that he was the LLW. (Ex. I-Chlebicki Aff. ¶15-16)

290. McGee also claims he was not shown the job sites covered by the Stevenson Yard. (Ex. M-McGee Dep., p. 322-323, Ex. N-McGee Interrogatory Responses, #5)

291. McGee told Chlebicki and Petrie that he didn't know the area, and claims he was told he would have to learn. (Ex. M-McGee Dep., p. 323)

292. One of McGee's crew members who was familiar with the area directed him around the area. (Ex. M-McGee Dep., p. 323)

293. McGee believes he wasn't shown the routes because of his race and promotion under the *Massie* decree, although he was not told this was the reason. (Ex. M-McGee Dep., p. 470-471)

294. The previous Lead Worker did not need to be familiarized with the routes, as he was from the area. (Ex. M-McGee Dep., p. 325-326)

#2 Being Watched by LLW John Petrie

295. McGee felt that he was watched by the Lead Lead Worker John Petrie, and that Petrie would “pull up behind [McGee's] crew to intimidate” them. (Ex. M-McGee Dep., p. 140)

296. McGee believes that Defendant Chlebicki “forced” Petrie to watch McGee's crew, although he has no personal knowledge to support his belief (Ex. M-McGee Dep., p. 229-230)

297. No one told McGee why Petrie was watching his crew. (Ex. M-McGee Dep., p. 471-472)

298. McGee admits that part of Petrie's job as Lead Lead Worker was to monitor and supervise McGee and his crew. (Ex. M-McGee Dep., p. 140, 232)

299. Petrie checked on crews up to three to four times per day. (Exhibit P-Deposition of Nicholas Janeteas p. 47)

#3 Not Being Given Opportunity to do Planning/Supervision

300. McGee claims that he was not given the opportunity to do “planning and supervision,” which he believes was part of his job as Lead Worker. (Ex. M-McGee Dep., p. 359, Ex. N-McGee Interrogatory Responses, #5)

301. A Lead Worker should spend approximately ten percent (10%) of his hours on ‘planning and supervision.’ (Ex. C-Tyszkiewicz Aff. ¶42)

302. During the time period of October 1, 2000 through September 30, 2002 McGee spent a total of 14% on planning and supervision. (Ex. B-Fulgenzi Aff. ¶105, [FN6] Ex.__-McGee Data, IDOT 10616-IDOT 10631)

FN6. As contained in Exhibit B, Affidavit of Giovanni Fulgenzi, the work assignment reports produced pursuant to Plaintiffs' discovery request (IDOT 10616-IDOT 10631) demonstrates that McGee worked a total of 2968 hours during this time period, and spent 417 hours on ‘planning and supervision. This equals 14%.

#4 Port-A-Potty Incident

303. Soon after McGee began at the Stevenson, there was a discussion in which he was informed he was giving too many breaks to his crew. (Ex. M-McGee Dep., p. 141-143)

304. On March 15, 2001, Defendant Chlebicki questioned McGee about what he characterized as McGee's crew's excessive restroom breaks. (Ex. M-McGee Dep., p. 151-152, 159, Ex. I-Chlebicki Aff. ¶39)

305. Chlebicki was attempting to aid McGee is improving his crew's work breaks. (Ex. H-Chlebicki Dep., p. 71, Ex. I-Chlebicki Aff. ¶41-42)

306. McGee claims that Chlebicki suggested that McGee tow a port-a-potty behind his truck so that the crew would not have to leave the job site as frequently. (Ex. M-McGee Dep., p. 151-152)

307. McGee questioned why Chlebicki was raising this issue, and Chlebicki attempted to end the conversation. (Ex. M-McGee Dep., p. 153-154)

308. During the incident, McGee admitted that he raised his voice to Chlebicki. (Ex. M-McGee Dep., p. 159)

309. McGee attempted to continue the conversation, when Chlebicki stated that if he wanted to continue the conversation, he should follow him to the police station. (Ex. M-McGee Dep., p. 154, 157, Ex. I-Chlebicki Aff. ¶49)

310. McGee's behavior caused Chlebicki to be concerned for his safety. (Ex. H-Chlebicki Dep., p.73-74, Ex. I-Chlebicki Aff. ¶49)

311. Chlebicki left the yard and went to the McCook police station. (Ex. H-Chlebicki Dep., p. 73)

312. Chlebicki contacted the Area Operations Engineer, Mark Jenkins by radio and by phone, and was advised to go ahead to the police station and wait. (Ex. I-Chlebicki Aff. ¶50, 52)

313. After Chlebicki left the yard, McGee called his attorney, the union and the Springfield IDOT Civil Rights Office. (Ex. M-McGee Dep., p. 157, 256-257)

314. The Area Operations Engineer and Chlebicki's immediate supervisor, Mark Jenkins, went to the Stevenson Yard and sent McGee home for the remainder of the day with pay. (Ex. M-McGee Dep., p. 157)

315. Chlebicki did not return to the yard until after McGee had been sent home. (Ex. I-Chlebicki Aff. ¶54)

316. On the next business day, McGee went to the IDOT office in Schaumburg, where he met with IDOT personnel and a union representative to discuss the incident with Chlebicki. (Ex. M-McGee Dep., p. 159-163)

317. McGee was never written up for the incident, nor did he receive any discipline. (Ex. M-McGee Dep., p. 165-67, Ex. B-Fulgenzi Affidavit ¶107)

318. Other non-minority IDOT employees have been disciplined for insubordination for raising their voice, or acting in an otherwise threatening manner, toward a Yard Technician. (Ex. B-Fulgenzi Aff. ¶ 107)

319. McGee thinks the incident was because of his race and promotion under the *Massie* decree, although he has no knowledge of Chlebicki's motivation. (Ex. M-McGee Dep., p. 168)

320. McGee does not think any other Lead Worker ever had to tow a port-a-potty behind their truck (McGee Dep., 171)

321. Other Lead Workers have used port-a-pottys at job sites, including one occasion when an IDOT crew took a port-a-john to a work site near Lake Shore Drive. (Ex. H-Chlebicki Dep., p. 75-76, Ex. I-Chlebicki Aff. ¶45)

#5 Accused of Poor Public Image for Allowing Crew Member to Lie Down in Truck

322. In the spring of 2001, one of McGee's crew members was ill after lunch, and McGee allowed him to lie down in his truck, while McGee got out and worked in his place. (Ex. M-McGee Dep., p. 210, 212-213)

323. LLW Petrie came to the job site, and asked why the worker was lying down in the truck. (Ex. M-McGee Dep., p. 214-215)

324. McGee told Petrie that he let the worker lie down because he wasn't feeling well. (Ex. M-McGee Dep., p. 214-215)

325. LLW Petrie took the worker back to the yard, where McGee claims the worker was written up for poor public image. (Ex. M-McGee Dep., p. 215)

326. McGee claims that when he returned to the yard, Defendant Chlebicki indicated that he was going to write him up for allowing the worker to lie down while on the job. (Ex. M-McGee Dep., p. 216, 219)

327. McGee was advised by his union representative that the write-up was just for his file, and would not result in any actual discipline. (Ex. M-McGee Dep., p. 223)

328. It is considered “poor public image” and is a violation of IDOT policy for a worker to lie down or rest in a truck while the crew is on a job site. (Ex. H-Chlebicki Dep., p. 82, Ex. C-Tyszkiewicz Aff. ¶_66, Ex. B-Fulgenzi Aff. ¶ 109, Ex. I-Chlebicki Aff. ¶57, Ex. O-Jenkins Aff. ¶18)

329. Other IDOT employees, including non-minority employees, have been disciplined for resting or lying down in a truck while on a job site when they should have

been working. (Ex. B-Fulgenzi Aff. ¶110)

330. McGee complained to his attorney (the Monitor), Terry Ransom, Nell Clay and Sandi Brown at IDOT's Civil Rights Office. (Ex. M-McGee Dep., p. 225-226, 256-257)

331. The write-up for this incident was dropped. (Ex. M-McGee Dep., p. 220-221)

332. McGee was never disciplined for this incident. (Ex. M-McGee Dep., p. 220-221)

333. McGee was never told that this incident was a result of his race or his promotion under *Massie.* (Ex. M-McGee Dep., p. 243)

334. McGee has no knowledge of any other employee at the Stevenson Yard being allowed to lie down in a truck when not feeling well. (Ex. M-McGee Dep., p. 238)

#6 Todd Krasnow Incident

335. Todd Krasnow was a snowbird (seasonal employee) at the Stevenson Yard during the snow and ice season of 2001/2002. (Ex. M-McGee Dep., p. 258-259, Ex. I-Chlebicki Aff. ¶61)

336. During snow and ice season, there are temporary workers whose lockers are in the extra room which was converted into McGee's office. (Ex. I-Chlebicki Aff. ¶23, Ex. M-McGee Dep., p. 259)

337. Krasnow's locker was in McGee's office room. (Ex. M-McGee Dep., p. 259, Ex. I-Chlebicki Aff. ¶61)

338. In winter 2002, at the end of the day, Krasnow asked McGee “Why are you looking at me like that,” accusing McGee of giving him a dirty look. (Ex. M-McGee Dep., p. 260)

339. McGee told Krasnow to leave his office. (Ex. M-McGee Dep., p. 260)

340. McGee and Krasnow then got into “a loud voice confrontation.” (Ex. M-McGee Dep., p. p. 261)

341. The argument continued and McGee told Chlebicki he wanted Krasnow moved from his office to the other locker room, which was agreed to by Chlebicki. (Ex. M-McGee Dep., p. 270)

342. The next day, McGee went to the IDOT Schaumburg office to discuss the incident involving Krasnow. (Ex. M-McGee Dep., p. 263)

343. McGee believes that it was harassment that he had to go to Schaumburg to discuss the incident. (Ex. M-McGee Dep., p. 273)

344. Jacek Tyszkiewicz explained to McGee that they wanted him to come to Schaumburg so that he would not have to interact with Defendant Chlebicki with respect

to the investigation of this incident, as McGee had already filed complaints against Chlebicki. (Ex. M-McGee Dep., p. 265-266, Ex. C-Tyszkiewicz Aff. ¶72)

345. McGee discussed the incident with Jacek Tyszkiewicz and Giovanni Fulgenzi, who asked McGee what he wanted done to Krasnow. (Ex. M-McGee Dep., p. 275-276, 287)

346. McGee responded that he did not want Krasnow to be fired, but allowed to come back to work as long as Krasnow stayed away from him. (Ex. M-McGee Dep., p. 287)

347. The next day at the end of the work day, Krasnow “made a face” at McGee and entered McGee's office. (Ex. M-McGee Dep., p. 276, 278-279)

348. McGee called Tyszkiewicz, whose phone was busy, and then called Giovanni Fulgenzi and told him he had another situation with Krasnow. (Ex. M-McGee Dep., p. 279)

349. Mr. Fulgenzi told McGee that Krasnow would be fired. (Ex. M-McGee Dep., p. 280)

350. Krasnow was then fired. (Ex. M-McGee Dep., p. 283)

351. McGee was not written up for his conduct during the incidents with Krasnow, nor did he receive any type of discipline. (Ex. M-McGee Dep., p. 273, 296)

352. McGee believes that Nicholas Janeteas (an HCEO at the Stevenson Yard), encouraged Krasnow to taunt him. (Ex. M-McGee Dep., p. 285)

353. McGee believes that Janeteas wanted power in the yard, and even caused problems for the Lead Lead Worker, John Petrie. (Ex. M-McGee Dep., p. 421)

354. McGee does not have any firsthand knowledge that Janeteas had any involvement in Krasnow's behavior towards McGee. (Ex. M-McGee Dep., p. 286)

355. McGee also has no knowledge that Chlebicki had any involvement in Krasnow's behavior towards McGee. (Ex. M-McGee Dep., p. 286)

356. McGee believes that Defendant Chlebicki should have fired Krasnow after the first incident, and that this was evidence that Chlebicki supported Krasnow. (Ex. M-McGee Dep., p. 291)

#7 Being Blamed For Damage to Saw

357. Soon after his promotion to Lead Worker at the Stevenson Yard, McGee was leading a crew cutting trees. (Ex. M-McGee Dep., p. 247)

358. After work began, the saw burned out, and could no longer be used. (Ex. M-McGee Dep., p. 251)

359. When it was reported to Chlebicki that the saw was broken, McGee claims Chlebicki blamed him for using the wrong oil in the saw. (Ex. M-McGee Dep., p. 252)

360. McGee admits that his crew broke the saw. (Ex. M-McGee Dep., p. 252)

361. McGee told Chlebicki that his crew had used the oil the mechanics told him was for use in the saw. (Ex. M-McGee Dep., p. 252-253)

362. McGee further stated that the State had money in the budget and could buy another saw. (Ex. M-McGee Dep., p. 252)

363. As Lead Worker, McGee was responsible for both his crew and the equipment the crew used. (Ex. M-McGee Dep., p. 258)

364. McGee was not written up for the damage to the saw. (Ex. M-McGee Dep., p. 254, Ex. B-Fulgenzi Aff. ¶107)

365. McGee was never told by anyone that he was blamed for breaking the saw because of his race or affiliation with the *Massie* decree. (Ex. M-McGee Dep., p. 483)

#8 Chlebicki Had McGee Change a Lane Closure

366. The same day as the saw incident, shortly after McGee began at the Stevenson Yard, Chlebicki told McGee he didn't like the lane closure McGee had set up, and directed him to change it. (Ex. M-McGee Dep., p. 247, 249)

367. Chlebicki did not think that the lane closure McGee set up was safe. (Ex. I-Chlebicki Aff. ¶83)

368. Chlebicki directed McGee to use a lane closure which was contained in a guideline book on lane closures. (Ex. M-McGee Dep., p. 249)

369. McGee disagreed with the lane closure that Chlebicki instructed him to use. (Ex. M-McGee Dep., p. 250)

370. Chlebicki, as the Technician, had the authority to change McGee's lane closure. (Ex. M-McGee Dep., p. 255)

371. McGee was never told by anyone that Chlebicki changed his lane closure because of his race or promotion under the *Massie* decree. (Ex. M-McGee Dep., p. 483-484)

372. McGee did not complain to anyone about this incident until the Spring of 2001, when he complained about the poor public image incident. (Incident #5, 56.1 ¶329) (Ex. M-McGee Dep., p. 225-226, 256)

#9 Not Given the Proper Equipment to Do His Job

373. On one occasion in June 2001, McGee claims he was not given enough equipment to perform his assignment, cutting trees. (Ex. M-McGee Dep., p. 347-350)

374. McGee suggested that Chebicki call the Alsip yard for extra equipment. (Ex. M-McGee Dep., p. 348)

375. Chebicki called the Alsip Yard to request additional equipment for Mr. McGee. (Ex. M-McGee Dep., p. 348-349)

376. McGee received the extra equipment from the Alsip Yard. (Ex. M-McGee Dep., p. 349)

377. On this occasion, Chlebicki also complimented McGee on his work. (Ex. M-McGee Dep., p. 350)

378. McGee had never heard Chlebicki compliment someone else. (Ex. M-McGee Dep., p. 351)

379. Besides the occasion when McGee entered the yard to obtain another truck (see Incident #10, 56.1 ¶381), this is the only time that McGee claims he was not initially given enough equipment to perform his assignment. (Ex. M-McGee Dep., p. 351-352)

380. McGee has no personal knowledge that he was not given the proper equipment because of his race or promotion under the *Massie* decree. (Ex. M-McGee Dep., p. 494)

#10 McGee Was Told Not to Come Into the Yard

381. During snow and ice season in 2001, after being sent out with his crew, McGee came into the yard to get another truck for sewer cleaning. (Ex. M-McGee Dep., p. 314-315)

382. McGee brought his crew back into the yard with him. (Ex. I-Chlebicki Aff. ¶89)

383. When he arrived at the yard, McGee claims that Chlebicki asked him why he came back to the yard, and told him not to come into the yard again; if he needed additional equipment, he should have someone bring it to him. (Ex. M-McGee Dep., p. 315-316)

384. It is the preferred procedure for a Lead Worker or crew leader to stay with his crew and have the crew continue working while another employee obtains additional equipment from the yard. (Ex. C-Tyszkiewicz Aff. ¶45-46, Ex. I-Chlebicki Aff. ¶90-91)

385. McGee was not written up for coming into the yard to get the additional truck. (Ex. M-McGee Dep., p. 318)

386. No one told McGee that he wasn't to come into the yard because of his race or promotion under the *Massie* decree. (Ex. M-McGee Dep., p. 493)

#11 Claims that McGee's Crew Was Written-Up Because They Were On McGee's Crew

387. McGee claims that his crew members were written up for incidents that other workers would not have been written up for. (Ex. M-McGee Dep., p. 389)

388. McGee claims an employee, Rudy DeLaJoya [sic], was written up because he fell asleep on the hydraulic arm control while operating a spreader, causing damage. (Ex. M-McGee Dep., p. 394-396)

389. McGee does not know of any employee who caused damage because they fell asleep while operating equipment who was not written up. (Ex. M-McGee Dep., p. 397)

390. Mr. DeHoyos was written up for “careless operation and damage to state property,” and received a written warning. (Ex. B-Fulgenzi Aff. ¶ 116)

391. Mr. DeHoyos' discipline is consistent with past discipline issued for similar incidents. (Ex. B-Fulgenzi Aff. ¶ 117)

392. Other non-minority employees have also been disciplined for “careless operation and damage to state property.” (Ex. B-Fulgenzi Aff. ¶ 118)

393. McGee claims Johnny Jones was written up because he caused $1,200 in damage to a mower when he slid into and up onto a tree while mowing on an incline. (Ex. M-McGee Dep., p. 402)

394. Mr. Jones was written up for “careless and unsafe operation of state equipment” and received a written warning. (Ex. B-Fulgenzi Aff. ¶ 120)

395. The discipline Mr. Jones received for this incident is consistent with past discipline issued for similar incidents. (Ex. B-Fulgenzi Aff. ¶ 121)

396. Other non-minority employees have also been disciplined for “careless and unsafe operation of state equipment.” (Ex. B-Fulgenzi Aff. ¶ 122)

397. McGee was never told that his crew was written up because of McGee's race or promotion under the *Massie* decree. (Ex. M-McGee Dep., p. 494)

#12 Claims that McGee Was Assigned Crew of Snowbirds

398. McGee claims that he was harassed in December 2001 or January 2002 by being assigned a crew of snowbirds. (Ex. M-McGee Dep., p. 296-297)

399. McGee was originally to have three other full-time employees, but McGee didn't want them on his crew, so he told LLW Petrie he didn't want them and asked Petrie to have the snowbirds instead, which was agreed to by Petrie. (Ex. M-McGee

Dep., p. 297-299)

400. The three full-time employees were then assigned to LLW Petrie's crew, where they gave Petrie a hard time. (Ex. M-McGee Dep., p. 300)

401. McGee considers this harassment against him, because he believes the full-time employees who gave Petrie a hard time would rather have been on McGee's crew to give him a hard time. (Ex. M-McGee Dep., p. 300)

#13 Miscellaneous Problems with Crew and Co-workers

402. On one occasion, two of McGee's crew members did not follow his instructions while setting up a lane closure. (Ex. M-McGee Dep., p. 201-202)

403. LLW Petrie came to the job, and verbally reprimanded the employees who did not follow McGee's directions. (Ex. M-McGee Dep., p. 203-204)

404. McGee believes that these crew members did not follow his instructions because of his promotion under the *Massie* decree, although he has no personal knowledge of that. (Ex. M-McGee Dep., p. 478-479)

405. McGee had no problem with the way Petrie handled the situation. (Ex. M-McGee Dep., p. 207)

406. McGee also claims that employees in the yard were spreading rumors about him. (Ex. M-McGee Dep., p. 382-383)

407. McGee never told Chlebicki or Jenkins about the rumors he believed were being spread, but nevertheless believes that Chlebicki and Jenkins should have stopped it. (Ex. M-McGee Dep., p. 413-414)

408. McGee claims that the men in the yard were against the *Massie* decree and didn't like him. (Ex. M-McGee Dep., p. 244)

409. None of these employees ever said anything to McGee about the *Massie* decree, or ever made any racial comments towards him. (Ex. M-McGee Dep., p. 243-244)

410. McGee retired from his employment at IDOT on December 31, 2002. (Ex. B-Fulgenzi Aff. ¶75)

McGee's Job Performance-Stevenson Yard

411. McGee's conduct during his employment at the Stevenson Yard caused concern among his superiors. (Ex. O-Jenkins Aff. ¶15,19, 23, 30, Ex. C-Tyszkiewicz Aff. ¶84-85 Ex. H-Chlebicki Dep., p. 61, 63-65, Ex. I-Chlebicki Aff. ¶95)

412. Among the causes of concern was McGee's inability to accept constructive criticism from his superiors, his inability to control his anger in certain situations, his disrespect of his Yard Technician, his overuse of sick time, his inab-

ility to properly complete the paperwork required during snow and ice season, and the taking of unusually long breaks. (Ex. O-Jenkins Aff. ¶15, 19, 23, 30, Ex. C-Tyszkiewicz Aff. ¶84, Ex. H-Chlebicki Dep., p. 61, 63-65, Ex. I-Chlebicki Aff. ¶97, 100-101)

413. The Yard Technician, Chlebicki, did not conduct an employee review for McGee during his employment at the Stevenson Yard. (Ex. I-Chlebicki Aff. ¶102, Ex. O-Jenkins Aff. ¶28)

414. Had Chlebicki completed McGee's evaluation, he would not have rated McGee as a satisfactory employee in all areas. (Ex. I-Chlebicki Aff. ¶104, Ex. O-Jenkins Aff. ¶27)

415. At the time McGee's review was scheduled to be completed, Chlebicki was concerned that due to the numerous complaints McGee had made against him, a negative employee review would only serve to add to McGee's unwarranted complaints. (Ex. I-Chlebicki Aff. ¶103, 105, Ex. O-Jenkins Aff. ¶26, 27)

416. Chlebicki discussed his concerns about McGee with his superior, Mark Jenkins. (Ex. I-Chlebicki Aff. ¶96, Ex. O-Jenkins Aff. ¶21)

417. Jenkins personally witnessed McGee failing to adequately perform his duties as LW. (Ex. O-Jenkins Aff. ¶30)

418. Jenkins observed McGee on a job site sitting in his truck when he should have been working with his crew. (Ex. O-Jenkins Aff. ¶31)

419. Jenkins has also personally witnessed McGee's inability to control his anger. (Ex. O-Jenkins Aff. ¶11-13, 15)

420. Based on his personal observations and McGee's attendance record, Jenkins was of the opinion that McGee should have been subject to discipline. (Ex. O-Jenkins Aff. ¶33)

421. McGee's personnel file does not contain any record of any discipline or Report of Rule Infraction issued to McGee during his employment at the Stevenson Yard. (Ex. B-Fulgenzi Aff. ¶101, 102)

422. Based on his personal observations and McGee's attendance record, Jenkins did not feel that McGee was meeting IDOT's expectations of him as a Lead Worker. (Ex. O-Jenkins Aff. ¶34)

McGee's Complaints to IDOT Officials

423. McGee called Giovanni Fulgenzi, IDOT District 1 Personnel Services Manager, approximately four months after he began at the Stevenson Yard. (Ex. M-McGee Dep., p. 189)

424. McGee told Fulgenzi about general problems with his crew, attitudes of his co-workers and that he felt it was harassment. (Ex. M-McGee Dep., p. 197-198, 201-204)

425. McGee did not mention anyone by name during his conversation with Fulgenzi, and discussed his concerns in a general manner. (Ex. M-McGee Dep., p. 204, 209)

426. Fulgenzi instructed McGee to stick with the situation, that things would get better. (Ex. M-McGee Dep., p. 208-209)

McGee's Complaint Under the Massie Decree

427. McGee had numerous complaints investigated by the "Investigation Committee" pursuant to the *Massie* Decree, including allegations of unequal treatment in his assignments, that a sexual harassment claim was fabricated against him and that he was harassed and retaliated against by Chlebicki questioning him about his crew's restroom breaks and suggesting he tow a 'port-a-potty' behind his truck. (Ex. B-Fulgenzi Aff. ¶78, Ex. J-Schick Aff. ¶9, 22)[FN7]

FN7. Plaintiff McGeee's complaint under the *Massie* decree is made a part of Defendants' 56.1 Statement of Facts for the sole purpose of demonstrating what allegations were made to IDOT, and what steps IDOT took in investigating those claims. Defendants do not waive any objections to this Exhibit for purposes of trial, including hearsay objections.

IDOT's Investigation of McGee's Complaints under the Massie Decree[FN8]

FN8. The investigation of Plaintiff's complaints under the *Massie* decree is included in this 56.1 for the purpose of showing what steps were taken in the investigation of Plaintiffs complaint. Defendants do not waive any objections to these materials for purposes of trial, including hearsay objections.

428. McGee's complaints were investigated by the "Investigation Committee" consisting of Sandi Brown, James Stumpner and Malcolm Erickson. (Ex L-Brown Dep., p. 161-162)

429. The Civil Rights Committee was provided with the investigative reports prepared by the *Massie* 'Investigation Committee' in response to McGee's complaints which included follow-up investigation at the request of the Monitor. (Ex. B-Fulgenzi Aff. ¶76, Ex. J-Schick Aff. ¶9, Ex. L-Brown Dep., p. 162- 168)

430. The Monitor's recommendations with respect to McGee's complaints were also provided to the members of the IDOT Civil Rights Committee. (Ex. B-Fulgenzi Aff. ¶ 77, Ex. J-Schick Aff. ¶9)

431. The Civil Rights Committee for McGee's case were: Giovanni Fulgenzi, Personnel Services Manager, District 1, J. Randle Schick, Assistant Chief Counsel and

James Allen, Deputy Director of Finance and Administration. (Ex. B-Fulgenzi Aff. ¶ 48-49, Ex. J-Schick Aff. ¶8)

432. The members of the Civil Rights Committee determined that witnesses would be called with respect to McGee's case, and therefore the Monitor was allowed to be present for the Civil Rights Committee meeting held on November 15, 2001. (Ex. B-Fulgenzi Aff. ¶51-52, Ex. J-Schick Aff. ¶11)

433. The Monitor was not present during the Committee's deliberations. (Ex. B-Fulgenzi Aff. ¶53)

434. The specific claims addressed by the Committee were Mr. McGee's claims of a fabricated sexual harassment claim against him, harassment by Chlebicki in suggesting that he tow a port-a-potty and that he was given less desirable assignments than other Lead Workers. (Ex. B-Fulgenzi Aff. ¶78, Ex. J-Schick Aff. ¶22)

435. The Civil Rights Committee heard statements from Mr. McGee and Mr. Chlebicki on the issues. (Ex. B-Fulgenzi Aff. ¶79, Ex. J-Schick Aff. ¶23)

436. At the conclusion of the Civil Rights Committee meeting, the Committee deliberated and determined that there was no merit to McGee's claims of harassment, discrimination and retaliation. (Ex. B-Fulgenzi Aff. ¶80, Ex. J-Schick Aff. ¶24)

437. The Committee was unanimous in its decision. (Ex. B-Fulgenzi Aff. ¶82, Ex. J-Schick Aff. ¶26)

438. The Committee then issued a written recommendation which included the basis for their finding that there was no merit to McGee's claims. (Ex. B-Fulgenzi Aff. ¶83, Ex. J-Schick Aff. ¶25)

439. After the Director of Finance and Administration approved the recommendation of the Civil Rights Committee, the recommendation was sent to the Monitor. (Exhibit W, January 10, 2002 Letter to Monitor enclosing recommendation)

440. The members of the Civil Rights Committee never received any document purporting to be an internal IDOT ‘response’ to the Civil Rights Committee recommendation, nor was such a document prepared by a member of the Committee. (Ex. B-Fulgenzi Aff. ¶84, Ex. J-Schick Aff. ¶27)

441. The recommendation of the Civil Rights Committee was sent to the Monitor on January 10, 2002, and although the Monitor had the authority to address the recommendation of the Committee with IDOT, and if no resolution could be achieved, to further pursue the matter in court under the *Massie* consent decree, the present lawsuit was filed on January 11, 2002. (Ex. A-Complaint, Ex. Q-Investigation Schedule, Ex. W-January 10 letter)

McGee's Complaints Against IDOT

442. McGee does not believe that IDOT created a hostile work environment for him. (Ex. M-McGee Dep., p. 514-515)

443. McGee does not believe that IDOT discriminated, harassed or retaliated against him. (Ex. M-McGee Dep., p. 514-515)

444. McGee admits “IDOT had nothing to do with this” (Ex. M-McGee Dep., p. 539-540)

McGee's Complaints About John Kos

445. John Kos had no direct contact with McGee whatsoever. (Ex. M-McGee Dep., p. 533)

446. McGee never complained to John Kos about his treatment at the Stevenson. (Ex. M-McGee Dep., p. 534)

McGee's Damages

447. McGee did not lose any wages while employed at the Stevenson Yard. (Ex. M-McGee Dep., p. 536)

448. McGee did not suffer any financial damages as a result of his employment at the Stevenson Yard. (Ex. M-McGee Dep., p. 536)

449. McGee never did any job which was not part of his job description while employed at the Stevenson Yard. (Ex. M-McGee Dep., p. 355)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

NOW COME Defendants Illinois Department of Transportation (“IDOT”), John Kos, Dennis Mahoney and Kenneth Chlebicki, by and through their attorney, LISA MADIGAN, Illinois Attorney General, and in their Memorandum of Law in Support of their Motion for Summary Judgment state as follows:

I. INTRODUCTION

Plaintiffs John McGee and Thomas Malone bring this complaint against IDOT, John Kos, Dennis Mahoney and Kenneth Chlebicki, alleging race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1984, as amended, 42 U.S.C. §2000e *et seq.*, (“Title VII”), 42 U.S.C. §1981 and 42 U.S.C. §1983 (Local Rule 56.1(a) Statement of Facts (“D. 56.1”), at 1). Plaintiffs claim they were discriminated against in violation of Title VII by IDOT, and that IDOT retaliated against them in violation of Title VII as a result of their involvement in the *Massie v. IDOT* consent decree, their resulting promotions, and their complaints of harassment. (D. 56.1 at 1). Plaintiffs further claim that the individual Defendants (Kos, Mahoney and Chlebicki) are liable for the same conduct under 42 U.S.C. §1981 and 1983.[FN1] (D. 56.1 at 1).

FN1. It should be noted that Plaintiffs do not claim what constitutional right has been violated in their §1983 claim. However, based on representations of Plaintiffs' counsel, Defendants construe the §1983 claim as based on an Equal Protection violation.

Plaintiff Malone's allegations of retaliation and discrimination include:

1. being given less desirable work assignments, although Plaintiff Malone makes no allegation that any of his assignments were not within his job duties (D. 56.1 at 189-192),

2. being ordered, on one occasion, to shovel snow by hand while an “acting” HCEO used a snowblower (D. 56.1 at 104),

3. being blamed for damage to equipment, although Plaintiff admits to causing the damage and that he never received any discipline for any of these incidents (D. 56.1 at 124, 127, 129, 137, 146, 150, 151, 158, 165, 169, 171),

4. being written up for damage to equipment in an untimely manner, although no discipline resulted from the Report of Rule Infraction (D. 56.1 at 158, 167, 169),

5. being monitored and criticized by the Yard Technician, Defendant Mahoney (D. 56.1 at 185, 200),

6. failure of the Technician to post the Temporary Assignment Rotation sign-up sheet, although Malone was able to sign up after filing a grievance (D. 56.1 at 216, 221) and

7. an allegation that Mr. Mahoney used a racial slur against him outside of his presence, which was told to Malone by another employee (D. 56.1 at 178, 179).

Plaintiff McGee's allegations of retaliation and discrimination include:

1. not being introduced to the yard employees and not given his own work space and facilities upon his arrival, although an office was later created for him (D. 56.1 at 268, 274, 281),

2. having his work checked by the Lead Lead Worker, John Petrie (D. 56.1 at 295),

3. not being given the opportunity to “Plan and Supervise” as part of his job (D. 56.1 at 300),

4. being asked to tow a port-a-potty behind his truck due to his crew's excessive restroom breaks which led to a confrontation with the Technician, Mr. Chlebicki (D. 56.1 at 304, 306),

5. being accused of “poor public image” for allowing a crew member to lie down in his truck while on a job site, although no discipline was issued as a result of this incident (D. 56.1 at 322, 326, 332),

6. being taunted by a temporary employee who was fired for his actions (D. 56.1 at 338, 347, 350),

7. being blamed for damaging a saw (D. 56.1 at 359),

8. having the Yard Technician change a lane closure that McGee set up (D. 56.1 at 365),

9. on two occasions, not initially being given sufficient equipment for his assignment (D. 56.1 at 373, 379),

10. on one occasion, being told not to come into the yard to pick up additional equipment after he had already left the yard with his crew (D. 56.1 at 381-383),

11. that his crew members were written up for incidents for which other employees would not have received write-ups (D. 56.1 at 387),

12. being assigned a crew of temporary employees (snowbirds) during snow and ice season (D. 56.1 at 398), and

13. other miscellaneous issues with his crew and co-workers (D. 56.1 at 402, 406).

Defendants will prove in this Memorandum and its Statement of Facts that the complaints of the Plaintiffs in this action do not amount to discrimination, harassment or retaliation.

Defendants move for summary judgment on the grounds that:

1. There is no direct evidence of discrimination or retaliation;

2. Plaintiffs cannot establish a *prima facie* case of discrimination or retaliation as neither Plaintiff suffered an adverse employment action, Mr. McGee was not meeting his employers expectations, neither Plaintiff can show that he was treated less favorably than similarly situated non-minority employees, and Defendants had legitimate non-discriminatory and non-retaliatory reasons for their actions which Plaintiff cannot show were pretexts for harassment or retaliation;

3. Plaintiffs cannot demonstrate that they were subjected to a hostile work environment, as there was no severe or pervasive harassment which rendered the environment “hellish;”

4. Plaintiffs cannot establish a prima facie case against Defendants Kos, Mahoney or Chlebicki under either §1981 or §1983, which require the same burden for Plaintiffs as the Title VII claims, including demonstrating that the Defendants intentionally discriminated against Plaintiffs;

5. Defendant Kos did not have the requisite personal involvement required under Section 1983 to be held liable for damages; and

6. Defendants Kos, Mahoney and Chlebicki are entitled to qualified immunity from damages in this action as their conduct was objectively reasonable and did not violate clearly established constitutional rights.

II. FACTUAL BACKGROUND

As its factual background, in the interests of judicial economy Defendants incorporate by reference their Local 56.1 (a) Statement of Uncontested Facts which is filed with this Motion and Memorandum.

III. STANDARD OF REVIEW

Summary judgment is appropriate pursuant to Fed. R. Civ. Proc. 56 if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In ruling on the motion, the court will not resolve factual disputes or weigh conflicting evidence. *Sweet v. Peabody Coal Co.,* 94 F.3d 301, 304 (7th Cir. 1996). The evidence is considered in the light most favorable to the nonmovant and all legitimate inferences are drawn in favor of the nonmovant. *See Dey v. Colt Construction & Development Co.,* 28 F.3d 1446, 1453 (7th Cir. 1994). The nonmovant, however, "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The nonmovant must produce "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. 56(e). Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex,* 477 U.S. at 322.

III. ARGUMENT

A. *TITLE VII CLAIMS AGAINST IDOT*

In Counts III and IV of their Complaint, Plaintiffs allege that IDOT violated Title VII by discriminating against Plaintiffs based on their race and by retaliating against them for their involvement, promotions and complaints resulting from the *Massie* decree.

I. Title VII Discrimination

Title VII forbids an employer from discriminating against an employee based on their race. 42 U.S.C. 2000(e) et seq., (2002) ("Title VII"). However, Title VII "does not guarantee a utopian workplace, or even a pleasant one" *Yore v. Indiana Bell Tel. Co.,* 32 F.3d 1161, 1162 (7th Cir. 1994). Furthermore, not everything

that makes a Plaintiff unhappy is actionable under Title VII. *Smart v. Ball State University,* 89 F.3d 437, 441 (7th Cir. 1996). In order to bring a claim under Title VII, Plaintiffs must present a prima facie case that they were the victims of intentional race discrimination either through direct evidence or indirect evidence. *Hong v. Children's Memorial Hospital,* 993 F.2d 1257, 1261 (7th Cir. 1993).

Direct evidence is evidence which, "if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." *Randle v. LaSalle Communications, Inc.,* 876 F.2d 563, 569 (7th Cir. 1989). Such evidence is that which can be interpreted as an acknowledgement of discriminatory intent by the Defendant or its agents. *Troupe v. May Dept. Stores,* 20 F.3d 734, 736 (7th Cir. 1994). As neither Plaintiff has identified any direct evidence of discrimination, Plaintiffs must proceed under the indirect approach as described in *McDonnell Douglas Corp., v. Green,* 411 U.S. 792, 802 (1973).

In order to establish a prima facie case of discrimination through indirect evidence, Plaintiffs must establish: (1) they are members of a protected class; (2) they were meeting their employer's legitimate expectations; (3) they suffered an adverse employment action; and (4) other similarly situated employees who were not members of the protected class were treated more favorably. *Id.* If the Plaintiffs demonstrate a prima facie case, the burden shifts to the Defendants to demonstrate that there was a legitimate, nondiscriminatory reason for its employment decision. *Id.* The burden then shifts again to Plaintiffs to demonstrate that the reasons put forth by Defendants are pretextual. *Id.* "Although intermediate evidentiary burdens shift back and forth under this framework, 'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' " *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)(quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

With respect to the first requirement, it is undisputed that Plaintiffs are both members of a protected class.

With respect to the second requirement, although Plaintiff Malone may have met his employer's legitimate expectations for a new and inexperienced HCEO, Plaintiff McGee has not demonstrated that he met IDOT's expectations of a 20-plus year employee promoted to a Lead Worker position. Although Plaintiff McGee was a long-standing IDOT employee (D. 56.1 at 259), who had in fact, worked in the capacity of "acting" lead worker prior to his promotion (D. 56.1 at 261), his performance as Lead Worker in the Stevenson Yard concerned his superiors, namely his poor attendance record, his inability to handle routine criticism, his inability to properly supervise his crew and his inability to control his anger. (D. 56.1 at 411-422). *See Peters v. Renaissance Hotel Operating Co.,* 307 F.3d 535, 545 (7th Cir. 2000)(finding that the question of whether or not an employee was meeting his

employers' legitimate expectations involves the employee's performance at the time of the adverse employment action). These concerns were of a serious enough nature that the Area Operations Engineer who oversaw the Stevenson Yard felt that discipline should have been issued to McGee for numerous incidents (D. 56.1 420). McGee, therefore, cannot establish that he was in fact, meeting his employer's legitimate expectations.

Notwithstanding the inability of McGee to satisfy the second prong, both Plaintiffs' claims for discrimination are fatally damaged by their inability to demonstrate that they suffered any adverse employment action. An adverse employment action must have a tangible job consequence. *Sweeney v. West,* 149 F.3d 550, 556 (7th Cir. 1998). Differences in treatment which have "little or no effect on an employee's job" and changes in the conditions or terms of employment which do not amount to more than "mere inconveniences or alteration of job responsibilities" do not satisfy this requirement. *Id.* Simply put, there must be 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." *Bell v. Environmental Protection Agency,* 232 F.3d 546, 555 (7th Cir. 2000). "Not everything that makes an employee unhappy is an actionable adverse action. Otherwise, minor and even trivial employment actions that 'an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.' " *Smart,* 89 F.3d at 441 (quoting *Williams v. Bristol-Myers Squibb Co.,* 85 F.3d 270, 274 (7th Cir. 1996). Plaintiffs then "must show some quantitative or qualitative change in the terms or conditions of their employment that is more than mere subjective preference." *Johnson v. Cambridge Industries, Inc.,* 325 F.3d 892, 901 (7th Cir. 2003).

The present case bears striking similarity to another suit against IDOT, in which the District Court for the Northern District of Illinois found that the Plaintiff had not suffered an adverse employment action.[FN2] In *Grana v. IDOT,* 232 F.Supp.2d 879 (N.D.Ill. 2002),the Plaintiff claimed he received less desirable assignments than his co-workers, that his supervisors did not make casual talk with him, that, on occasion, he was not given 15 minutes at the end of the work day to wash up, that his supervisor slammed a door in his face, and that after he filed his suit against IDOT and two of its yard supervisors, he was told by one supervisor that "he hoped [Plaintiff] had a good lawyer," and by another supervisor that the supervisor "would own [Plaintiffs] home." *Id.* With respect to Grana's complaints about his work assignments, the Court found that the only consequence the Plaintiff "seemed to have suffered is disliking and resenting the duties he was assigned to do, which is insufficient to amount to a 'tangible job consequence.' " *Id.* at 887. With respect to the claims of harassment by the supervisors, failing to make casual talk, and the statements referencing Grana's lawsuit, the court found that the supervisor's behavior and statements did not amount to an adverse employment action, stating that "Grana may not enjoy his current situation, but a less-than-desirable rapport with his supervisors does not consti-

tute an adverse employment action." *Id.* at 887.

> FN2. *Grana* claimed a violation of Title VII for retaliation, rather than discrimination. However, the analysis of what constituted an "adverse employment action" is generally the same as in discrimination cases. (cite...)

Plaintiff Malone's claims that he was given undesirable work assignments, was monitored by the Yard Technician Dennis Mahoney, was required to shovel show by hand, was initially unable to sign up for the Temporary Assignment Rotation List as well as his other claims simply do not demonstrate that he suffered any "tangible job consequence." Malone was never asked or required to perform tasks which were outside his duties as HCEO. (D. 56.1 at 192). Malone was also able to sign up on the Rotation List when his grievance was granted, and did in fact, act as "Acting Lead Worker" while he was assigned to the Kennedy Yard. (D. 56.1 at 212, 221). The record further reflects that at no time was Malone disciplined in any way for damage to equipment that he admittedly caused (D. 56.1 at 225, 226), and the only Report of Rule Infraction which was ever issued to Malone was rescinded, did not result in any discipline, and was not recorded in Malone's Personnel file. (D. 56.1 at 169, 226). Likewise, his allegation of being checked-up and criticized by Yard Technician Mahoney cannot be deemed an adverse employment action, as it was part of Mahoney's job responsibility to monitor the crews to ensure that assignments were being completed and that safety procedures were being followed (D. 56.1 at 188, 201, 211).

McGee's claims also do not demonstrate that he suffered an adverse employment action. Most of McGee's claims point to nothing more than a personality conflict between McGee and Chlebicki and other yard employees. Like Malone, McGee was never disciplined for any of his shortcomings including the incident when his hostility forced Chlebicki to flee the Yard and go to the McCook police station out of fear for his safety (D. 56.1 at 310, 311, 317, 421) Furthermore, McGee was never required to perform a task that was outside his job description (D. 56.1. at 449). Even if the Court were to find that the criticisms of Plaintiff's performance (for allowing a crew member to lie down on the job, the port-a-potty confrontation with Chlebicki, and the other various performance-based criticisms were unwarranted, it is well established that unfair reprimands, without tangible job consequence, do not constitute adverse employment actions. *Sweeney v. West,* 149 F.3d 550, 556-57 (7th Cir. 1998). The fact that McGee had a less than desirable rapport with his Technician and co-workers does not amount to an adverse employment action. *See Grana,* 232 F.Supp. at 887, *Parkins v. Civil Constructors of Ill.,* 163 F.3d 1027, 1039 (7th Cir. 1998) (employee who was shunned and ostracized by co-workers did not establish an adverse employment action).

To the extent Plaintiffs claim that they were harassed to such a degree as to constitute an adverse employment action, Plaintiffs still have not met their burden. As demonstrated in the following section regarding a Title VII claim for hostile work environment (infra, Section A(III)), the conduct complained of by Plaintiffs

simply falls short of that required to be actionable under Title VII.

Neither Plaintiff has demonstrated that they were disciplined, transferred, demoted, suffered changes in their job duties or lost wages or benefits. Therefore, as neither Plaintiff can satisfy their burden in demonstrating that they suffered an adverse employment action, IDOT is entitled to summary judgment on Plaintiffs' Title VII discrimination claim.

Just as Plaintiffs have failed to meet their burden with respect to the third factor of the *McDonnell Douglas* test, Plaintiffs also cannot satisfy the third prong: demonstrating that similarly situated employees who were not African-American were treated more favorably. *McDonnell Douglas,* 411 U.S. at 804. Similarly situated refers to other employees who were "directly comparable to [[Plaintiff] in all material respects." *Patterson v. Avery Dennison Corp.,* 281 F.3d 676, 680 (7th Cir.2002). The Court considers whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications. *Id.* Here, neither Plaintiff has been able to identify a similarly situated employee who was treated more favorably than the Plaintiffs.

In Plaintiff Malone's case, other employees, including non-minorities had to shovel snow by hand on this same occasion. (D. 56.1 at 105). As Malone was never disciplined for any damage to equipment that he caused, there is no need to compare the discipline issued to other employees for similar incidents (the record further reflects that other non-minority employees have been disciplined for similar incidents, thereby leading to the conclusion that Malone was treated *more favorably* than similarly situated employees with respect to incidents of equipment damage. (D. 56.1 at 124, 131, 137, 150, 151, 158, 170, 171, 225, 226). In terms of any claim that John Gabor, the other HCEO in the Kennedy Yard received better assignments than Malone(D. 56.1 at 189), Gabor is in no way similarly situated to Malone. Gabor has been an HCEO in the Kennedy Yard since 1975 (D. 56.1 at 103), and is far more experienced that Malone, who had only acted as HCEO for a two-month period more than three years before his promotion (D. 56.1 at 90, 93). Therefore, any comparison between Gabor's assignments and Malone's cannot demonstrate that Gabor was treated more favorably than Malone. Finally, with respect to any claimed harassing treatment of Malone by Defendant Mahoney, Malone himself denied feeling harassed or treated differently than non-minority employees when questioned by the IDOT Civil Rights Committee. (D. 56.1 at 252). In any event, Malone's claims that Mahoney treated other non-African-American employees badly, seriously undermines any claim that Mahoney treated minorities less favorably than non-minority employees.

In McGee's case, there is no other Lead Worker at the Stevenson Yard. Therefore, as the other Lead Workers at other yards report to different Yard Technicians (D. 56.1 at 13), and have different job duties due to the varying responsibilities of the maintenance yards (D. 56.1 at 10, 13), there are no valid comparable employees

with whom to compare McGee's assignments. Furthermore, there is no need to compare discipline of other employees as McGee was not disciplined for any of the incidents he complains of, and in fact seems to have been treated *more favorably* than a comparable employee who certainly would have been disciplined for insubordination which resulted in a Technician fleeing the yard in fear for his safety (D. 56.1 at 310, 311, 318, 322, 329, 332). McGee has also failed to demonstrate that LLW Petrie checked up on him (which was part of Petrie's job duty as the Lead Lead Worker) more than other employees, as other white employees confirmed that Petrie would routinely check on them, sometimes three or four times per day (D. 56.1 at 299). Regarding McGee's complaint of being verbally criticized for poor public image after allowing an ill crew member to lie down on the job, not only did the conduct not result in any discipline, other IDOT employees have been disciplined for lying down or sitting in a truck while on the job (D. 56.1 at 329, 332). Likewise, with respect to McGee's various complaints regarding Chlebicki's treatment of him, McGee is unable to satisfy his burden in demonstrating that Chlebicki treated previous non-minority Lead Workers differently than he treated McGee. In fact, McGee seems to claim that Chlebicki treated everyone badly, which would certainly not satisfy the third prong of the *McDonnell* test.

As Plaintiffs have thus failed to satisfy their burden, the Court need not determine whether IDOT had legitimate nondiscriminatory reasons for the alleged actions (especially in light of the fact that Plaintiffs' did not suffer any adverse employment action), or whether those reasons are pretextual. *See Haywood v. Lucent Technologies, Inc.,* 323 F.3d 524, 531 (7th Cir. 2003).

However, even if this Court were to determine that further analysis is warranted, Plaintiffs would still fail in their burden. In order to sufficiently demonstrate that all of the reasons for the decisions regarding Plaintiffs were pretextual, Plaintiffs must show that these reasons (1) have no basis in fact; (2) that the proffered facts did not actually motivate the adverse action; or (3) that the facts were insufficient to motivate the adverse action. *Collier v. Budd Co.,* 66 F.3d 886, 892 (7th Cir. 1995. *See also Ghosh v. Indiana Dept. of Environmental Mgmt.,* 192 F.3d 1087, 1091 (“Pretext is established if the plaintiff can show that the defendant's proffered reasons are either lies or completely lacking in factual basis.”). Furthermore, the court does not take the position of a “super-personnel department that reexamines an entity's business decisions.” *Dale v. Chicago Tribune Co.,* 797 F.2d 458, 464 (7th Cir. 1986), *cert. den.* 479 U.S. 1066, 107 S.Ct. 954, 93 L.Ed.2d 1002 (1987). “If at least one reason remains unquestioned which, standing alone, would have caused [the employer] to take the challenged action, then summary judgment is proper.” *Sample v. Aldi Inc.,* 61 F.3d 544, 549 (7th Cir. 1995).

As demonstrated in Defendant's 56.1 Statement of Facts, incorporated in the “Background” section of this Memorandum, all of the matters complained of by Plaintiffs are routine operational matters that have legitimate, non-discriminatory reasons. For example, with respect to Plaintiff Malone, it is ad-

mitted that he was one of the employees required to shovel snow by hand during a large snowstorm in which the reversible lane gates of the expressway were inundated with snow (D.56.1 at 104, 105). Requiring an HCEO with no snowblower experience to shovel snow by hand while experienced personnel operate the snowblowers is an operational decision that is both legitimate and non-discriminatory. Likewise, any day-to-day decisions regarding equipment use which resulted in the experienced HCEO using equipment while Malone performed other tasks is a decision which is based on the needs of the yard at the time. It is perfectly legitimate in many situations where time is of the essence to have an experienced person perform a task rather than an inexperienced one. It is absurd to expect that just because Malone was an HCEO that he would never be required to do work that did not require equipment use, especially as these other duties are within his job description. *See Grana,* 232 F.Supp2d at 887, (finding no discrimination, as Plaintiff not ordered to do any task which was outside of his job description).

Regarding McGee, IDOT has legitimate, non-discriminatory reasons to explain any alleged action. For example, it is considered a violation of the poor public image policy for employees to be lying in trucks on job sites (D. 56.1 at 328). Other employees have been severely disciplined just for sitting in trucks when they should have been working (D. 56.1 at 329). As McGee was a lead worker, and was responsible for his crew, it is legitimate that the issue be discussed with him (D. 56.1 at 58). With respect to the issue of not being able to come into the yard to obtain additional equipment, IDOT's legitimate, non-discriminatory reason is that it is preferable to have the crew leader (Lead Worker) remain with the crew, rather than coming into the yard, especially in situations where another worker could bring the equipment out to the job site (D. 56.1 at 63, 64). Finally, with respect to the "port-a-potty" incident, IDOT has legitimate concerns when a Lead Worker is continually taking employees off of a job site for restroom breaks, as the Lead Worker should be directing and working with his crew, not running a shuttle service.[FN3]

> FN3. IDOT does not discuss in this Memorandum every complaint of Plaintiffs and attempt to rebut them with a legitimate non-discriminatory reason, but rather refers the Court to the Defendants' 56.1 Statement of Facts, incorporated in the Background section of this Memorandum.

As Plaintiffs have thus failed to establish a prima facie case for discrimination, Defendants are entitled to summary judgment on Plaintiffs' discrimination claim against IDOT.

II. Title VII Retaliation

To establish a prima facie case for retaliation under Title VII, Plaintiffs may proceed under either a direct or indirect method. Under the direct method, Plaintiffs must demonstrate that (1) they engaged in a protected activity under Title VII; (2) they suffered an adverse employment action; and (3) there was a

causal link between the two. *McDonnell Douglas,* 411 U.S. 792, *Jones v. Gen. Elec. Info. Servs., 3 F.Supp.2d 910 (N.D.Ill.1998).* Plaintiffs may also demonstrate retaliation under a less demanding indirect test which requires Plaintiffs to demonstrate that (1) they engaged in statutorily protected activity; (2) their performance met their employer's legitimate expectations; (3) despite their satisfactory job performance, they suffered an adverse employment action; and (4) they were treated less favorably than similarly situated employees who did not engage in statutorily protected activity. *Haywood,* 323 F.3d at 531(7th Cir. 2003). As in the discrimination context, the burden then shifts to the Defendant to demonstrate that the reasons for the employment action were legitimate and non-retaliatory, and then shifts back to Plaintiffs to demonstrate that these reasons were pretextual. *Id*

While their involvement in the *Massie* case, their subsequent promotions under the *Massie* decree and their complaints of discrimination and harassment are admittedly protected activity, Plaintiffs have again failed to establish a prima facie case for retaliation under either test.

As in their discrimination claim, under either test, Plaintiffs are required to establish that they suffered an adverse employment action in order to survive summary judgment. *Id.* Although ‘retaliatory harassment’ could be considered an adverse employment action, *see Hennreiter v. Chicago Housing Authority,* 315 F.3d 742, 745 (7th Cir. 2002), none of the conduct complained of by Plaintiffs is actionable. As is discussed in the sections below regarding a “hostile work environment” claim, none of the conduct complained of is egregious enough to cause a significant change in Plaintiffs' employment status.

Plaintiffs' allegations of ‘harassing’ behavior of their Yard Technicians and coworkers are “too petty and tepid to constitute a material change in the terms and conditions of [Plaintiffs'] employment.” *Stutler v. Illinois Dept. of Corrections,* 263 F.3d 698, 704 (7th Cir. 2001)(finding that supervisor's repeated comments that Plaintiff “had to go,” characterizing Plaintiffs behavior in an e-mail to IDOC Director as “bizarre” and requesting the return of her office key not actionable as retaliation under Title VII); *Parkins,* 163 F.3d at 1039 (finding ostracism without material harm to Plaintiff such as reduced salary, benefits, seniority or responsibilities not adverse employment action in retaliation claim). Malone and McGee's have not demonstrated that they were transferred, demoted, disciplined, suffered any changes in their job duties or loss in wages or benefits. (D. 56.1 at 225, 226, 351, 364, 421, 447, 449) Plaintiffs complaints are more fairly characterized as a “less than desirable rapport” with their Yard Technicians and coworkers, which are not actionable as adverse employment action for a retaliation claim under Title VII. *Grana,* 232 F.Supp.2d at 887.

Just as in their claim for discrimination, Plaintiffs' failure to demonstrate that they have suffered any adverse action is fatal to their claim of retaliation.

Notwithstanding that they have failed to satisfy the requirement of an adverse employment action under either the direct or indirect methods, Plaintiffs have also not met the other requirements. Under the direct method, Plaintiffs have failed to establish that any of the conduct they allege to be retaliatory was causally related to any of the protected activity. Under the indirect method, Plaintiffs' claims fail for the reasons set forth in the previous section. Plaintiff McGee is not able to establish that he was meeting his employer's legitimate expectations, and neither Plaintiff can demonstrate that any other employee who did not engage in statutorily protected activity was treated more favorably. As previously demonstrated, if anything can be discerned from the allegations of the Plaintiffs, it is that they were, in fact, treated *better* than other employees due to their complaints under the *Massie* decree, as neither Plaintiff was ever disciplined (D.56.1 at 225, 226, 421), even under circumstances where other employees would have received some sort of disciplinary action against them (D. 56.1 at 170, 318, 329).

Plaintiffs are therefore unable to establish a prima facie case, and Defendant IDOT is entitled to summary judgment on Plaintiff's retaliation claim.

III. Hostile Work Environment Discrimination

To be actionable as a hostile work environment, harassment must be of a severity and pervasiveness so as to alter conditions of employment. *Gleason v. Meisrow Fin., Inc.,* 118 F.3d 1134, 1143 (7th Cir. 1997).

In a discrimination context, to establish a prima facie case for a hostile work environment claim, Plaintiffs must demonstrate that: (1) they were subjected to unwelcome harassment; (2) the harassment was based on race; (3) the harassment was so severe or pervasive as to alter the conditions of their environment and create a hostile or abusive environment; and (4) there is a basis for employer liability. *Mason v. Southern Illinois Univ. at Carbondale,* 233 F.3d 1036, 1043 (7th Cir. 2000). The conditions giving rise to the claim must be both objectively and subjectively hostile and thus render the environment “hostile” or “abusive.” *Murray v. Chicago Transit Auth.,* 252 F.3d 880, 888-89 (7th Cir. 2001). In determining whether a workplace is ‘hostile,’ a court must examine the totality of the circumstances, including the “frequency of the allegedly discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.” *Harris v. Forklift Systems Inc.,* 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed2d 295 (1993). The workplace must be “hellish” to be actionable. *Perry v. Harris Chernin, Inc.,* 126 F.3d 1010, 1013 (7th Cir. 1997).

In determining a basis for liability, the employer is strictly liable if there was sufficient harassment by a supervisor. However, if the harassment was not by a supervisor, the employer is only liable if they were negligent in discovering or remedying the harassment. *Baskerville v. Culligan International Co.,* 50 F.3d 428, 431-32 (7th Cir. 1995); *Zimmerman v. Cook County Sheriff's Dept.,* 96 F.3d 1017,

1018 (7th Cir. 1996). The various allegations of poor treatment of Plaintiffs do not meet the criteria to establish a hostile work environment claim. While Plaintiffs may believe their working environments were hostile, under an objective standard the conduct complained of simply does not meet the criteria to establish a hostile work environment claim.

Plaintiff Malone complains that he was watched by Defendant Mahoney, that he was given less-desirable work assignments, that he was not able to use certain equipment in one instance, and that he was told by a third person of racially derogatory remark allegedly made by Defendant Mahoney (D. 56.1 at 179). The complaints about over-supervision, work assignments and equipment use are not objectively unreasonable, nor are they objectively hostile. Furthermore, Malone has failed to demonstrate that these incidents were motivated by his race or his affiliation with the *Massie* consent decree. As previously discussed, Defendant Mahoney was Malone's Yard Technician, and it was within his job duties to oversee the yard employees (D. 56.1 at 35, 201, 211). Likewise, the work assignment and equipment use issues are not objectively unreasonable, as all assignments were within Malone's job description (D. 56.1 at 192). As Malone was a new HCEO with limited experience (D. 56.1 at 90, 93), it is also perfectly reasonable that other, more experienced employees would be utilized in certain situations.

With respect to the alleged racial remark, Malone never personally heard Defendant Mahoney make a derogatory remark against African-Americans (D. 56.1 at 180). Even assuming, in a light most favorable to Plaintiff Malone that these remarks were made, they would still not be actionable. The remarks are not objectively "hostile" as they were made outside of Malone's presence, and as there is no evidence that Malone felt physically threatened or that the remarks had an effect on Malone's performance. *See Ngeunjuntr v. Metropolitan Life Ins. Co.,* 146 F.3d 464, 467 (7th Cir. 1998) and *Johnson v. City of Fort Wayne,* 91 F.3d 922 n.8 (7th Cir. 1996) (racial slurs used outside the presence of Plaintiff not actionable); *Black v. Zaring Homes, Inc.,* 104 F.3d 822, 826 (6th Cir. 1997)(finding that comments not directed at Plaintiff were merely offensive, rather than objectively hostile); *McPhaul v. Board of Commissioners of Madison County,* 226 F.3d 558, 567 (7th Cir. 2000) (finding no actionable claim where there was no claim that offensive remarks interfered with Plaintiffs work performance or were physically threatening or humiliating).

Furthermore, any alleged comments, even if taken as true, were not frequent enough to be considered hostile. The Seventh Circuit has held that isolated comments do not establish a hostile working environment. *See Schwapp v. Town of Avon,* 118 F.3d 106, 110 (2nd Cir. 1997)(finding that "[i]nstead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments"); *Logan v. Kautex Textron North America,* 259 F.3d 635, 641 (7th Cir. 2001) (finding that three racially charged comments made directly to an employee by supervisor and co-workers regarding lynching and disgust at interracial relationships did not amount to a hostile work environment) and *McPhaul* 226 F.3d at 567 ("mere utterance of an ...epithet

which engenders offensive feelings in an employee is not sufficient to establish a hostile working environment.”).

With respect to McGee's possible claim pursuant to a hostile work environment, it should be noted that McGee has not claimed any racial remarks on the part of Defendant Chlebicki, the Lead Lead Worker John Petrie or any of his co-workers (D. 56.1 at 409). McGee's claims, instead seem to be based on his perceived ill-treatment by Chlebicki, which simply does not meet the standard to be a hostile work environment. McGee has not demonstrated that this perceived ill-treatment was based on his race. *See Rodgers v. Western-Southern Life Ins. Co.,* 12 F.3d 668 (7th Cir. 1993) (finding that Plaintiff would not have an actionable claim under Title VII if [his supervisor] had not mixed racial comments into his daily routing of race-neutral verbal abuse.”) *Id.* at 676. Nor has McGee demonstrated that the complained of behavior was objectively sufficiently severe or pervasive as to make his working environment “hellish.” *Gleason,* 118 F.3d at 1143-1144; *Perry,* 126 F.3d at 1013.

Furthermore, even if Plaintiffs were able to present sufficient evidence of a hostile work environment, IDOT would not be liable under Title VII in this case. Neither Defendant Chlebicki or Mahoney are supervisory personnel. Where the harasser is not a supervisor, on the theory that employers do not entrust co-employees with “any significant authority with which they might harass a victim,” employers are liable for harassment of one employee by another only when they have been negligent in either discovering or remedying the harassment. *Parkins,* 163 F.3d 1027, 1032 (7th Cir. 1998). Employers adequately discharge their legal responsibility in the case of harassment of one employee by another if they “take ‘reasonable steps to discover and rectify acts of... harassment.’ ” *Id.* (quoting *Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997)).*

“Supervisor” as used in Title VII cases refers to persons who have the authority to hire, fire, demote, promote, transfer or discipline an employee. *See Rhodes v. IDOT,* 243 F.Supp. 2d 810, 819 (N.D.Ill. 2003). As Yard Technicians, Chlebicki and Mahoney did not have any such authority (D. 56.1 at 41-46). In fact, the Northern District of Illinois has specifically found that IDOT Yard Technicians are not supervisors for the purposes of Title VII. *Rhodes,* 243 F.Supp.2d at 820. Therefore, as any instances of harassment in this case would be co-worker harassment, Plaintiffs' cannot succeed on a hostile work environment claim, as IDOT was not negligent in either discovering or remedying the alleged harassment. *See Parkins,* 163 F.2d at 1032.

IDOT took reasonable steps in the present case to discover alleged acts of harassment and rectify the situations if necessary. IDOT fully investigated the numerous claims of each Plaintiff. (D. 56.1 at 243, 429). IDOT also had its own Civil Rights Committee hear each case, and even took the additional step of allowing each Plaintiff to personally give their statements to the Committee. (D. 56.1 at 249, 435). After reviewing the investigation materials and after hearing

Plaintiffs' statements, the Civil Rights Committee did not find any credible evidence that either Plaintiff was the subject of harassment, discrimination or retaliation (D. 56.1 at 253, 436). Nonetheless, the Committee ordered an expanded investigation into the allegations of racial slurs in the Kennedy Yard, which revealed that the vast majority of employees did not witness or perceive any racial animus in the yard (D. 56.1 at 257).

Throughout this time period, IDOT had both its own Civil Rights Office, responsible for receiving and investigating complaints of harassment, discrimination and retaliation, and continued its ongoing training of the workforce on anti-discrimination policies. Additionally, IDOT required all Yard Technicians, Operations Engineers, LLW, LW and all other union members to attend additional meetings, in which the *Massie* decree, its' implications, and the Department's policies toward harassment, discrimination and retaliation were discussed. (D. 56.1 at 22)

Although no discipline was issued as a result of the complaints of Plaintiffs, the fact that Plaintiffs disagree with the resolution of their complaints of harassment is not sufficient to demonstrate that IDOT was in any way negligent. The standard is whether IDOT responded with "appropriate remedial action reasonably likely under the circumstances to prevent the conduct from recurring." *Tuttman v. WBBM-TV, Inc.* 209 F.3d 1044, 1049 (7th Cir. 2000). As IDOT's investigation found the claims of Plaintiffs' to be unsubstantiated, the remedial measures taken were more than reasonable, and summary judgment is proper in favor of IDOT.

B. SECTION 1981 CLAIMS AGAINST KOS, CHLEBICKI AND MAHONEY

Count I alleges a Section 1981 claim against Defendants Kos, Chlebicki and Mahoney in their individual capacities for discriminating against, harassing and retaliating against the Plaintiffs.

Presently, this District is divided on whether there is an independent cause of action under Section 1981 against state actors. In *Jett v. Dallas Independent School Dist.,* 491 U.S. 701, 735, 109 S.Ct. 2701, 105 L.Ed.2d 598 (1989), the Supreme Court held that a plaintiff may not proceed directly against a state actor under § 1981 for violations of that section but instead must bring such actions under § 1983. It is an unsettled question in this District whether *Jett* is still controlling. *See Tabor v. City of Chicago,* 10 F.Supp.2d 988, 991 (N.D.Ill.1998) (Gettleman, J.); *Nolen v. City of Chicago,* No. 97 C 6608, 1998 WL 111675, at *3-6 (N.D.Ill. March 4.1998) (Plunkett, J.) (declining to recognize a direct cause of action) contrast with *Yohannan v. Patla,* 971 F.Supp. 323, 327 (N.D.Ill.1997) (Aspen, C.J.); *Jackson v. City of Chicago,* No. 96 C 3636, 1996 WL 734701, at *8 (N.D.Ill.Dec. 18, 1996) (Castillo, J.); *Jefferson v. City of Chicago,* No. 97 C 4895, 1999 WL 116223, at *3 (N.D.Ill.Fe.26, 1999) (Williams, J.) (recognizing a direct cause of action).

In the event this Court allows Plaintiffs to proceed under Section 1981, Defend-

ants Kos, Chlebicki and Mahoney are still entitled to summary judgment. Claims for discrimination, retaliation and harassment brought under Section 1981 are analyzed under the same standards as Title VII claims. *Alexander v. Wisconsin Dept. of Health and Family* Services, 263 F.3d 673, 681-82 (7th Cir. 2001). However, Section 1981 claims against individuals also require proof of intentional discrimination. *Sanghvi v. St. Catherine's* Hospital, 258 F.3d 570, 578 (7th Cir. 2001). As the above sections analyzing Plaintiffs' Title VII discrimination and retaliation claims demonstrate, Plaintiffs cannot meet their burden under Title VII. Therefore, the Section 1981 claims must also fail. Furthermore, Plaintiffs have failed to demonstrate that any of the individual Defendants intentionally discriminated, harassed or retaliated against either Plaintiff on the basis of their race or protected activity under the *Massie* decree. Therefore, Defendants Kos, Chlebicki and Mahoney are entitled to summary judgment in their favor on Count I.

C. SECTION 1983 CLAIMS AGAINST KOS, CHLEBICKI AND MAHONEY

In Count II of the Complaint, Plaintiffs bring a claim against Defendants Kos, Chlebicki and Mahoney for violation of Section 1983.[FN4] As with the Section 1981 claim, a claim of intentional discrimination under the Equal Protection clause requires the same method of proof as a Title VII claim, "with the added burden that the intentional discrimination must have been the 'but for' cause of the adverse employment action." *McLaughlin v. Chicago Transit Authority,* 263 F.Supp.2d 1130, 1138 (N.D.Ill. 2003).

> FN4. Plaintiffs do not identify the Constitutional right alleged to have been violated in their Section 1983 claim, however Defendants assume that it is a violation of their Equal Protection Rights which is asserted, and proceed accordingly.

Adopting by reference the previous section analyzing Plaintiffs' Title VII discrimination[FN5] claim, Plaintiffs' Section 1983 claims fail as McGee has not demonstrated that he was performing to his employer's legitimate expectations, neither Plaintiff has suffered any adverse employment action, and as IDOT and the individual Defendants have legitimate non-discriminatory reasons for all of the conduct complained of by Plaintiffs.

> FN5. Plaintiffs may not proceed with a retaliation claim grounded in § 1983 as the retaliation claim may only be brought under Title VII. *Gray v. Lacke,* 885 F.2d 399 (7th Cir. 1989)

Therefore, Defendants Kos, Chlebicki and Mahoney are entitled to summary judgment on Count II.

Furthermore, Defendant Kos lacks the requisite personal involvement required for liability under §1983. In claims under §1983, a supervisor can be held liable only if he actively condones or facilitates a constitutional violation. *Gossmeyer v. McDonald,* 128 F.3d 481, 495 (7th Cir. 1997). There is no vicarious liability or

respondeat superior available in §1983 cases. *Id.*

In the present case, Defendant Kos did not have any direct contact with Plaintiffs, nor is he alleged to have personal involvement in the day-to-day operations of either the Kennedy or Stevenson maintenance yards (D. 56.1 at 29-31). Furthermore, Kos was not directly involved in the investigation of Plaintiffs' complaints under the *Massie* decree (D. 56.1 at 33), nor was he a member of the IDOT Civil Rights Committee (D. 56.1 at 34). Defendant Kos was entitled to rely on other divisions of IDOT to carry out these tasks. *Pacelli v. DeVito,* 972 F.2d 871, 878 (7th Cir. 1992)(head of large bureaucracy not required to know details of every case.). Furthermore, Kos attended the meetings in June and August, 2001, which reinforced IDOT's non-discrimination and non-retaliation policies in connection with the complaints under the *Massie* decree. Therefore, Plaintiffs cannot demonstrate that Kos acted with deliberate indifference to the Plaintiffs' claims, and he cannot be held liable under §1983. Summary judgment is therefore warranted in his favor on Count II.

D. DEFENDANTS KOS, CHLEBICKI AND MAHONEY ARE ENTITLED TO QUALIFIED IMMUNITY

Government officials are shielded from liability for civil damages so long as their conduct does not violate clearly established constitutional rights of which a reasonable person would have been aware. *McDonnell v. Cournia,* 990 F.2d 963, 968 (7th Cir. 1993), quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396, S.Ct., L.Ed.)(1982). Determining whether an official's conduct violates clearly established constitutional rights involves a two-step inquiry. *Id.* at 968. “First, the plaintiff must show that the law was clearly established when the challenged conduct occurred. In this Circuit, we ask ‘whether the law was clear in relation to the specific facts confronting the public official when he or she acted.’ ” *Id.* quoting *Apostol v. Landau,* 957 F.2d 339, 341 (7th Cir. 1992). In other words, the unlawfulness of the action must be apparent in light of pre-existing law. *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). “Second, we evaluate the objective legal reasonableness of the defendants' conduct. We inquire whether reasonably competent officials would agree on the application of the clearly established right to a given set of facts.' ” *Cournia,* 990 F.2d at 968, quoting *Apostol,* 957 F.2d at 341. Qualified immunity allows governmental officials to make mistakes in judgment. *See Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). As the Supreme Court stated in *Anderson,* “qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.” 483 U.S. at 638.

There is no case law which would indicate that any of the conduct alleged against Defendants Kos, Chlebicki or Mahoney violated the constitutional rights of Plaintiffs. While discrimination, harassment and retaliation are admittedly seen as violation of constitutional rights, as illustrated in the previous sections, the conduct complained of in this case does not rise to that which constitutes impermissible conduct. Likewise, it cannot be said that the conduct of Defendants

Kos, Chlebicki or Mahoney was not objectively reasonable. Therefore, Defendants Kos, Chlebicki and Mahoney are entitled to qualified immunity in this case and summary judgment is warranted in their favor.

V. CONCLUSION

WHEREFORE, Defendants IDOT, John Kos, Dennis Mahoney and Kenneth Chlebicki respectfully request this Honorable Court grant summary judgment in their favor on all counts.

Appendix not available.

John McGEE and Thomas Malone, Plaintiffs, v. ILLINOIS DEPARTMENT OF TRANSPORTATION, John Kos, Dennis Mahoney and Kenneth Chlebicki, Defendants.
2003 WL 23683994 (N.D.Ill.)

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