No. 25-1952

IN THE
United States Court of Appeals for the Third Circuit

ZACK DE PIERO,

Plaintiff-Appellant,

v.

PENNSYLVANIA STATE UNIVERSITY; AND MARGO DELLICARPINI; DAMIAN FERNANDEZ; LILIANA NAYDAN; CARMEN BORGES; ALINA WONG; LISA MARRANZINI; FRIEDERIKE BAER; AND ANEESAH SMITH, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, NO. 2:23-cv-02281-WB

BRIEF FOR PLAINTIFF-APPELLANT ZACK DE PIERO AND VOLUME 1 OF APPENDIX (App. 00001—App. 00082)

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Corporate Disclosure Statement

The undersigned attorneys for Plaintiff-Appellant, Zack De Piero, certify that Professor De Piero is an individual. He is not a member of any publicly traded company or its parent corporation.

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Statement of Related Cases

The following case is related under Third Circuit Rule 28.1(a)(2):

- *Zack K. De Piero, v. Pennsylvania State University, et al.*, 2:23-cv-02281, docketed June 14, 2023.

This case has not been before this Court prior to this appearance. Counsel is not aware of any other cases or proceedings that would be deemed related to this appeal.

Statement Regarding Oral Argument

Oral argument would materially benefit the Court. The issues presented are nuanced, and the Court may wish to press the parties on the numerous arguments made in the briefing. While the Court is in the best position to know, undersigned counsel believes that 15 minutes per side would be adequate to provide the Court with sufficient time to question the advocates.

I. Introduction

Appellant Zack De Piero had a promising future at Penn State, before he and his colleagues were charged with learning, internalizing, and operationalizing virulent anti-white rhetoric that fundamentally altered the workplace—indeed, that was its point. When De Piero raised legitimate objections both on campus and in the press, he was targeted with multiple harassment complaints, and pushed out of Penn State altogether. The District Court held that De Piero stated a claim for relief related to discrimination, but dismissed claims related to his speech questioning the materials themselves. It subsequently granted summary judgment on his discrimination and retaliation claims before they could ever reach the jury. These were errors, and this Court should reverse.

In *Aman v. Cort Furniture Rental Corp.*, this Court held that employers create a hostile work environment when they "convey[] the message that members of a particular race are disfavored and that members of that race are, therefore, not full and equal members of the workplace." 85 F.3d 1074, 1083 (3d Cir. 1996). In some instances, the message is "masked in subtle forms," *id.* at 1082, and may only be

appreciated "as part of a complex tapestry of discrimination," *id.* at 1083. Not so here.

Instead, there can be no mistaking the message sent by Penn State to white employees like Zack De Piero. De Piero, a writing professor, was told in his official training sessions that "white teachers are a problem." He was informed that, no matter his intentions, efforts, or desires, the unavoidable fact that he inhabits a "white body" meant he would forever be an inadequate educator. When De Piero objected, his supervisor determined that he violated workplace rules because he filed his complaint "as a white man." And Penn State announced over and over again that it sought to re-adjust the racial balance among its staff, essentially declaring that there were *too many of De Piero's kind*, and that a different racial mix—one limiting employment for people like him—was a primary goal of the institution. When he complained about this misconduct, he suffered retaliatory discipline himself.

These facts are not mere inferences available to a reasonable juror given the available evidence. They are essentially undisputed. Standing alone, they are far more than enough to get past summary judgment on a hostile work environment theory.

In granting summary judgment to Appellees on De Piero's hostile work environment claims, however, the District Court all but ignored these facts, choosing instead to isolate particular incidents where various co-workers and supervisors made statements denigrating white people. Having improperly framed these datapoints as De Piero's core allegations, the District Court determined that none of them rose to the level of severe and pervasive discrimination. Along the way, the District Court impermissibly resolved disputed questions of fact and made credibility determinations.

The District Court also erred by granting summary judgment against De Piero's statutory retaliation claim under Title VII and Pennsylvania law. It applied the wrong legal standard, and ignored key facts establishing that the discipline meted out against De Piero was sufficiently adverse to support his claim.

Separately, the District Court erred long before it entered summary judgment by dismissing De Piero's First Amendment retaliation claim at the pleading stage on the aggressive basis that topics like racial preferences in educational policy and employment, the existence (or not) of present-day "systemic racism," and whether or not white students' and

professors' accomplishments are attributable solely to ongoing "white privilege," *did not address matters of public concern*. App. 0026–0027 ("De Piero's concerns track the more personal complaints that the Third Circuit in *De Ritis* held merely brushed against a matter of public concern and thus constitute merely a personal grievance.") (cleaned up). Contrary to the District Court's view, there are very few topics of greater public concern than the ones forming the basis of De Piero's First Amendment claim.

II. Jurisdictional Statements

A. The District Court possessed subject matter jurisdiction.

The District Court possessed jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 2000e-5(f)(3) and over his state law claims, pursuant to 28 U.S.C. § 1367(a).

Plaintiff appeals the District Court's Rule 12(b)(6) dismissal of his 42 USC § 1983 claim alleging unlawful retaliation under the First Amendment. Separately, De Piero appeals the following claims, for which the District Court initially denied a 12(b)(6) motion, but subsequently entered summary judgment: (1) violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1); (2) violation of Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e-3(a); (3) violation of 42 U.S.C. § 1981 alleging hostile work environment; and (4) violation of Pennsylvania Human Relations Act, 43 P.S. § 951 alleging retaliation and hostile work environment.

B. This Court possesses appellate jurisdiction.

Under 28 U.S.C. § 1291, this Court has jurisdiction over all final decisions from the U.S. District Court for the Eastern District of Pennsylvania.

C. Appellant timely appealed.

The District Court dismissed Appellant's complaint on April 16, 2025. The deadline to timely appeal was 30 days from that date. *See* Fed. R. App. P. 4(a)(1)(A). Appellant timely filed his Notice of Appeal on May 15, 2025.

D. The District Court disposed of the entire case.

The District Court granted Appellees' Motion to Dismiss with respect to his First Amendment claim on January 10, 2024, and entered judgment with prejudice. It then granted Appellees' motion for summary judgment on March 6, 2025. After *sua sponte* ordering supplemental briefing on Appellant's remaining clams, the District Court entered judgment on April 16, 2025.

III. Statement of the Issues Presented for Review

1. Did the District Court err in dismissing De Piero's First Amendment retaliation claims at the pleading stage?
2. Did the District Court err in granting summary judgment against De Piero's state and federal hostile work environment claims?
3. Did the District Court err in granting summary judgment against De Piero's state and federal statutory retaliation claims?

IV. Statement of the Case

A. Factual Summary

1. De Piero joined Penn State as a writing professor.

Before obtaining his Ph.D., Plaintiff Zack De Piero worked extensively with underserved students as a public-school teacher, and then became a highly effective and sought after instructor at the university level. App. 0534:18–0535:18, 0560:11-0562:9, 4084-4087. De Piero believes that the best way to prepare students for the real world is to help them master standard English writing, and he knows that students from underprivileged backgrounds stand to gain the most by learning these skills.

De Piero is white.

In 2018, Appellee Liliana Naydan recruited him to join the writing program at Pennsylvania State University Abington ("Penn State" or "PSUA"). App. 4086. At all times during De Piero's tenure at PSUA, Naydan was his "direct supervisor," and the head of the English Department and its writing program. App. 3064 (official university report referring to Naydan as De Piero's "co-supervisor"); App. 1512:19–22.

De Piero is always interested in more effectively reaching his students and overcoming barriers to their learning, whatever the source. He recognizes that some of his students come from backgrounds different from his own, and he strives to be sensitive to those differences, as any good teacher would be. He does not believe, however, that there is anything intrinsic about him—especially not his race—that renders him incapable of teaching. PSUA disagrees, and instructs that, due to the color of his skin, De Piero's performance will always be deficient when teaching non-white students.

2. PSUA embraced aggressive DEI / "anti-racist" activism in the classroom and in its employment practices.

Like many institutions in recent years, PSUA has increasingly

committed itself to an ideology known as "diversity, equity, and inclusion" ("DEI") or "anti-racism." *See generally* App. 3186-3199 (DEI Committee report); App. 3473-3482 ("anti-racism" resolution incorporating aggressive DEI campus wide). DEI practitioners generally denigrate white people, and locate the source of societal problems almost exclusively in free-floating concepts of "whiteness" or "systemic racism." In this way, DEI practitioners often conceal their discriminatory practices by marketing them as inclusionary; in reality, they are anything but. *Cf.* Executive Order 14151, *Ending Radical And Wasteful Government DEI Programs And Preferencing* (Jan. 20, 2025) (noting that DEI is used as a disguise for "illegal and immoral discriminatory programs")[1]; Equal Employment Opportunity Commission, *What to Do if You Experience Discrimination Related to DEI at Work*.[2]

Through a combination of slapdash, but consistent, discriminatory efforts, PSUA followed this pattern to a T, and created a hostile work environment for white faculty under the guise of "anti-racism."

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[1] https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing/

[2] https://www.eeoc.gov/sites/default/files/2025-03/One_Pagers_2025-2_%28002%29_508.pdf (last visited, August 11, 2025).

First, PSUA began officially instructing its faculty on "anti-racism" in the summer of 2020. For instance, it distributed an official SharePoint platform with numerous resources containing denigrating opinions and lessons about white people. Some sample materials follow:

- "So, I'm just going to put it right out here. As a result of being born and raised *as a white person in this culture, I have a racist worldview*. I have deep, racist biases." App. 4295 at 45:30–46:15 (DiAngelo video) (emphasis added).[3]
- "*[Y]ou cannot help but have* [*internalized superiority*] *if you are raised white in this culture.*" *Id.* at 49:20–49:35 (emphasis added).
- "Whites are unconsciously invested in racism." *Id.* at 1:19:30–1:20:00.

To signal their commitment to DEI, De Piero and other faculty were expected to embrace these resources. Many did, and it was thus common to hear anti-white bigotry expressed by faculty and administrators. *See, e.g.*, App. 3293–3295, 3229–3234, 3238–3240 (listserv discussion about a white police officer needing "anti-racism" instruction based on his race); App. 2704 (mass e-mail instructing white people to "[s]top talking and listen" and to "feel terrible" about race relations); App. 3233 ("The

[3] https://www.youtube.com/watch?v=45ey4jgoxeU.

oppressor [white people], by definition, cannot be the oppressed"); App. 4089 (Appellee Alina Wong, AVP for Educational Equity, challenging "especially…white and non-black people of color…to hold our breaths just a little bit longer" to atone for purported complicity in deaths of George Floyd and others); App. 3235, 4101–4106 (linking to an article that claimed "schools...were created to uphold white supremacy" and "whiteness is [coded] for privilege and power"). This included De Piero's own supervisor, Liliana Naydan. App. 3231, 3239 (restating the incorrect belief that "reverse-racism isn't racism").

PSUA also implemented racist teachings and practices (deceptively labeled "anti-racist") in curricular and employment practices. The faculty senate passed a resolution requiring that racial concepts be incorporated into all instruction, without exception. App. 3476 (demanding that all faculty "embed[] equity pedagogy into their teaching and curricula, *especially if racial justice is perceived as tangential* to their disciplines [e.g., mathematics and physical sciences]") (emphasis added); App. 4098 ("Racism is everywhere" including "Calculus"). PSUA extended race-based benefits to non-white students. App. 3475 (calling for "paid research opportunities for [only] [b]lack students").

As for employment, PSUA's discrimination extended to hiring, compensation, and other tangible terms and conditions of employment. *See* App. 1164:3–1165:19 (Carmen Borges, the university's affirmative action chair, testifying that it was PSUA's priority to increase the percentage of "Black, Hispanic, Asian and Native American" staff.); App. 1181:7–20 (Borges testifying that PSUA was trying to "balance out" the racial composition of its staff); App. 3477 (Faculty Senate resolution seeking to further ratchet up race-based hiring by "substantially increas[ing] the number of [b]lack faculty"); *id.* (university to "reward [black] faculty members [for their alleged invisible labor of being black]"); *id*. ("enhanced mentoring and support programming to include sponsorship and advocacy for [b]lack faculty [but no other category of faculty]"); App. 3189 (seeking explicit hiring quotas by race, including a "baseline for full-time hiring goals based on…race and ethnicity."). And the campus was so gripped by DEI that it was common for academic and administrative bodies to issue statements expressing regret over the fact that so many employees were white. *See, e.g.*, App. 3188 ("Abington still has a majority white staff (59%) and faculty (64%)"); *id.* (calling for more race-based hiring and a reduction in the white faculty ranks).

3. DEI activism in the writing program was particularly caustic.

2020 was a banner year for PSUA's adoption of overtly racist policies, particularly in the writing program. That approach imported racialized assumptions about students' learning capacities, and the fitness of white teachers to educate non-white students. The unmistakable messages of these approaches were: (1) that white professors could never fully serve their students, no matter how hard they tried and no matter their best intentions, because they inhabited "white bodies;" (2) that white professors' successes are never earned through merit, but rather conferred to them due to their race; and (3) that white professors should feel shame about their race, and were less desirable than their non-white counterparts.

a) De Piero was instructed that "white teachers are a problem" and that his "white body" prevented effective teaching.

In the writing program, PSUA policies were disseminated to De Piero and other professors though a series of professional development meetings occurring at regular intervals throughout the academic year. App. 2768, 4161, 2855. Naydan spearheaded these meetings. App. 3803–3804 (Naydan agreeing to "official[ly]" transform writing program

meetings to incorporate "anti-racist" pedagogies); App. 1539:2–6. She determined an annual program agenda, compiled required readings and other materials, and generally supervised the series, as she did for all activities within the writing program. App. 1870–1871:9–4; App. 1537:17–20.

There were six total meetings in the 2020-2021 academic year, all of which focused on issues of race, with a strong focus on the problems of "whiteness" and the intrinsic racism of whites. App. 2768. For example, in preparation for the November 2020 meeting, De Piero and other faculty were assigned to watch a video entitled "White Teachers Are a Problem." App. 3524. The video was an interview with Asao Inoue, a professor of rhetoric and composition, and a prominent promoter of DEI and "anti-racism." App. 2828–2829.

As De Piero soon learned, the title "White Teachers Are a Problem" was not intended to be hyperbolic. Inoue advised white teachers that even if they adopted "anti-racist" pedagogy, they would still "perpetuate White language supremacy in [their] classrooms because [they] are White and stand in front of students." App. 3410; *see also* App. 4180 (Inoue explaining that because a teacher had a "white body" her "attempt to be

antiracist in her classroom in practice ended up being racist"); App. 4104 (opinion of a different "anti-racist" scholar that "messages are heard differently from white bodies than racialized bodies."). During the video, the interviewer even asked Inoue what white educators could do to negate their "white" privilege and supremacy. Inoue's answer was...nothing:

> Interviewer: I'm gonna quote several sentences [from your writings]. "This year, *you perpetuate white language supremacy in your classrooms because you are white and stand in front of your students*, as many white teachers have before you, judging, assessing, grading, professing on the same kinds of language standards, standards that come from your group of people....*Your body perpetuates racism*." One is white actions, specifically the action of judging by white standards, and then the other is *white bodies simply being in the room as a white person*….I'm wondering, kind of where does that leave us?
>
> Inoue: So, I think this came…as part of me needing to tell my white colleagues…that *it sucks and hurts and is hard to be the problem*.
>
> * * *
>
> Interviewer: But your point is precisely, "No." You're not going to solve it.
>
> Inoue: Right.

App. 2834 (emphases added).

Naydan used writing program meetings to drill these concepts of "anti-racism," explaining that she adopted these practices and encouraged others to follow suit. *See, e.g.*, App. 2766 (Naydan notifying writing program faculty that Inoue would be a "common theme" for writing program meetings during the 2020-21 academic year); App. 1641–1644, 1667:18–21, 1670–1671:19–9 (Naydan Dep.) (discussing incorporation and circulation of Inoue's material); App. 4150 (writing program e-mails circulating Inoue's material to faculty). Naydan even facilitated Inoue attending and leading a writing program training session personally, over Zoom, where Inoue—no surprise—taught about the evils of whites, white bodies, and white teaching methods. App. 3022 ("We invited Dr. Inoue because he is one of the most prominent scholars in the field."); App. 2955–2956 (e-mail advertising Inoue event). Lest there be any doubt, dissemination of these coercive views was not the result of a lone administrator going rogue. All of this was done pursuant to "the Campus Strategic Plan." App. 3054.

As such, it was common for members of the writing program to parrot Inoue's views. *See, e.g.*, App. 4386 ¶ 8 ("Thomas Heise put in a

faculty chat, 'all grading and assessment...are racist and white supremacist.'").

b) De Piero was instructed that white people cannot take credit for their successes and are inherently racists.

The writing program meetings also informed Appellant that white writing teachers can never take credit for their accomplishments, because they are always the result of unearned racial "privilege." *See e.g.*, App. 4341 (white accomplishments "are 'premised on the mistaken notion of individual meritocracy and deservingness (hard work, family values, etc.) rather than [white] favoritism'"); App. 3413 ("White" teachers are by necessity "steeped" in a "White racial *habitus"* which "is the source of [their] privileges [and] likely part of the reason [they] are in front of the class in the first place."); App. 2992 (instructing "white" professors to "deconstruct" their own "white privilege" before leading classroom discussions and "identify how whiteness operates in their own lives."); App. 3408 ("Many [whites] even think they earned the [privileges] they take. It is their wages,...it is the 'wages of whiteness.'"); App. 3409–3410 ("White folks in this room…You thinking you're special is the problem. It always has been, because you, and White people just like you who came

before you, have had most of the power."); App. 3408 ("White colleagues...have...been paid off too many times to even recognize the bribes.").

Under these teachings, "white" students, too, were discredited, their achievements simply due to their race. As Inoue explained, "[white] students' good grades seem to be due simply to hard work and merit, but this is only so because their white racial habitus and the habitus that informs the standard for good writing agree with one another." App. 4341. Consistent with these views, Naydan encouraged the adoption of race-based grading practices. App. 0748:12–17 (De Piero Dep.) (Naydan considered "grading as an antiracist act," which meant undoing white privilege by "applying [differential] grading [to] students" based on race); *see also* App. 2522 (Naydan telling De Piero that "racism is in the results if the results draw a color line").

c) De Piero was instructed to feel shameful about his race and told that white professors were less desirable than their non-white counterparts.

Although the official position of the writing program was that it was impossible to "solve" the problem of white-bodied teachers, *supra* § IV(A)(3)(a), white professors were nevertheless instructed to constantly

dwell on their racial status. *See, e.g.*, App. 2991 (anti-racist teaching "should…focus on the benefactors of racism[,] *whites,*" and take action to strip whites of their unearned privilege) (emphasis added). This included demands to engage in racial self-shaming in the classroom. App. 2990 ("In bringing in multicultural texts and not examining their own racial place, the white compositionist is telling students of color, 'although I profit every day from white privilege, I am still sensitive to their place within the racial discourse.' *This is disingenuous and hypocritical*.") (emphasis added). And participants' white racial shame was evident from many of the examples provided of this racist pedagogy in action. App. 2994. ("[I]t became painfully obvious that I was contributing to the production of whiteness in my classroom...While I am fully aware that I cannot forego the benefits of whiteness or cease my own contribution to the meaning of whiteness, I nonetheless disappointed myself.").

Given the alleged futility of white teachers to overcome their inadequacies, it is hard to glean any academic benefit from this training, as opposed to serving merely as an admonishment that white employees were disfavored. Shockingly, that appears to have been the main goal.

App. 4339 (admitting that causing white teachers to feel "uncomfortable" was the point because it forced them to "confront their whiteness.").

4. Naydan filed her first complaint against De Piero when he publicly challenged PSUA's racist teachings.

Faced with this toxic environment, De Piero struggled. He felt "humiliated" and "awful" about his race "every single day," App. 2982 at 9:15–9:35, 17:30–18:00, and that his job as a non-tenured professor at Penn State was increasingly threatened because of his race. He began to speak up.

He first tried questioning fellow professors, including his supervisor Naydan, when they posted what De Piero perceived to be unsubstantiated claims about racism or sexism, by asking for more critical evaluations from the speakers. App. 2910. De Piero also challenged the racist material being taught at writing program meetings.

See id.[4] When questioning this material, Appellant was always respectful. *See* App. 2920:20–:20.

Even respectful disagreement was too much for Naydan, who was troubled by De Piero's criticism of "anti-racism" and "whiteness" theories. So, in March 2021, Naydan filed her first "bias report" against De Piero with Penn State's Affirmative Action Office, charging him with numerous "microaggressions." App. 2908. For example, Naydan reported De Piero for merely seeking empirical support about a claim that non-whites were being discriminated against in student teaching evaluations; this, she said, was "questioning the experiences of women and people of color." App. 2910. She also reported De Piero for critiquing certain academic papers because the target was a "very famous scholar of color." *Id.* And

[4] Despite his objections, De Piero continued to attend program meetings. He did so because he understood that it was important for his annual performance evaluation that he attend (which it was). See App. 0567–0568 (De Piero Dep.). However, the District Court improperly determined that De Piero "[sought] out opportunities to rustle up disharmony amongst his colleagues," by attending meetings that the District Court incorrectly characterized as "voluntary." App. 0067. In making these findings of fact, the District Court improperly weighed evidence and made credibility determinations concerning De Piero's purported intent to agitate his colleagues—a proposition he vehemently denies. Standing alone, the District Court's determinations on these points was reversible error.

she reported De Piero for merely "question[ing]" the value of "antiracism" as a framework for educating students. *Id.*

5. De Piero filed a bias complaint against Naydan, but university officials dismissed his concerns.

On September 13, 2021, De Piero filed his own Bias Report with Penn State's Affirmative Action Office, alleging discrimination and harassment on the basis of race. App. 2972–2974.[5] On September 22, 2021, Appellee Borges met with De Piero, but she brushed off his concerns and instructed him to continue engaging with the racist material being peddled in his department. In her words, De Piero needed to "get beyond" these "shocking titles" and ask, "what is this all about?" App. 2982 at 17:20–17:40, 24:45–25:00.

When De Piero highlighted the harassment inherent in being trained that "white teachers are a problem," Borges stated, "It's about the white race. Yes. It's about the white race, but it's not about you." App. 2982 at 30:54–31:03. Of course, it was about him, because De Piero is a

[5] De Piero's complaint was not a reaction to Naydan's complaint against him. Naydan's original complaint was kept secret from De Piero until October 27, 2022, App. 2982 at 36:10–37:06, and De Piero did not know that it existed at the time he filed his complaint.

white teacher and has a "white body." Nevertheless, Borges did nothing to address the problems highlighted in De Piero's complaint.

6. De Piero published an opinion piece challenging PSUA's racist practices

On October 4, 2021, De Piero published an opinion piece in several Pennsylvania media outlets expressing concerns about how overt race discrimination was being peddled at Penn State. App. 0162 ¶ 90. He opined that race-based curricula would exacerbate student achievement gaps by lowering standards. *Id*. Management-level staff at PSUA, including individuals involved in subsequent disciplinary action against De Piero, were aware of this public challenge to university practices. App. ¶ 91–93; App. 3311–3315, 3534–3537, 3545–3546, 4564–4565.[6]

[6] De Piero's OpEd formed part of the basis for his First Amendment retaliation claim. That claim was dismissed at the pleading stage pursuant to Fed. R. Civ. P. 12(b)(6), a decision that is challenged in this appeal. Because the claim was dismissed, discovery did not fully encompass issues related to the OpEd. This Court should reverse the dismissal of the First Amendment claim and remand with instructions to allow discovery on the claim.

7. Naydan filed a second complaint against De Piero, and De Piero was subjected to baseless formal discipline.

In the meantime, as he was required to do, De Piero continued to attend racially hostile training sessions. One of those trainings focused on a reading entitled, "The Myth of the Colorblind Writing Classroom: White Instructors Confront White Privilege in Their Classrooms." As he had before, De Piero questioned and sought to elicit real discussion on the ideologies being advanced during the training. He did so respectfully.

In response to material that charged white instructors with "reproducing racist discourses and practices in their classroom," De Piero asked for examples of ways he could avoid that outcome. App. 3002 at 18:20–19:07; *see also* App. 3278. None of the other participants gave a concrete answer, likely because they had been trained that it was *impossible* for a white-bodied professor to escape his status as an oppressor. App. 3002 at 19:07–1:00:15.

De Piero raised other questions and concerns. Responding to the subtitle of the reading "White Instructors Confront White Privilege in Their Classrooms," De Piero asked the group "why not read a piece to the tune of 'instructors confront their identity in the classroom?' If it is a good

idea for all instructors to examine their own background and consider how that might play out in educational dynamics, why is the focus just on white teachers?" App. 3002 at 41:15–41:56. De Piero also stated that the training was reminiscent of the "White Teachers Are a Problem" instruction, and voiced that PSUA might be violating federal anti-discrimination laws. App. 3002 at 45:16–50:19.

Rather than addressing De Piero's concerns, Naydan and the meeting co-organizer Grace Lee-Amuzie filed bias complaints against De Piero. Naydan alleged that De Piero committed an "egregious act of bullying," App. 3019, and Lee-Amuzie stated that he "verbally attacked us suggesting that we are racists and [that] what we are doing is 'illegal,'" App. 3027. They complained that De Piero was "aggressive, threatening [and] hostile," App. 3027, and "dominating the discussion[,] sp[eaking] more than anyone else." App. 3020.

Unbeknownst to them, an audio recording of the meeting had been created. The recording showed exactly the opposite. *See generally* App. 3002 (meeting recording); *see also* App. 1510:21–24, 1512:4–12, 1519:16–22, 1531–1532:12–10, 1532:21–24 (Naydan testifying that De Piero was engaged with the reading and *not* hostile when shown the recording of

the October meeting); App. 1360:4–10, 1363:12–18, 1367:6–10, 1368–1369:17–15, 1370:1–11, 1371:5–10, 1373:15–23 (Borges testifying the same); App. 1080:9–14, App. 1084:2–20, App. 1087:10–23, App. 1090:4–12, App. 1093:11–15, App. 1094:7–16, App. 1096:2–7 (Rigilano testifying the same); App. 4361–4362 (analysis showing that only one person spoke *less* than De Piero.).

In her deposition, Naydan repeatedly conceded that it was De Piero's questioning of the training's legality—not his demeanor—that created the "hostility." App. 1530:2–8, 1532:21–24, 1556:5–20. Of course, De Piero's questioning of the writing program's "whiteness" training is protected under federal law, and cannot be the basis for employer discipline.

Aside from her false accusations of misconduct during the meeting, Naydan also re-raised "ongoing transgressions" against De Piero that were initially alleged in her March 2021 bias report. App. 3021–3025. Among De Piero's purported misconduct was *his* September 2021 complaint against Naydan. Naydan accused De Piero of filing his complaint against her "*as a white man*, which [she] view[ed] as a form of harassment." App. 3022 (emphasis added). Additionally, Naydan listed

various incidents where De Piero questioned her "anti-racist" teachings. App. 3020–3022.

Naydan's report was immediately investigated by Carmen Borges. Borges determined that De Piero engaged in "unprofessional" conduct, "contrary to the University Values Statement." App. 3060–3061; *see also* App. 3063. When she was later confronted with a recording of the meeting, Borges failed to identify any point where De Piero did, in fact, act in a hostile or unprofessional manner. App. 1360:4–10, 1363:12–18, 1367:6–10, 1368–1369:17–15, 1370:1–11, 1371:5–10, 1373:15–23.

Nevertheless, based on Naydan's false charges and Borges's unsupported findings against him, De Piero was subjected to formal discipline, including the entry of a performance improvement plan letter in his personnel file. App. 3545–3546. That performance improvement plan constituted an official sanction under University human resources policies, App. 3224–3225, and De Piero's annual performance review was lowered as a result, *compare* App. 2512 (May 20, 2022 Faculty Annual Review rating of "fair to good" in the Service category) *with* App. 3313–3315 (De Piero's Faculty Annual Reviews for 2019 through 2021, rating him "very good").

De Piero signed the disciplinary letter under protest that the process was retaliatory. App. 3546. The letter specifically advised De Piero that his conduct during the October 18, 2021 meeting was unacceptable, and would subject him to further discipline if repeated. *Id*. But since (as meeting participants admitted during their depositions) De Piero's conduct consisted entirely in raising questions and concerns over PSUA's discriminatory policies, the disciplinary letter was functionally an order to tolerate direct efforts to discriminate against him, and to stop questioning PSUA's "anti-racist" activities.

On top of the fact that De Piero's career prospects were suddenly hanging by a thread, he was then subjected to yet *another* false complaint of misconduct by Naydan. App. 3839. Facing the prospect of additional unwarranted discipline, and against a backdrop of years of relentless race-based attacks, this time, De Piero was driven to resign from PSUA. App. 3092–3093. On his way out the door, PSUA took one final swipe. Despite the fact that De Piero completed his contractual obligations, Penn State forced De Piero to reimburse $3,386.47 of his salary that he had earned over the summer. App. 4366.

B. Procedural History

On June 15, 2023, De Piero filed a complaint in the District Court for the Eastern District of Pennsylvania, alleging, *inter alia*, hostile work environment discrimination under Title VII, Section 1981, and the Pennsylvania Human Relations Act ("PHRA"), and retaliation under Title VII, the PHRA, and the First Amendment, alongside other related claims.

The District Court ultimately dismissed De Piero's claims in three separate orders. On January 10, 2024, the District Court dismissed his First Amendment Retaliation claim with prejudice under Fed. R. Civ. P. 12(b)(6). On March 6, 2025, the court granted Appellees' motion for summary judgment, dismissing De Piero's hostile work environment claims under Title VII, Section 1981, and the PHRA. Subsequently, the court *sua sponte* sought briefing on the remaining statutory retaliation claims under Title VII and the PHRA. After supplemental briefing, on April 16, 2025, the District Court granted summary judgment dismissing the balance of De Piero's claims.

V. Argument

A party is entitled to summary judgment only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as

a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Inferences about the underlying facts in the record must be viewed "in the light most favorable to the party opposing the motion." *Peters Twp. Sch. Dist. v. Hartford Acc. & Indem. Co.*, 833 F.2d 32, 34 (3d Cir. 1987). A genuine issue of material fact "is present when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the non-moving party in light of his burden of proof." *Doe v. Abington Friends Sch.*, 480 F.3d 252, 256 (3d Cir. 2007) (citation omitted).

A. De Piero's hostile work environment claims should have gone to trial.

Title VII makes it an "unlawful employment practice for an employer…to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Title VII does not distinguish between Caucasian and non-Caucasian employees. *See Ames v. Ohio Dep't of Youth Servs.*, 605 U.S. 303, 310 (2025); *Ricci v. DeStefano*, 557 U.S. 557, 579–80 (2009).

In addition to protecting against discrimination in "economic" or "tangible" employment decisions such as hiring, discharge, and

compensation, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), Title VII forbids discrimination as to the "intangible fringe benefits" of employment, which include the "emotional and psychological stability of…workers." *Rodgers v. E.E.O.C.*, 454 F.2d 234, 237–39 (5th Cir. 1971); *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 65–69 (1986) (following *Rodgers* in the context of a sex-based discrimination claim); *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) (*Rodgers/Meritor* apply in racial context); *Ellison v. Brady*, 924 F.2d 872, 876 (9th Cir. 1991); *Hatch v. Franklin Cnty.*, 755 F. App'x 194, 202 (3d Cir. 2018).

Accordingly, an employer violates Title VII if it subjects certain employees to abusive working conditions because of their race, just as an employer violates the law if it provides inferior compensation or other "tangible" items to employees because of their race. *See, e.g.*, *Rodgers*, 454 F.2d at 238; *see also Ellison*, 924 F.2d at 876.

One type of intangible Title VII claim alleges a hostile work environment. To succeed, a plaintiff must show that: (1) he suffered intentional discrimination because of his protected status; (2) "the discrimination was severe or pervasive;" (3) it "detrimentally affected" him; and (4) it "would detrimentally affect a reasonable person in like

circumstances." *Castleberry v. STI Grp.*, 863 F.3d 259, 263 (3d Cir. 2017). The same framework governs claims brought the PHRA and Section 1981. *Jones v. Sch. Dist. of Phila.*, 198 F.3d 403, 410 (3d Cir. 1999); *Branch v. Temple Univ.*, 554 F. Supp.3d 642, 648 (E.D. Pa. 2021).

The sole issue on De Piero's work environment claims is whether PSUA's racially hostile conduct was sufficiently "severe or pervasive." App. 0055. The District Court held that there was insufficient evidence on this element to present to a jury. But that was error.

1. The discrimination against De Piero was severe and pervasive.

The "severe or pervasive" test isn't meant to block employees from lodging genuine complaints about racially-charged workplaces; instead, it merely "shield[s] employers from...the idiosyncratic concerns of...hyper-sensitive employee[s]." *Ellison*, 924 F.2d at 879; *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990) ("The objective standard protects the employer from the 'hypersensitive' employee, but still serves the goal of equal opportunity.").

When high-level supervisors insult or ridicule employees based on race, courts often find such remarks relevant to the inquiry. *See Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) ("[A]

supervisor's use of [racially offensive language] impacts the work environment far more severely than use by co-equals."); *Young v. Colo. Dep't of Corrections*, 94 F.4th 1242, 1252 (10th Cir. 2024) (whether harassing acts "constituted official acts of the company" is "relevant to the court's analysis" under Title VII); *Woods v. Cantrell*, 29 F.4th 284, 285 (5th Cir. 2022) (collecting cases finding "severity" due to a single utterance of the "n-word" by a supervisor). Intuitively, a manager or supervisor's offensive remarks affect the workplace more, because employees recognize that an insult or derogatory comment is one that they must live with—lest they risk their job. *Cf. Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 763 (1998) ("[A] supervisor's power and authority invests his or her harassing conduct with a particular threatening character.").

Here, a reasonable trier of fact would find that De Piero suffered "severe or pervasive" discrimination. He and other white faculty were subjected to a barrage of racially hostile admonitions, stated as undeniable facts, on an unrelenting basis. De Piero was meant to believe such insults about himself as a condition of his job, and his colleagues were taught that whites like De Piero "were a problem" and could never

be adequate teachers. Even if he tried his hardest to account for his skin color, he would fail, according to PSUA; De Piero's students would still suffer under his tutelage, due specifically to his race. *Cf. Howley v. Town of Stratford,* 217 F.3d 141 (2d Cir. 2000) (finding a hostile work environment based on sex where "[t]he [derogatory] comments were made in front of a large group in which [the plaintiff] was the only female…and some of the comments were connected to her ability to perform her job.").

The fact that PSUA's statements were offensive is obvious. But in this case, the hostile environment is exacerbated because the remarks were part of "training" in De Piero's writing department. *Young*, 94 F.4th at 1251 ("If not already at the destination, this type of race-based rhetoric is well on the way to arriving at objectively and subjectively harassing messaging."); *accord Hartman v. Pena*, 914 F. Supp. 225, 230 (N.D. Ill. 1995) ("[T]he program's objective was to influence continuing future behavior of the participants….Participants were expected to return to the employment environment, as Hartman did, feel the effects of the exercises, and make a practical application of their workshop experiences.").

The fact that the remarks were not just from supervisors, but in fact the employer itself, ought to essentially be dispositive. *See* Department of Justice, *Guidance For Recipients of Federal Funding*, July 29, 2025 (DEI training "[c]reates an objectively hostile environment through severe or pervasive use of presentations, videos, and other workplace training materials that single out, demean, or stereotype individuals based on protected characteristics.")[7]; *cf. Pisoni v. Illinois*, Nos. 12–0678–DRH, 12–0755–DRH, 2013 WL 2458522, at *4 (S.D. Ill. June 6, 2013) ("[T]he joint amended complaint alleges that 'Defendants developed mandatory training exercises which were unsafe and which increased the likelihood of injury or death to Plaintiffs with the intent of forcing Plaintiffs off the SWAT team.' Clearly, these allegations set forth plausible claims under the ADEA for both hostile work environment and retaliation."); *Grant v. Metro. Gov't of Nashville and Davidson Cnty.*, No. 3–04–cv–00630, 2017 WL 1153927, *2 (M.D. Tenn. Mar. 27, 2017) (ruling for plaintiffs because "the Court also found that Defendant's training materials included racially discriminatory remarks").

[7]https://www.justice.gov/ag/media/1409486/dl?inline=&utm_medium=email&utm_source=govdelivery

While the Court need not decide that using the nomenclature "DEI" is always enough to establish a hostile environment, an employer's decision to implement race-based employee training and other policies *which succeed at their mission* of destroying white employees' ability to do their job is absolutely sufficient to establish a violation of Title VII. *See Young*, 94 F.4th at 1252 n.2 ("[R]equiring government employees to either endorse a particular race-based ideological platform or risk losing their jobs could also evolve into a plausible claim of pervasive hostility."); App. 0020–0021 ("When employers talk about race—any race…with a constant drumbeat of essentialist, deterministic, and negative language, they risk liability under federal law."); *Diemert v. City of Seattle*, 689 F.Supp.3d 956, 963 (W.D. Wash. 2023) ("Diemert alleges this conduct was unwelcome, and he has pleaded sufficient factual allegations showing a pattern of race-based harassment of a repeated, routine, or generalized nature that affected his ability to do his job."); U.S. Equal Emp. Opportunity Comm'n, WHAT TO DO IF YOU EXPERIENCE DISCRIMINATION

RELATED TO DEI AT WORK (Mar. 2025)[8] ("Depending on the facts, DEI training may give rise to a colorable hostile work environment claim.").

Authorities in the context of Title VI—covering educational institutions receiving federal funds—are in accord. *See* U.S. Dep't of Educ., Off. for Civ. Rts., ANNUAL REPORT TO THE SEC'Y, PRESIDENT, AND CONGRESS, at 46 (2021) ("[P]olicies or pedagogical practices that perpetuate the idea that students may be categorized by race, assigned a set of characteristics, and be considered to possess certain characteristics based on that race, may subject students or staff to discrimination in violation of Title VI.") (applying even heavier standard in Title VI context)[9]; *B.W. v. Austin Indep. Sch. Dist.*, 121 F.4th 1066, at 1082 (5th Cir. 2024) (Mem.) (Ho, J., dissenting from denial of *en banc* review) ("It's

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[8] https://www.eeoc.gov/what-do-if-you-experience-discrimination-related-dei-work

[9] https://ed.gov/sites/ed/files/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf; *see also* Dep't of Educ., *OCR Webinar: Racially Exclusive Practices and Title VI*, at 3 (2021), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/ocr-tvi-webinar-reptvi.pdf ("([A] school may not advocate that students adopt specific beliefs based on their race, such as urging that white students be white without signing on to whiteness. These sorts of exercises would also be impermissible if used in the context of ascribing specific characteristics or qualities to all members of other races.") (withdrawn, but still available for historical value).

racist to characterize whites as racist. Because it's racist to attach any negative trait to a group of people based on their race. And it's no less racist just because the victimized racial group is white."). The analogy to education works in the Title VII context. *See, e.g.*, *Students for Fair Admissions v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 290 (Gorsuch, J., concurring) ("Both Title VI and Title VII codify a categorical rule of individual equality, without regard to race.") (cleaned up); *Young*, 94 F.4th at 1255 ("When a state agency treats employees on the basis of race, it engages in the offensive and demeaning assumption that employees of a particular race, because of their race, think alike.") (citing *SFFA*) (cleaned up).

If individuals of any other race had been subjected to regular demeaning insults about their inherent flaws and fundamental inadequacy, it would be obvious that PSUA created a hostile work environment. *See e.g.*, *Cox v. Onondaga Cnty. Sheriff's Dept.*, 760 F.3d 139, 149 (2d Cir. 2014) (false accusations of racism by Caucasian employees against black employee "could be viewed by a reasonable observer as…racial harassment."); *see also Lee v. Riverbay Corp.*, 751 F. Supp. 3d 259, 286 (S.D.N.Y. 2024) (holding that comments related to the

plaintiff's race, such as referring to him as "Bruce Lee" or asking why he "did not own a dry-cleaning business like other Korean people" was sufficient to survive a motion to dismiss). Indeed, defendants acknowledged during depositions that if one simply substituted "black" or "blackness" for "white" or "whiteness" in PSUA's teachings, no one would question the existence of a hostile environment. App. 1543–1544:15–24 (Naydan testifying that she would "not tolerate" the circulation of a paper entitled "Black teachers are a problem"); App. 0994:19–23, 0995:7–10 (testimony that a paper called "Black People are the Problem" would be "racist"); App. 1974:9–22 (Baer testifying that she would "likely expect complaints" in response to discussion about the problems with black people).

To reject De Piero's claim here would effectively bless other employers to engage in top-down efforts to demean, humiliate, and stigmatize black, Hispanic, and Asian employees in regular employer training sessions, and demand that all employees adopt and believe such messages, so long as the training is spread out slightly. *Ames*, 605 U.S. at 304 ("[T]he standard for proving disparate treatment under Title VII

does not vary based on whether or not the plaintiff is a member of a majority group."). That cannot be the rule under Title VII.

The District Court held, nevertheless, that De Piero couldn't even get to a jury on his Title VII claim. App. at 0065 ("[N]o rational trier of fact could determine that he was subjected to the 'steady barrage of opprobrious racial comments' required to sustain his pervasive harassment claim."). But because remarks uttered or facilitated by supervisors during training are the *most* severe and the *most* pervasive, this Court should reverse, and at least let De Piero's claims go to the jury.

2. The District Court erred by minimizing the "pervasiveness" element based on PSUA's sweeping racist generalizations about white individuals.

The District Court treated PSUA's offensive statements about white individuals charitably. It concluded that De Piero was not targeted by name in certain statements, and that making sweeping generalizations about a person's race was less likely to establish pervasive harassment under Title VII. App. 0058–0059, 0060–0061. But the opposite is true.

Yes, a plaintiff that has merely "overheard" slurs and witnessed racist graffiti and flyers will not suffice to establish "severe or pervasive"

harassment. *See Caver v. City of Trenton*, 420 F.3d 243, 249, 262–63 (3d Cir. 2005). But that gloss flows from the ordinary proposition that a derogatory comment about another person generally does not have the same sting as an ethnic slur directed at its victim. App. 0059.

For obvious reasons here, the District Court missed the mark. Equating PSUA's *systematic* racist targeting of white faculty—*in which De Piero was included*—with isolated offhand remarks *about other people* fundamentally mischaracterizes the nature and severity of the conduct.

In reality, institutional statements that demean and humiliate white faculty target their core professional identity. Those statements bear no resemblance to offhand remarks, or the racist jokes in cases like *Sherrod v. Phila. Gas Works*, 57 F. App'x 68, 75–77 (3d Cir. 2003), that the District Court relied on. De Piero did not eavesdrop on PSUA's messages about white people; PSUA deliberately issued those messages directly to De Piero with the intent and purpose that white employees would engage, reflect upon, and believe its racist instruction. It would be no less pervasive if a university deliberately instructed its employees that black professors inherently lacked the necessary skills to adequately teach their students.

The court's ruling also contradicts its decision to dismiss De Piero's First Amendment claims. There, the court ruled that De Piero had complained about discrimination targeting only him personally. On that basis, the District Court concluded that the discrimination was not a "matter of public concern." App. 0026–0027. But on summary judgment, the District Court identified the discriminatory conduct as targeting whites more broadly, rather than De Piero personally. App. 0061. These conflicting rulings are irreconcilable. In truth, De Piero complained about both discrimination against whites generally (including himself) and personal harassment he experienced in retaliation for his opposition to the school's discriminatory teachings.

3. The District Court erred by finding that departmental instruction that white employees were unfit for the job was a mere matter of academic discussion.

The District Court minimized PSUA's racist efforts by describing them as merely academic. App. 0063–0064. That was reversible error.

Writing program meetings were not truly open fora. Honest conversations about race were stifled, rather than encouraged. Indeed, the goal of incorporating "anti-racism" and "whiteness" theory into writing program meetings was to make those ideas "official," and give

them "institutional weight" as departmental policy. App. 2753 ("Mostly I am asking you because I'd like to see you (Lila [Naydan]) channel communication about it so that it seems 'official' and sanctioned by the English program."); App. 3201 (describing the writing program meetings as "official Writing/English/AIMSS professional development events."). In so doing, Naydan and others in the writing program sought to insulate these ideas from debate, not encourage discussion.

To further protect this racist dogma, Naydan *retaliated* against dissenters. App. 2908 (Naydan's first bias report against De Piero), App. 3019 (Naydan's second bias report against De Piero). And indeed, the training materials themselves preemptively silenced dissent by teaching that any disagreement from white participants merely confirmed their inherent racism. App. 3417 ("It may appear that I'm pointing fingers at [white] individuals unnecessarily. Calling out people for things they do not control. If you think that, you are missing the point. You are feeling your White fragility."); App. 3450 ("[N]ot talking about race is an act of white privilege, and in particular, a form of unearned authority—authority granted to white instructors not by virtue of their actions, but by the perception of their skin tone.").

Citing *Diemert*, the District Court erroneously concluded that discriminatory instruction is less likely to constitute pervasive discrimination because a "skilled facilitator can [turn it] into a learning opportunity, not a personal attack." App. 0063. This reasoning fails too. No skilled facilitator was present at writing program meetings, and the materials presented were meant to be accepted uncritically; when De Piero politely questioned them, he was disciplined. Official trainings that attack employees based on race cannot be sanitized as mere "learning opportunities," especially when those materials *intend* to solicit white racial shame and discomfort. *See* App 4339; *see also* App. 2990, 2994.

4. The District Court erred by resolving disputes over whether the writing program meetings were optional, and whether De Piero enjoyed being harassed.

In dismissing De Piero's hostile work environment claims, the District Court minimized the import of the writing program meetings, concluding that they were merely voluntary. As a result, the court concluded that De Piero "sought out" these meetings, and therefore the discrimination against him was not actionable. App. 0066. In so holding, the court first erred by resolving a testimonial dispute related to a material fact in this case—whether the meetings were truly voluntary.

Second, it erred by declaring that voluntary activities sponsored by an employer are a Title VII-free zone, where victims of discrimination are simply asking for it.

Whether writing program meetings were truly voluntary was a disputed question of material fact. De Piero testified that his absence would hurt his annual evaluations, effectively making attendance mandatory. App. 0567–0568. As a non-tenure-track teaching professor with limited opportunities to demonstrate "service and scholarship," participating in these meetings was one of the few ways he could meet that evaluation criteria. *Id.*; App. 4388–4389 ¶ 25 (De Piero testifying that he "believed there would be professional consequences if [he] did not attend the Writing Program Meetings, which [he] understood was evaluated as 'service' in [his] reviews").

But the District Court did not credit De Piero's testimony and ignored other evidence showing that his participation at these meetings was evaluated. For one, Naydan herself reported De Piero for his participation (and lack thereof) at program meetings. App. 2910 (Naydan reporting De Piero for "questioning the value" of her "anti-racist" trainings at program meetings and for "backing out" of leading a meeting

on anti-racist material); App. 3022 (Naydan reporting De Piero for being "disengaged" at program meetings and "not participating"). And indeed, De Piero's "disruption" at these meetings was cited as a reason for his poor evaluation score related to "service and scholarship" in his final year at PSUA. App. 2512. To the extent Appellees testify otherwise, resolving these testimonial discrepancies is a question of fact for a jury, not the court below. On that basis alone, reversal is warranted.

Setting aside the question of whether meeting attendance was considered in evaluations, the change in the meetings' focus to issues of race and "whiteness" fundamentally altered De Piero's working conditions.

Writing department meetings were designed to help train and develop writing program faculty. App. 3185. The meetings existed to inform attendees about new teaching methods, discuss the attendees' experience with these pedagogies in the classroom, and facilitate a group session regarding the pros and cons of these efforts. App. 1989:2–18. By designating a set time for the writing program to meet, the sessions gave professors structure; a set time each month so writing professors could focus on their professional development within the program. Those

meetings were a core part of De Piero's professional development as a professor at PSUA.

After 2020, writing program meetings changed. For the rest of De Piero's tenure at PSUA, program meetings focused on one topic: white individuals. That topic extensively covered the problem with white teachers, whiteness, and white people more broadly. App. 1659:5–8 (Naydan Dep.) (confirming she told the writing program "there's no way I would be okay with not talking about racism right now as a writing program."); App. 3200 (Naydan e-mailing the writing program that she will be "having separate conversations with each of [them] about how [she] want[s] to focus on race this semester—and all year really.").

This fundamentally transformed a core part of De Piero's employment. No longer were these meetings a place where De Piero could grow as a professor. Instead, program meetings became a place for De Piero to reflect and brood on his status as a white teacher; they were a place for him to confront his "whiteness."

And De Piero attended for another important reason: to try to mitigate the damage PSUA was causing by implementing what he correctly perceived as racist (and illegal) pedagogy. De Piero's hostile

work environment claim should not be dismissed because he attempted to engage with racist material taught by department, and push back against a racist takeover of a valuable professional development program. In the same way that a victim of sexual harassment is not "asking for it" when she tries to stand up to her harasser, but fails, De Piero is not guilty of inviting the racist treatment in this case.

5. PSUA sent an unmistakable message that white employees are less desirable than non-white employees.

In an ordinary hostile environment case, courts slog through the offensiveness and frequency of various comments in the workplace—often slurs from colleagues or managers. But that model is not actually the legal test for when Title VII has been violated. At the most fundamental level, an employer violates Title VII when its conduct "convey[s] the message that members of a particular race are disfavored and that members of that race are, therefore, not full and equal members of the workplace." *Aman*, 85 F.3d at 1083. So this Court need not engage in the usual exercise of determining whether the sporadic use of racially-charged commentary suffices for Title VII. Instead, this case is

fundamentally different because it involves official messages sent by the employer itself, from the top down.

In other words, De Piero's claim challenges PSUA's *official* position that *white employees are inherently deficient*, and that *the institution would be better off with fewer of them*. PSUA cannot deny that it sought to reduce the proportion of white employees through affirmative action programs. Likewise, PSUA cannot deny that its trainings for writing instructors included explicit claims that white instructors were the "problem," and that the university would be better if professors did not have "white bodies." Accordingly, there are no interpretive difficulties to work through in determining whether PSUA conveyed a message that it would rather have less "whiteness" in its employee ranks—it said so explicitly, repeatedly.

Courts have consistently held that employer statements describing certain employees as less capable or unsuitable for their roles based on a protected status constitutes discrimination under Title VII. *Cf. Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 694–95 (7th Cir. 2001) (statements questioning the ability of women to do their jobs created discriminatory environment); *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027,

1035 (9th Cir. 2005) (finding a material issue of fact where the supervisor stated "women have no business in construction," and "he wished he could hire men to do [their] jobs"). Appellant submits that, without even considering myriad other expressions of hostility toward white persons that happened on a continual basis at PSUA, these basic, essentially undisputed facts are enough to get to a jury under the rule of *Aman*. For this reason alone, it was error to grant summary judgment on this claim.

B. The record supports a strong statutory retaliation claim under Title VII and the PHRA.

Title VII's anti-retaliation provision makes it an "unlawful employment practice for an employer to discriminate against any of his employees…because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge…under this subchapter." 42 U.S.C. § 2000e-3(a). To prove retaliation, a plaintiff must show (1) that he engaged in a protected activity; (2) that he suffered an adverse employment action; and (3) that there was a causal connection between the two events. *Smith v. City of Atl. City*, 138 F.4th 759, 775 (3d

Cir. 2025) (citing cases).[10] The District Court did not question whether De Piero adduced sufficient evidence on the first and third elements. *See* App. 0074–0075. Nor could it.

First, De Piero engaged in protected activity on multiple occasions, including when he when he spoke up at the October meeting to oppose what he reasonably believed were PSUA's unlawful practices, App. 3002 at 51:34-52:05, and when he filed a complaint with the PSUA Affirmative Action Office, App. 2972–2973. *See, e.g.*, *Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130, 135 (3d Cir. 2006) (protected activity includes both formal complaints of discrimination and informal "opposition" to practices the plaintiff reasonably believes are unlawful); *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 276 (2009) ("When an employee communicates to her employer a belief that the employer has engaged in...a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity.") (cleaned up).

[10] The PHRA and Title VII anti-retaliation provisions "apply[] identically [and are] governed by the same set of decisional law." *Slagle v. Cnty. of Clarion*, 435 F.3d 262, 265 n.5 (3d Cir. 2006). Accordingly, the PHRA claim is not separately addressed in this brief.

Second, the evidence plainly shows that De Piero's protected activity was causally connected to adverse job consequences. De Piero's supervisor Naydan filed multiple complaints against him because he resisted race-based teaching, grading, and employment practices, and because he questioned the *legality* of PSUA's conduct. In fact, Naydan specifically stated as much in one of her complaints. App. 3020 (De Piero "spoke inflammatory language, intimating that Grace and I were involved in illegal activity that discriminates against white people as a protected category."). Naydan also admitted that one of the reasons she took action against De Piero was that he had "reported [her] for bias against him *as a white man*." App. 3022. (emphasis added). Naydan's complaints led to formal discipline against De Piero, including the lodging of a performance improvement letter in his personnel file and a reduction in his annual performance review scores.

The District Court granted summary judgment dismissing De Piero's statutory retaliation claims, however, solely on the second element, asserting that the adverse actions De Piero suffered in retaliation for his protected activity were not adverse enough. In rendering this decision, the court made a plain error of law by applying

the wrong legal standard. The court also improperly weighed evidence and resolved disputed questions of fact.

1. The District Court applied the wrong legal standard to the adverse action element.

In granting summary judgment against De Piero's retaliation claims, the District Court relied on a line of cases beginning with *Weston v. Pennsylvania*, 251 F.3d 420 (3d Cir. 2001), that interpreted Title VII's anti-retaliation provision to require proof that the defendant took an adverse action that "caused 'a material change in the terms or conditions of [the plaintiff's] employment.'" App. 0079–0080 (quoting *Weston*, 251 F.3d at 431).

That position, however, has been resoundingly rejected by the Supreme Court. In *Burlington N. & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the Court resolved a circuit split on this issue, explicitly rejecting the interpretation favored by the Third, Fourth and Sixth Circuits that adverse action for purposes of the anti-retaliation provision was governed by the "same standard…appl[ied] to a substantive discrimination offense," 548 U.S. 53, 60 (2006), namely that the challenged action must result in a "materially adverse change in the terms and conditions of employment," *id.* (cleaned up). As this Court has

recognized post-*Burlington*, the correct standard is whether "a reasonable employee would have found the alleged retaliatory actions materially adverse in that they well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006) (cleaned up). The anti-retaliation provision thus provides "broader protection for victims of retaliation than for…victims of…discrimination." *Burlington*, 548 U.S. at 66.

In *Weston*, decided before *Burlington*, the court held that the issuance of a written reprimand allegedly in retaliation for protected activity was insufficiently adverse because it did not cause a "material change in the terms or conditions of…employment." 251 F.3d at 431. Following *Weston*, the District Court here held the same thing. App. 0079–0080 ("[Neither the] 'Performance Expectations' memorandum, [nor the] downgrad[ed]…annual performance review…materially

changed the terms or conditions of De Piero's employment"). That decision was error under *Burlington* and *Moore*.[11]

By applying the wrong legal standard to De Piero's statutory retaliation claims, the District Court committed reversible error.

2. Applying the correct legal standard, De Piero's statutory retaliation claim should go to a jury.

The proper standard for the adverse action element is whether the employer's retaliatory conduct might deter a reasonable employee from speaking up in opposition to discrimination. *Moore*, 461 F.3d at 341. Each individual action need not be materially adverse, as long as the employer's retaliatory conduct, considered as a whole, would deter

[11] The District Court also cited to the post-*Burlington* decision in *Mieczkowski v. York City Sch. Dist.*, 414 F. App'x 441, 446–47 (3d. Cir. 2011) for the proposition that "written reprimands…do not themselves constitute adverse employment actions" for purposes of Title VII's anti-retaliation provision. App. 0076. This too was error. *Mieczkowski* relied on *Weston* for the proposition that "two letters of reprimand" issued against a plaintiff were not "adverse employment actions" because they did not "effect a material change in the terms or conditions of…employment." 414 F. App'x at 446–47. But *Mieczkowski* was *not* a Title VII retaliation case. Instead, the court there was determining whether the letters of reprimand were sufficiently adverse to support a *substantive discrimination claim* under an entirely different provision of Title VII, 42 U.S.C. § 2000e-2(a). *Id.* at 444–48. As noted above, the standards for substantive discrimination claims and statutory retaliation claims are different.

protected activity. *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72 (2d Cir. 2015); *Sanford v. Main St. Baptist Church Manor, Inc.*, 327 F. App'x 587, 599 (6th Cir. 2009) ("[T]he incidents taken together might dissuade a reasonable worker from making or supporting a discrimination charge").

The adverse action element does not set a high bar to recovery, but is meant simply to "separate significant from trivial harms." *Burlington N.*, 548 U.S. at 68. The Supreme Court has warned against imposing categorical rules, noting that an "act that would be immaterial in some situations *is material* in others." *Id.* at 69 (citation omitted) (emphasis added).

Applying these standards, a reasonable juror viewing the evidence as a whole, could easily find that De Piero suffered an adverse employment action. The university acted against De Piero in three distinct, but related, ways: (1) Naydan (his supervisor) filed baseless complaints against him, (2) relying on those complaints, PSUA formally disciplined him, and (3) PSUA downgraded his annual performance evaluation because of the falsely alleged conduct and his broader opposition to "anti-racism."

Lower courts have held that the filing of a knowingly false report against a Title VII complainant constitutes an adverse action. *See Middleton v. Deblasis*, 844 F. Supp. 2d 556, 570–71 (E.D. Pa. 2011). And when that report is followed by an official sanction from the employer, the adverse action is even more apparent. *See Millea v. Metro-N. R. Co.*, 658 F.3d 154, 165 (2d Cir. 2011); *see also Alvarado v. Metro. Transp. Auth.*, No. 07 Civ. 3561 (DAB), 2012 WL 1132143, at *13 (S.D.N.Y. Mar. 30, 2012) (claim could proceed to trial where "Letter of Instruction" was placed in the plaintiff's personnel file and could be used in future disciplinary actions).

The record demonstrates that Naydan's report contained false claims about De Piero. Naydan reported that De Piero was being disruptive and speaking for a majority of the October meeting. App. 3020–3021. She alleged he was "bullying" and used "inflammatory language." App. 3019–3020. These allegations were false. The record, through audio evidence, dispels any question that De Piero acted unprofessionally at the meeting. Indeed, when deposed, Defendant Borges could not identify a single instance where De Piero acted inappropriately. App. 1360:4–10, 1363:12–18, 1367:6–10, 1368–1369:17–

15, 1370:1–11, 1371:5–10, 1373:15–23. That testimony contradicts Borges's findings that De Piero acted unprofessionally at the meeting in her final AAO report. App. 3064.

Naydan, too, could not support her complaint against De Piero when deposed, testifying instead that most of his conduct did not amount to harassment. App. 1510:21–24, 1512:4–12, 1519:16–22, 1531–1532:12–10, 1532:21–24 (Naydan testifying that De Piero was engaged with the reading and *not* hostile at the October meeting); App. 1530:2–8, 1532:21–24, 1556:5–20 (Naydan testifying that it was De Piero's "persistent questioning" and questioning of the training's legality that created the "hostility.").

The record also demonstrates that Naydan's false report resulted in an official sanction against De Piero that went into his permanent record. App. 3064 (AAO letter to De Piero with findings that his "behavior...was aggressive and disruptive" and sending the matter to human resources for further disciplinary action); App. 3545–3546 (notice of performance expectations and HR's findings of improper conduct). That sanction also directed De Piero to change his behavior in response to the investigation, which amounted to instructing him to stop

challenging PSUA's racist teachings. *Id.* If De Piero did not obey the sanction, a juror could reasonably infer that he would face further discipline. If the sanction alone did not indicate the threat of future discipline, PSUA's reliance on the sanction in evaluating De Piero's performance clearly demonstrates that the sanction carried ongoing employment consequences that would disadvantage him in future employment decisions. *See* App. 2512.

Instead of considering this evidence, the District Court erroneously concluded that Naydan's false report and PSUA's subsequent discipline did not constitute an adverse action under *Weston* and its progeny. App. 0076. As explained above, the court's holding applied incorrect legal standards, warranting reversal. But moreover, Naydan's false report and PSUA's disciplinary response (without more) provide sufficient evidence for a jury to find adverse employment action.

An unjustified performance evaluation also constitutes an adverse action under Title VII. After PSUA disciplined De Piero, Friederike Baer (a more senior supervisor) lowered his annual performance grade, explicitly citing the official sanction in his file. App. 2512. Courts have consistently held that an unjustified negative performance evaluation

can constitute adverse action. *Est. of Oliva v. New Jersey*, 589 F. Supp. 2d 539, 542 (D.N.J. 2008) (denying reconsideration) ("Oliva's negative performance evaluation (viewed in the light most favorable to Plaintiff) is analogous to the suspension without pay in *Burlington Northern* and the lateral transfer in *Moore*."); *Halfacre v. Home Depot, U.S.A., Inc.*, 221 Fed. Appx. 424 (6th Cir. 2007) (lower performance evaluation scores could be sufficiently materially adverse); *Pérez-Cordero v. Wal-Mart P.R., Inc.*, 656 F.3d 19, 31 (1st Cir. 2011) ("[T]he escalation of a supervisor's harassment on the heels of an employee's complaints about the supervisor is a sufficiently adverse action"); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) ("Transfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions'"). Moreover, where unjustified performance evaluations are accompanied by other disciplinary actions, adverse action is *especially* apparent. *See White v. Dep't of Corr. Servs.*, 814 F. Supp. 2d 374, 388 (S.D.N.Y. 2011) (while a counseling memo and negative comment in a performance evaluation may not be adverse actions in themselves, a jury could find them actionable in combination with a notice of discipline).

De Piero's poor performance review was unjustified. Borges's testimony reveals a clear contradiction between her final report and De Piero's actual conduct. The record also supports that De Piero's poor performance review had consequences. De Piero was not a tenured professor. His contract expired at the end of each year, and could only be renewed annually. This poor review increased the likelihood that De Piero's contract would not be renewed, effectively silencing his criticism of the school's racist policies for fear of continued poor evaluations and his eventual termination.

A juror considering this "constellation of surrounding circumstances," could easily find that a reasonable employee might be "dissuade[d]...from complaining or assisting in complaints about discrimination." *Burlington N.*, 548 U.S. at 69–70. De Piero's claim should not have been dismissed at summary judgment. This Court should reverse.

C. The District Court erred in dismissing De Piero's First Amendment retaliation claim.

Long before it took De Piero's hostile work environment and retaliation claims away from the jury, the District Court dismissed De Piero's separate First Amendment retaliation claim at the pleading

stage, without leave to amend. App. 0027; App. 0029. As the court noted, De Piero pleaded a First Amendment retaliation claim based on his statements "both to university administrators and in the press." App. 0005.

In those statements, De Piero challenged PSUA's race-based educational practices, which he argued "would…exacerbate student achievement gaps by lowering standards and focusing attention away from teaching key academic skills," as well as its employment practices, which amounted to unlawful discrimination on the basis of race. App. 0161–0166 ¶¶ 83–84, 86, 90, 96, 101–111. He alleged that, in retaliation for his speech, he was subjected to a number of adverse acts, including a false complaint of harassment against him filed mere days after he published an opinion piece in several Pennsylvania media outlets, App. 0162–0165 ¶¶ 90, 101–102, 110, an unjustified finding that he had violated workplace rules during a meeting at which he questioned the legality of PSUA's practices, App. 0165–0167 ¶¶ 108, 116–119, significant downgrading of his annual performance review scores, App. 0167–0168 ¶¶ 121–123, a failure to take his complaints of discrimination seriously, App. 0162 at ¶ 89; App. 0165 ¶ 108, his constructive

termination from employment, App. 0168 ¶¶ 124–125, and, eventually, a gratuitous demand that he return $3,386.77 in wages he had earned over the summer before he left PSUA's employment, App. 0168–0169 ¶¶ 126–127.

The District Court, however, impermissibly read De Piero's complaint in the most uncharitable fashion imaginable, re-framing his claims as "airing fundamentally personal grievances," which meant that such statements did not address matters of public concern. App. 0027. Contrary to the District Court's opinion, when read in the light most favorable to De Piero, his complaint plausibly alleged First Amendment violations.

To survive a motion to dismiss, a plaintiff must allege facts that, if accepted as true, are sufficiently "plausible on their face" to state a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when a plaintiff pleads facts that create a reasonable inference that a defendant is liable for the alleged misconduct. *Id.* When analyzing a plaintiff's claims on a motion to dismiss, courts must construe the complaint "in the light most favorable to the plaintiff," asking "whether, under any

reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009).

To successfully allege a claim for First Amendment retaliation, a plaintiff must show (1) that the plaintiff's speech was protected, (2) that the defendants took an adverse action against the plaintiff and (3) that the adverse action was substantially motivated by the plaintiff's speech. *Gorum v. Sessoms*, 561 F.3d 179, 184 (3d Cir. 2009). The District Court dismissed De Piero's First Amendment claim primarily on the first element, arguing that that, according to the court, his speech "addresse[d] only [his] own problems," which were not of concern to the public. App. 0026 (quoting *De Ritis v. McGarrigle*, 861 F.3d 444, 455 (3d Cir. 2017)). That holding was error.

First, allegations of employment discrimination by a public employer are inherently matters of public concern. *See Fender v. Delaware Div. of Revenue*, 628 F. App'x 95, 97 (3d Cir. 2015) (allegation of "gender discrimination is clearly a matter of political and social concern"); *Konits v. Valley Stream Cent. High Sch. Dist.*, 394 F.3d 121, 126 (2d Cir. 2005) (finding that speaking out about employer discrimination against a fellow employee was a matter of public concern).

The District Court did not address this issue in its opinion. Instead, it relied on *De Ritis v. McGarrigle*, 861 F.3d 444 (3d Cir. 2017) to dismiss De Piero's retaliation claim outright. But that case is easily distinguished.

In *De Ritis*, an assistant public defender who had been transferred from a trial court unit to a juvenile unit shared "speculative comments about the reason for [the] perceived demotion," 861 F.3d at 449. He was allegedly terminated for these comments. The comments had nothing whatsoever to do with alleged employment discrimination, but were entirely based on the employee's speculation based on "after work gossip" and "fourth-person hearsay," that a trial court judge thought he was not "moving his cases" fast enough. *Id.* at 449–50 (cleaned up). To some audience members, the employee said simply, "I'm being punished" and "Judge Kenney thinks I'm telling too many defendants they can have trials." *Id.* at 455.

Because these comments, if true, did not implicate anything other than the "day-to-day minutiae" of the employee's working life, they were not statements on matters of public concern. *Id.* at 456. That is because, even if the statements were true, they did not allege any cognizable

wrongdoing on the part of Judge Kenney or anyone else. They merely alleged a workplace disagreement over the employee's performance.

By contrast, De Piero's assertions that PSUA was discriminating against white employees and exposing them to a hostile work environment based on race, if true, *would mean that the public servants in charge of the university were violating the law*. That is why allegations of employment discrimination in the public sphere are *automatically* matters of public concern. *See Connick v. Myers*, 461 U.S. 138, 148 (1983) (Speech that "bring[s] to light actual or potential wrongdoing or breach of public trust" is speech that addresses a matter of public concern, as is speech that "seek[s] to inform the public that [the government] [is] not discharging its governmental responsibilities."). For this reason alone, the District Court's decision should be reversed.

Second, De Piero's statements did not only concern allegations of racial discrimination in public employment. He also addressed broader issues involving racial preferences in educational policy, the existence (or not) of present day "systemic racism," and the wisdom of policies such as watering down standards of quality for student performance out of a concern for "equity." *See, e.g.*, App. 0162 ¶ 90 ("De Piero expressed

concern that race-based curricula would actually exacerbate student achievement gaps [and] criticized the potential psychological effects on young children."). Indeed, De Piero's concerns were so obviously of public interest that they were accepted as opinion pieces in various Pennsylvania media outlets. App. 0162 ¶ 90.

The District Court nominally recognized as much. App. 0027 ("To be clear, it cannot seriously be questioned that the underlying issue that gave rise to [some of] De Piero's statements—how to address racial inequality in the classroom—is a matter of public concern."). Yet, it then immediately re-framed De Piero's allegations as related only to his "own problems." But even if the court's uncharitable reading of the complaint were to be credited, it still committed reversible error.

As the District Court admitted, at least *some portion* of De Piero's speech—the portion relating to race, education, and standards of teaching—was unquestionably on a matter of public concern. As the court in *De Ritis* recognized, where statements on "matters of public concern…*overlap with* [purely personal] matters," the former do not lose their protected status under the First Amendment. 861 F.3d at 456 (emphasis added). Even crediting the District Court's characterizations

that *some* of De Piero's statements were purely personal (a point De Piero contests), there is no dispute that *other* statements concerning education policy, "equity," and other topics were matters of public concern. As in *De Ritis*, the mere fact that there was "overlap" between the two does not defeat De Piero's claim. The District Court's decision should be reversed at least on this ground.[12]

[12] The District Court suggested that De Piero indeed suffered treatment sufficiently adverse "to deter a person of ordinary firmness from exercising his constitutional rights." App. 0025–0026 (noting allegations that Naydan's false complaint against De Piero and the ensuing disciplinary letter entered into his personnel file were adverse and sufficient to deter protected speech). And the court didn't question whether De Piero had adequately pled the causation element of his First Amendment claim.

Confusingly, however, the court did take time to argue that one "adverse action" purportedly listed in the complaint—a failure by PSUA to "signal boost" De Piero's opinion writing in a campus newsletter—was insufficiently adverse to deter speech. *Id.* That issue is not relevant. De Piero does not claim that defendants violated the First Amendment by failing to promote his writing. He was retaliated against when defendants filed false complaints against him, lodged unfounded disciplinary actions in his permanent file, downgraded his performance review and prospects for future career growth, failed to take his complaints of discrimination seriously, and engaged in other acts outlined in the complaint.

VI. Conclusion

This Court should reverse the orders (1) granting Appellees' motion to dismiss De Piero's First Amendment retaliation claims, (2) granting summary judgment against De Piero's hostile work environment claim, and (3) granting summary judgment against De Piero's Title VII and PHRA retaliation claims.

Respectfully Submitted,

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Statement of Bar Membership

I, James L. Kerwin, am duly admitted to practice law before the United States Court of Appeals for the Third Circuit.

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Statement of Compliance With Frap 32(a)(7)(b)

This brief was prepared using Microsoft 365. The font is Century Schoolbook, 14-point, double spaced. The word count of the body of the brief, including footnotes and point headings, is 12,970 words.

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Statement of Service and ECF Filing

I, James L. Kerwin, hereby certify that seven hardcopy briefs have been properly served on the court the date of the ECF filing of this brief.

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Statement of Identical Compliance Briefs

I, James L. Kerwin, hereby certify that the briefs are served in compliance with the Court's rules and identical to one another and the electronic PDF version.

/s/ James L. Kerwin
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Statement of Virus Check

I, James L. Kerwin, hereby certify that a virus check was performed on this brief and that it is free from viruses. The check was performed with SentinelOne.

/s/ James L. Kerwin
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No. 25-1952

IN THE
United States Court of Appeals for the Third Circuit

ZACK DE PIERO,

Plaintiff-Appellant,

v.

PENNSYLVANIA STATE UNIVERSITY AND MARGO DELLICARPINI IN HER OFFICIAL CAPACITY, AND DAMIAN FERNANDEZ, LILIANA NAYDAN, CARMEN BORGES, ALINA WONG, LISA MARRANZINI, FRIEDERIKE BAER, AND ANEESAH SMITH, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, NO. 2:23-cv-02281-WB

VOLUME I OF APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZACK DE PIERO,

Plaintiff,

VS.

PENNSYLVANIA STATE UNIVERSITY and MARGO DELLICARPINI in her official capacity, and DAMIAN FERNANDEZ, LILIANA NAYDAN, CARMEN BORGES, ALINA WONG, LISA MARRANZINI, FRIEDERIKE BAER, and ANEESAH SMITH, in their official and individual capacities,

Defendants.

Civil Case No. 2:23-cv-02281-WB

Date: May 15, 2025

NOTICE OF APPEAL

Pursuant to Federal Rules of Appellate Procedure 3 and 4, notice is hereby given that Plaintiff Zack De Piero appeals to the United States Court of Appeals for the Third Circuit from the following:

- Memorandum Opinion (ECF No. 31) and Order (EFC No. 32) granting Defendants' Motion to Dismiss (ECF 23);
- Memorandum Opinion (ECF No. 59) and Order (ECF No. 60) granting Defendants' Motion for Summary Judgment (ECF No. 52), dated and entered on March 6, 2025;
- Memorandum Opinion (ECF No. 64) and Order (ECF No. 65) granting Defendants' Motion for Summary Judgment, dated and entered on April 16, 2025.

Plaintiff De Piero also hereby appeals all prior orders and decisions that merge into these Orders.

May 15, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date appearing in this document, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system. I certify that the following counsel of record are registered as ECF filers and that they will be served by the CM/ECF system:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZACK K. DE PIERO, **Plaintiff,** **v.** **PENNSYLVANIA STATE UNIVERSITY, MARGO DELLICARPINI, DAMIAN FERNANDEZ, LILIANA NAYDAN, CARMEN BORGES, ALINA WONG, LISA MARRANZINI, FRIEDERIKE BAER AND ANEESAH SMITH,** **Defendants.**	**CIVIL ACTION** **NO. 23-2281**

MEMORANDUM OPINION

Plaintiff Zack De Piero, a white man, was a writing professor at the Abington campus of Pennsylvania State University ("Penn State"). He became profoundly uncomfortable with how his colleagues and superiors talked about race in the workplace. De Piero made his feelings known, both to university administrators and in the press, and alleges that he was disciplined in response. He eventually quit his job. In this suit, he claims: (1) racial discrimination and hostile work environment, in violation of Title VI and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; (2) interference with his right to contract and to the "equal benefit" of the laws on the basis of his race, in violation of 42 U.S.C. § 1981; (3) retaliation for speech protected by the First Amendment of the United States Constitution, in violation of 42 U.S.C. § 1983; and, (4) violation of the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. C.S. § 951 *et seq.*. Defendants move to dismiss De Piero's Amended Complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). For the reasons stated below, Defendants' Motion to Dismiss will be granted in part and denied in part.

I. BACKGROUND

De Piero received a PhD in Education from the University of California, Santa Barbara in

2017 and began working at Penn State Abington as a non-tenure-track Assistant Teaching Professor of English and Composition in 2018. Penn State Abington holds itself out as "the most diverse campus within" the Penn State system "and the only majority minority campus." Each semester, De Piero taught a first-year writing course called Rhetoric and Composition and a mix of upper-level writing courses like Writing for the Social Sciences.

A. Training on Race at Penn State Abington

The facts set forth herein are taken from Plaintiff's Amended Complaint, plausible and non-conclusory allegations from which the Court is obligated to take as true at this stage in the litigation. *Rivera v. Monko*, 37 F.4th 909, 917 (3d Cir. 2022) (citation omitted). De Piero describes a series of university-sanctioned professional development meetings and comments from supervisors that addressed racial issues in sweeping, absolute terms. First, he alleges that Defendants instructed him to incorporate race into his grading. De Piero's supervisor, Defendant Liliana Naydan, Chair of the English Department, emailed him and two white colleagues in early 2019, telling them that "racist structures are quite real in assessment . . . . For me, the racism is in the results if the results draw a color line." To avoid being tarred as a racist, then, De Piero alleges that he had to discard his own race-neutral grading rubric and instead "penalize students academically on the basis of their race."

According to De Piero, this atmosphere only became more heated after the murder of George Floyd in May 2020. Amidst the mass protest movement that erupted that summer, Defendant Damian Fernandez, then-Chancellor of Penn State Abington, "called all faculty and staff" to join a "Conversation on Racial Climate" on Zoom. Defendant Alina Wong, Assistant Vice Provost for Educational Equity, hosted the event. De Piero "experience[d] discomfort" when, in a discussion about the scope of systemic racism, Wong "led the faculty in a breathing exercise in which she instructed the 'White and non-Black people of color to hold it just a little

longer—to feel the pain.'" Over the next few days, a colleague told De Piero that "resistance to wearing masks" to prevent the spread of COVID-19 was "more likely" to happen "in classrooms taught by women and people of color" and to be "led by white males." Also, Defendant Aneesah Smith, Director of Diversity, Equity, and Inclusion, sent an email to all employees "calling on white people" to "feel terrible," about their "own internalized white supremacy," and to "hold other white people accountable."

De Piero further alleges that he then had to sit through three more events that singled out white instructors. First, Naydan and another professor led one of a series of monthly professional development meetings, which, as a full-time member of the writing faculty, De Piero was "expected to attend." In the workshop, which was on "multiculturalism," the facilitators presented examples of problematic comments that a teacher could make to a student; every hypothetical faculty member was white. Next, in a training video called "White Teachers Are a Problem," the training's facilitator intimated that "white colleagues" should feel like "the problem." The facilitator encouraged viewers to "feel uncomfortable" about race. Naydan and another colleague had hyped the video repeatedly. Third, Naydan "imposed" on the writing faculty a "presentation and dialogue about critical race theory and antiracism" that attacked "race neutrality, equal opportunity, objectivity, colorblindness, and merit" and condemned "white self-interest."

2021 brought more of the same. At an "Antiracism pedagogy meeting" in early January, Naydan said that she was "thinking about grading as an antiracist act," which De Piero took to mean that teachers "must apply different grading standards on the basis of race." That spring, the department put on another training presentation about "White Language Supremacy" as well.

B. De Piero Reports His Concerns

In April 2021, unhappy with the school's "'antiracist' dogma," De Piero told Defendant

Friederike Baer, Division Supervisor at Penn State, that Naydan's conduct made him feel that he had been harassed. He asked that training sessions focused on anti-racism be stopped immediately. De Piero filed a report alleging racial harassment with the Pennsylvania Human Relations Commission ("PHRC") the same month and filed a bias report with Penn State's Affirmative Action Office ("AAO") a few months later.

Defendant Carmen Borges, Associate Director of the AAO, asked to meet with De Piero to discuss his bias report. At that meeting, she responded to De Piero's concern that he had been made to feel "humiliated, disgraced, harassed, and discriminated against," by telling him that "[t]here is a problem with the white race" and he should "broaden [his] perspective." "Until you get it," she told De Piero, he should continue to attend anti-racism workshops. By November 2021, Borges had resolved De Piero's initial complaint and had decided that no further action would be taken. She concluded that the "White Teachers are a Problem" training, "while it may be offensive to [him], does not constitute discrimination towards you as an individual and does not rise to a violation of the University's Non-Discrimination policy."

Days after his first meeting with Borges, De Piero took his complaints public. He published an opinion piece that was circulated in multiple Pennsylvania media outlets via Gannett Publishing in which he "expressed concern that race-based curricula would actually exacerbate student achievement gaps by lowering standards and focusing attention away from teaching key academic skills" while risking "potential psychological effects on young children." Inconsistent with Penn State's regular practice, and despite De Piero's request, the school did not include this article in the bi-monthly "News from Sutherland" newsletter, which publicizes faculty "achievements." "On information and belief," De Piero alleges that Defendant Margo DelliCarpini, Penn State's Chancellor, cut any reference to the article out after the newsletter's

publisher had included it in an earlier draft.

Throughout the second half of 2021, race-focused trainings continued. Naydan co-led another remote training that October focused on "white privilege," which included a required reading titled "The Myth of the Colorblind Writing Classroom: White Instructors Confront White Privilege in Their Classrooms." After the training "accused white faculty of 'unwittingly reproduc[ing] racist discourses and practices in our classrooms,'" De Piero protested that he felt targeted based on his race. He also asked for specific examples of what it meant to "reproduc[e] racist discourses." Naydan and De Piero both expressed their discomfort with their interaction.

C. De Piero Leaves the School

Naydan and her co-facilitator subsequently filed a complaint against De Piero for bullying and harassment. Again, Borges fielded the complaint. At a meeting with De Piero, she pointed out that Naydan's choice of content for the training was protected speech and chided him for using "intimidating body language." Borges refused De Piero's repeated requests for further information about the precise nature of Naydan's complaints. In December 2021, Borges sent De Piero a letter in which she concluded that he "had bulled and harassed his colleagues during the meeting by asking questions that challenged Penn State's race-based orthodoxy." Around this time, De Piero filed a second complaint with the PHRC and with the Equal Employment Opportunity Commission ("EEOC").

After Borges resolved Naydan's complaint, Baer and Defendant Lisa Marranzini, Penn State's Human Resources Representative, met with De Piero "to discuss the university's findings that he was a 'bully' and harassed his colleagues by asking questions that hurt their feelings." He forwarded to them his PHRC and EEOC complaints and explained that he felt he had been harassed, discriminated against, and retaliated against based on his race. They issued him a "Performance Expectations Notice" which stated that he had "caused significant disruption to the

meeting" and that his behavior was "not becoming of a faculty member at our College and is not acceptable." "[F]uture repeat of such conduct as was exhibited" that October, they warned, "may result in disciplinary action."

De Piero received his next annual performance review in June 2022. Although in previous years he had received an "excellent" teaching rating, this time it was "very good." The component of his review relating to his service to the school, which had always been rated "very good," was now "fair to good." Specifically noted in the review was De Piero's interaction with Naydan in the October 2021 training, describing his behavior as "aggressive, disruptive, unprofessional and in opposition to the University's Values Statement."

That August, De Piero resigned from his position at Penn State. In his resignation email, he expressed his view that Penn State "must strongly reconsider whether its recent emphasis on so-called 'antiracist' programming ultimately has students' best interests in mind, from their academic training to their psychological well-being." After his resignation, Defendant Melinda Kennedy, a human resources representative at Penn State, had him return his salary for the previous month.

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

When analyzing a motion to dismiss, the complaint must be construed "in the light most

favorable to the plaintiff," with the question being "whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). A court may dismiss a claim with prejudice if an amendment could not cure a deficiency. *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000). On the other hand, where, as here, one amended pleading already has been filed, further amendment may be allowed "only with the opposing party's written consent or the court's leave which leave should be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2).

III. DISCUSSION

A. Title VII, Section 1981, and the PHRA

Title VII of the Civil Rights Act of 1964 makes it illegal to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The PHRA makes it unlawful "[f]or any employer because of the [employee's] race . . . to . . . discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract . . . ." 43 Pa. C.S. § 955(a). And, Section 1981 guarantees that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts." 42 U.S.C. § 1981(a). Because the same framework is used to evaluate employment discrimination claims brought under Title VII, Section 1981, and the PHRA, *Jones v. Sch. Dist. of Phila.*, 198 F.3d 403, 410 (3d Cir. 1999); *Branch v. Temple Univ.*, 554 F. Supp.3d 642, 648 (E.D. Pa. 2021), the Court addresses these claims together, with one exception discussed *infra* in Section III.B. De Piero alleges that Defendants violated these statutes in two separate ways: (1) by treating him differently from his non-white colleagues ("disparate treatment"); and, (2) by "creat[ing] a racially hostile environment" ("hostile work environment").

i. Disparate Treatment

To establish the *prima facie* case of employment discrimination, a plaintiff must show: (1) that he was "a member of a protected class;" (2) that he was qualified for his position; (3) that he "suffered an adverse employment action;" and, (4) that adverse employment action "occurred under circumstances that could give rise to an inference of intentional discrimination." *Makky v. Chertoff*, 541 F.3d 205, 214 (3d Cir. 2008).

Defendants argue that De Piero's disparate treatment claim must be dismissed because he resigned from his job at Penn State, and, thus, did not suffer an adverse employment action. De Piero disagrees, arguing that, under the circumstances, his resignation constituted a constructive discharge. "Employee resignations and retirements are presumed to be voluntary." *Leheny v. City of Pittsburgh*, 183 F.3d 220, 227 (3d Cir. 1999) (citation omitted). That means "the onus is on" De Piero "to produce 'evidence to establish that the resignation . . . was involuntarily procured.'" *Judge v. Shikellamy Sch. Dist.*, 905 F.3d 122, 125 (3d Cir. 2018) (quoting *Leheny*, 183 F.3d at 228). Such resignations become constructive discharges when an employer has "permitted conditions so unpleasant or difficult that a reasonable person would have felt compelled to resign." *Duffy v. Paper Magic Grp., Inc.*, 265 F.3d 163, 167 (3d Cir. 2001) (quotation omitted); *see also Goss v. Exxon Off. Sys. Co.*, 747 F.2d 885, 888 (3d Cir. 1984).[1] Threats of discharge, suggestions to resign or retire, demotions, reductions in pay or benefits, involuntary transfers to less desirable positions, alterations in responsibilities, and "unsatisfactory job evaluations" can also suggest a constructive discharge. *Clowes v. Allegheny*

[1] However, separately proving that a plaintiff was subjected to a hostile work environment is not a sufficient condition for a constructive discharge. *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 316 n.4 (3d Cir. 2006) ("To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment." (quoting *Landgraf v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992))).

Valley Hosp., 991 F.2d 1159, 1161 (3d Cir. 1993), *cert. denied*, 510 U.S. 964 (1993); *see also Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 169-70 (3d Cir. 2013). Furthermore, "a reasonable employee will usually explore such alternative avenues thoroughly before coming to the conclusion that resignation is the only option." *Clowes*, 991 F.2d at 1161 (citations omitted).

De Piero argues he was constructively discharged because: (1) his "job responsibilities were radically altered" when he "was required to grade on the basis of race;" (2) "his annual performance reviews were downgraded;" (3) he "was sanctioned" for objecting to the race-conscious trainings he attended; and, (4) Penn State clawed back his July 2022 paycheck. But viewed in the light most favorable to De Piero, for the reasons set forth below, "under any reasonable reading of the [Amended C]omplaint," he was not constructively discharged. *Fowler*, 578 F.3d at 210.

First, De Piero's allegations regarding changes to his grading rubric cannot support treating his resignation as a constructive discharge. In the Amended Complaint, De Piero alleges that Naydan instructed him to consider race as part of the grading process twice: first in March 2019, when she emailed him and said that "racist structures are quite real in assessment . . . regardless of the good intentions that teachers and scholars bring to the set-up of those structures, and again in January 2021, when, at an "[a]ntiracism pedagogy" meeting, she said, "I'm thinking about grading as an antiracist act." Based on these comments, De Piero alleges that "Penn State pressured [him] to ensure consistent grades for students across 'color line[s],'" which he argues "radically altered" his job responsibilities.

But neither of Naydan's comments warrant a conclusion that De Piero was constructively discharged. With respect to the March 2019 comment, it is implausible that De Pietro would have felt compelled to resign from his job because of a discussion he had three-and-a-half years

earlier, particularly given that nothing in the Amended Complaint can be construed to allege that, at that time, he was required by Penn State to incorporate race into his grading decisions. *See McWilliams v. W. Pa. Hosp.*, 717 F. Supp. 351, 355 (W.D. Pa. 1989) (citations omitted) ("[T]here must be at least some relation between the occurrence of the discriminatory conduct and the employee's resignation."). And, although Naydan was De Piero's direct supervisor, the second comment was purely aspirational—that she was "thinking about grading as an antiracist act." She included no requirement then, or subsequently, that a student's race enter into his grading decisions. Such statements do not amount to changes in one's job responsibilities. Indeed, far more dramatic alterations have not amounted to constructive discharges. *See, e.g.*, *Gray v. York Newspapers, Inc.*, 957 F.2d 1070, 1081-82 (3d Cir. 1992) (management's threat to remove plaintiff journalist "from her long-time courthouse beat" was insufficient to support a constructive discharge).

Next, De Piero points to his June 2022 performance review, which suggested that his performance had slipped from previous years. But receiving marks of "very good" instead of "excellent" and "fair to good" instead of "very good" cannot turn a resignation into a constructive discharge. In *Clowes* itself, the Third Circuit noted that "merely receiv[ing] ratings of 'fair'" is not the same thing as being "given unsatisfactory job evaluations." 991 F.3d at 1161. De Piero's "very good" and "fair to good" marks simply are not low enough to be an objective basis for being coerced into resigning. *Cf. Mayo v. Bangor Area Sch. Dist.*, 2013 WL 3716533, at *12 (E.D. Pa. July 16, 2013) (declining to treat a resignation as a constructive discharge even though the plaintiff had received "unsatisfactory" marks on a job evaluation because those marks were the result of the plaintiff "not complying with her reporting requirements").

Although De Piero alleged that Defendants "sanctioned" him—by Borges's finding that

he "had bullied and harassed his colleagues" and by a "Performance Expectations Notice" from Marranzini and Baer that De Piero's conduct "caused significant disruption to the meeting" and was "not becoming of a faculty member"—these allegations do not support his contention that he was constructively discharged. At no point was he threatened with termination or any change in his employment conditions or was there any suggestion that he resign. *Clowes*, 991 F.2d at 1161. Moreover, as De Piero describes it, the "Performance Expectation Notice" gave him another chance: In case of any "future repeat of such conduct," there "may" be "disciplinary action."

Neither does Penn State's claw back of De Piero's July 2022 salary after he resigned support his contention that he was constructively discharged. Actions by employers that follow a resignation cannot be the basis for treating it as a constructive discharge because, by definition, they cannot have formed part of the "working conditions" that were "so intolerable that a reasonable employee would be forced to" leave their job. *Goss*, 747 F.2d at 887; *see also Mandel*, 706 F.3d at 169.

In sum, based on *Clowes* and its progeny, De Piero has not pleaded sufficient allegations to clear the high bar that the Supreme Court and the Third Circuit have set for converting otherwise voluntary resignations into constructive discharges. Even if De Piero genuinely believed that he had no choice but to leave his job, "an employee's subjective perceptions of unfairness or harshness do not govern a claim of constructive discharge." *Mandel*, 706 F.3d at 169 (citation omitted). Objectively, viewing the Amended Complaint in the light most favorable to him, however, conditions had not gotten so intolerable for De Piero that Penn State coerced him into resigning as a matter of law. Therefore, he did not suffer an adverse employment action that can be a basis for his disparate treatment claims under Title VII, Section 1981, and the

PHRA, and the Amended Complaint will be dismissed without prejudice with respect to this theory of liability.[2]

ii. Hostile Work Environment

De Piero has, however, plausibly alleged that he was subjected to a race-based hostile work environment while at Penn State. Therefore, Defendants' Motion to Dismiss will be denied on this theory of liability.

Title VII (along with the PHRA and Section 1981) renders employers liable for harassment that is "sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *see also Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181-82 (3d Cir. 2009).[3] To succeed on his hostile work environment claim, Plaintiff must show that: (1) he suffered intentional discrimination because of his protected status; (2) "the discrimination was severe or pervasive;" (3) it "detrimentally affected" him; and, (4) it "would detrimentally affect a reasonable person in like circumstances." *Castleberry v. STI Grp.*, 863 F.3d 259, 263 (3d Cir. 2017) (quoting *Mandel*, 706 F.3d at 167). To determine employer liability, the plaintiff also must show that *respondeat superior* liability exists. *Mandel*, 706 F.3d at 167 (quotation omitted). Penn State argues that De Piero cannot satisfy the "severe or pervasive" element of this cause of action.[4] De Piero responds that his department's discussions of "antiracism,"

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[2] Because De Piero has not sufficiently alleged an adverse employment action, the Court will not address Defendants' argument that the Amended Complaint "fails to allege that he was treated differently from similarly situated non-white individuals"—*i.e.*, even if De Piero did suffer an adverse employment action, it did not take place under circumstances that give rise to an inference of intentional discrimination.

[3] This theory of liability does not require proof of a separate adverse employment action, *Spencer*, 469 F.3d at 316, so the fact that De Piero resigned from his position at Penn State has no bearing on whether Penn State is liable on this theory.

[4] By only contesting this element. Defendants waive any argument in favor of dismissal based on the other elements

"white supremacy," "white privilege," and other concepts relating to discussions of race on campus, all of which "repeatedly singl[ed] out and demean[ed] faculty members on the basis of race," subjected him to a hostile work environment.

In the context of a hostile work environment case, there is a distinction to be made between "severe" and "pervasive" harassment. "[S]ome harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive." *Castleberry*, 863 F.3d at 264. Hostile work environment claims alleging pervasive harassment are designed to remedy "the cumulative effect of a thousand cuts," and acts "which are not individually actionable" but "may be aggregated to make out a . . . claim." *O'Connor v. City of Newark*, 440 F.3d 125, 127-28 (3d Cir. 2006). Whether a series of alleged incidents constitutes pervasive harassment is a circumstance-specific question: the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employees work performance" are all relevant to whether the discrimination the employee suffered was sufficiently "severe" or "pervasive." *Castleberry*, 863 F.3d at 264 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

Penn State points to a few out-of-circuit district court cases that reject hostile work environment claims brought by white plaintiffs relating to anti-racism trainings like the ones De Piero attended. *Young v. Colo. Dep't of Corr.*, 2023 WL 1437894 (D. Colo. Feb. 1, 2023); *Shannon v. Cherry Creek Sch. Dist.*, 2022 WL 4364151 (D. Colo. Sept. 21, 2022); *Vitt v. City of Cincinnati*, 250 F. Supp.2d 885 (S.D. Ohio 2002), *aff'd*, 97 F. App'x 634 (6th Cir. 2004). Quite

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of De Piero's hostile work environment claim. *See Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994), *cert. denied*, 513 U.S. 946 (1994) (citations omitted) ("An issue is waived unless a party raises it in its opening brief . . . .").

apart from the fact that none of these cases has precedential value, none is persuasive. Two of these cases were resolved after discovery on motions for summary judgment, so their analysis is not particularly relevant to resolving a case at this early stage in litigation. *Shannon*, 2022 WL 4364151 at *1; *Vitt*, 250 F. Supp.2d at 888. And the third is distinguishable. In *Young*, the plaintiff alleged that facilitators of a series of mandatory trainings "made sweeping negative generalizations regarding individuals who are white" and encouraged him to review additional reading materials that "contain[ed] outright support for forms of invidious race discrimination masquerading as 'anti-racist' literature." 2023 WL 1437894, at *1-2. The district court dismissed the hostile work environment claim because the plaintiff had failed to "actually allege any specific facts describing the nature, contents, or frequency of the mandatory training" or identify which additional reading materials he reviewed. *Id.* at *7.

De Piero's allegations are more specific: he was obligated to attend conferences or trainings that discussed racial issues in essentialist and deterministic terms—ascribing negative traits to white people or white teachers without exception and as flowing inevitably from their race—in June 2020, October 2020, November 2020, January 2021, and October 2021. His Amended Complaint contains at least some discussion of the content of each such meeting; in June 2020, in the aftermath of the murder of George Floyd, "Wong expressed her intention to cause Penn State's white faculty to 'feel the pain' that [he] endured;" in a "breathing exercise," Wong told "White and non-Black people of color to hold [their breath] just a little longer—to feel the pain;" that October, Naydan, De Piero's supervisor, co-led a professional development meeting on multiculturalism that included "supposed examples of 'racist' comments" where every hypothetical perpetrator was white; the following month included an event called "Arts and Humanities as Activism," where De Piero alleges the facilitator "condemn[ed] white people

for no other reason than they spoke or were simply present while being 'white,'" including by "condemn[ing] . . . 'white elites' and 'white self-interest;'" Naydan endorsed that training's message repeatedly; in January 2021, at an "antiracism pedagogy" meeting, Naydan spoke of race conscious grading; and, finally, in October of that year, Naydan and her co-facilitator led another training, which included an excerpt that "accused white faculty" of 'unwittingly reproduc[ing] racist discourses and practices in our classroom." It was, according to Naydan's co-facilitator, "about a group."

De Piero also documents emails and interpersonal interactions from this time period, including a comment by a colleague "that resistance to wearing masks 'is . . .more likely to be led by white males,'" an email from Smith "instructing Penn State's white employees to 'feel terrible,'" messages from Naydan including one encouraging him to "assure that all students see that white supremacy manifests itself in language and in writing pedagogy," and multiple emails urging him to watch a video titled "White Teachers Are a Problem." And when De Piero went to Borges to air his concerns, she told him that "[t]here is a problem with the white race." De Piero simply did not "get it," so, according to Borges, he should continue to attend more workshops and trainings until the message sunk in.

Taken together, these allegations plausibly amount to "pervasive" harassment that, at least on a motion to dismiss, passes muster. *Castleberry*, 863 F.3d at 264. De Piero's case looks less like *Young* or other similar cases where the plaintiff failed to plead the specificity and pervasiveness necessary to state a hostile work environment claim, *Young*, 2023 WL 1437894, at *7; *Maron v. Legal Aid Soc'y*, 605 F. Supp.3d 547, 562-64 (S.D.N.Y. 2022); *Shannon*, 2022 WL 4364151, at *12, and is closer to the plausible claim analyzed in *Diemert v. City of Seattle*, 2023 WL 5530009, at *1-4 (W.D. Wash. Aug. 28, 2023), in which a white plaintiff alleged that

he had to attend anti-racism trainings that segregated employees based on race and declared "that all white people have white privilege and are racist" and that "white people are like the devil" and "racism is in white people's DNA." *Id.* at *1-2. True, some of the allegations in *Diemert*, including one instance where a defendant "chest bumped" the plaintiff and "got in his face," go beyond what De Piero says happened here, *id.* at *2, but in both cases, "it is clear on the face of [the] complaint that, beyond any problems [the plaintiff] may have had with [the trainings], he alleges his co-workers and supervisors verbally . . . assaulted him because of his race. And that he was the target of potentially offensive comments and other abusive actions, also because of his race," *id.* at *4. "Whether there is any merit to his claims is an inquiry for another day, but for now, he has stated a plausible claim for a hostile-work environment based on race . . . ." *Id.*

To be clear, discussing in an educational environment the influence of racism on our society does not necessarily violate federal law. In allowing De Piero's hostile work environment claim to proceed, the Court does not contemplate that it is, or should be, the norm to maintain a workplace dogmatically committed to race-blindness at all costs. To do so would "blink [at] both history and reality in ways too numerous to count." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 385 (2023) (Jackson, J., dissenting). Training on concepts such as "white privilege," "white fragility," implicit bias, or critical race theory can contribute positively to nuanced, important conversations about how to form a healthy and inclusive working environment. Indeed, this is particularly so in an educational institution. And placing an added emphasis on these issues in the aftermath of very real instances of racialized violence like the murder of George Floyd does not violate Title VII, Section 1981, or the PHRA. But the way these conversations are carried out in the workplace matters: When employers talk about race—any race, *McDonald v. Santa Fe Rail Transp. Co.*,

427 U.S. 273, 278-79, 286-87 (1976)—with a constant drumbeat of essentialist, deterministic, and negative language, they risk liability under federal law.

For the reasons set forth above, Defendants' Motion to Dismiss will be denied with respect to his hostile work environment theory of liability pressed under Title VII, Section 1981, and the PHRA.

B. Section 1981's Equal Benefit Clause

De Piero also alleges discrimination under the "equal benefit" clause of Section 1981, which guarantees "[a]ll persons within the jurisdiction of the United States . . . the full and equal benefit of all laws and proceedings for the security of persons and property." 42 U.S.C. § 1981(a). As amended in 1991, the statute emphasizes that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." *Id.* § 1981(c). As discussed below, that cause of action is not available against Penn State because it is a state entity. And the operative Complaint fails to plausibly allege the necessary but-for causation for such a claim to survive.

i. Penn State

De Piero argues that Penn State's "system of campus adjudicatory offices, including the AAO, which punished [him] for asking simple questions critical of Penn State's state-sanctioned racial dogma" violated Section 1981's "equal benefit" clause separate and apart from its infringement on his contractual rights.

The Supreme Court has held "that the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units . . . ." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 733 (1989). The Third Circuit has reaffirmed *Jett*'s holding even after Congress added § 1981(c)'s guarantee against "impairment" of the rights that Section 1981 protects committed "under color of State

law." 42 U.S.C. § 1981(c); *see McGovern v. City of Philadelphia*, 554 F.3d 114, 120-21 (3d Cir. 2009). Moreover, it is well established that Penn State is a state actor. *Am. Future Sys., Inc. v. Pa. State Univ.*, 752 F.2d 854, 861 n.24 (3d Cir. 1984); *see also Henderson v. Pa. State Univ.*, 2022 WL 838119, at *4-5 (M.D. Pa. Mar. 21, 2022). Therefore, because De Piero's "equal benefit" claim references only Section 1981, and not Section 1983, it does not state a cause of action and must be dismissed.[5]

ii. The Individual Defendants

And as pressed against the Individual Defendants, De Piero has failed to state a claim for violation of the equal benefit clause. A plaintiff proceeding under Section 1981 must plausibly allege "that, but for race, [he] would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of Af. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020). But the Amended Complaint alleges that Defendants punished De Piero for, in his words, his "dissent from its official race-based dogma," not because he is white.[6] *See Wright v. Reed*, 2021 WL 912521, at *4 (E.D. Pa. Mar. 10, 2021) (citations omitted) ("Plaintiffs' allegations fail to plausibly suggest that Burkett and Johnson would not have suffered the harm they did *but for* the fact that they are African American."). De Piero's Section 1981 claim thus will be dismissed against the Individual Defendants as well.

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[5] True, as De Piero points out, the Third Circuit has held in decades past "that § 1981 is not confined to contractual matters when a governmental entity is involved. Racially motivated misuse of governmental power falls within the ambit of its 'equal benefit' and 'like punishment' clauses." *Hall v. Pa. State Police*, 570 F.2d 86, 91 (3d Cir. 1978); *see also Mahone v. Waddle*, 564 F.2d 1018, 1028-29 (3d Cir. 1977). Cases like *Mahone* and *Hall* do not, however, accurately and completely reflect contemporary decisions in that both cases were decided prior to the Supreme Court's announcement that sub-state government units may be subject to liability under Section 1983 but not under Section 1981. *Monell v. Dep't of Soc. Servs. of Cty. of N.Y.*, 436 U.S. 658, 690-91 (1978).

[6] For this reason, even if De Piero were to proceed against Penn State under Section 1983, the allegations of his Amended Complaint would not be sufficient to survive a motion to dismiss.

C. Title VI

De Piero's claim that Penn State violated Title VI of the Civil Rights Act of 1964, which "provides that '[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance,'" *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 271 (3d Cir. 2014) (quoting 42 U.S.C. § 2000d), will also be dismissed for the following reasons.

Although the Amended Complaint alleges that "Penn State receives federal funding," it does so with no explanation as to the purposes for which such funding is received. Such allegations are necessary here because Congress has expressly barred Title VI's use in labor and employment cases "except where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3; *see Burks v. City of Philadelphia*, 950 F. Supp. 678, 683 (E.D. Pa. 1996). Absent allegations "(1) that a primary objective of the federal funding defendant receives is to provide employment, or (2) that the employment discrimination complained of necessarily causes discrimination against the intended beneficiaries of the federal funding," *Fields v. Am. Airlines, Inc.*, 2021 WL 4306021, at *16 (E.D. Pa. Sept. 22, 2021) (quoting *Rogers v. Bd. of Educ. of Prince George's Cnty.*, 859 F. Supp.2d 742, 750 (D. Md. 2012)), Plaintiff's Title VI claim cannot proceed. Therefore, it will be dismissed without prejudice.

D. First Amendment Retaliation

De Piero also alleges that DelliCarpini, Naydan, Borges, Marranzini, and Baer retaliated against him for engaging in speech that he argues is protected by the First Amendment, specifically: (1) his complaint to Baer alleging race-based harassment; (2) his multiple PHRC and EEOC complaints; (3) his bias report to the AAO; (4) his further statements to Borges that

he felt "humiliated, disgraced, harassed, and discriminated against" by the facilitators of the anti-racism trainings that he attended; (5) his op-ed criticizing what he saw as race-based changes to curricula, which Chancellor DelliCarpini allegedly "suppressed;" (6) his final complaint to Baer and Marranzini that he felt harassed and discriminated against on the basis of his race; and, (7) his "challenge[], in front of the whole faculty of 'Penn State's racist orthodoxy ascribing "racism" to all white people'" at one of the anti-racism trainings. All of this speech, he argues, "related to a matter of public concern, namely, whether it is appropriate to ascribe negative characteristics to a group of individuals based purely on the color of their skin." Because De Piero has failed to plausibly allege a cognizable retaliatory act related to constitutionally protected speech, his Section 1983 claim will be dismissed.

To prevail on a First Amendment retaliation claim, a plaintiff must show: (1) that his statement was constitutionally protected; (2) that "the defendant engaged in 'retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights;'" and, (3) a "causal link . . . between the constitutionally protected conduct and the retaliatory action." *Baloga v. Pittston Area Sch. Dist.*, 927 F.3d 742, 752 (3d Cir. 2019) (quoting *Palardy v. Twp. of Millburn*, 906 F.3d 76, 80-81 (3d Cir. 2018)); *see also Flora v. County of Luzerne*, 776 F.3d 169, 174 (3d Cir. 2015) (citation omitted). When it comes to public employees, their speech is protected by the First Amendment only if three conditions are met. First, a "threshold inquiry" is whether the plaintiff "spoke as a citizen or a public employee, and as such, whether [his] speech was either 'ordinarily within the scope of [his] duties,' or simply relating to those duties." *Javitz v. County of Luzerne*, 940 F.3d 858, 865 (3d Cir. 2019) (quoting *Lane v. Franks*, 573 U.S. 228, 240 (2014)); *see Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). The speech also must have "involved a matter of public concern." *Flora*, 776 F.3d at 175 (quoting *Hill v. Borough of*

Kutztown, 445 F.3d 225, 241-42 (3d Cir. 2006)). And, finally, the government must have lacked "'an adequate justification for treating the employee differently from any other member of the general public' as a result of the statement he made."[7] *Id.*

Two alleged retaliatory events are at issue here: (1) DelliCarpini's decision "to censor" De Piero's op-ed by declining to circulate it in the "News from Sutherland" memo; and, (2) Naydan's "bullying" accusation, which was sustained by Borges and led Marranzini and Baer to issue a "Performance Expectations Notice" for speaking out at Naydan's October 2021 training.[8]

On the former, De Piero points to no caselaw to support the proposition that simply declining to signal-boost an already-published piece of protected speech would be "sufficient to deter a person of ordinary firmness from exercising his constitutional rights." *Baloga*, 927 F.3d at 752 (quotation omitted). Not every action by an employer rises to the level of retaliation. Although the threshold is "very low," *O'Connor*, 440 F.3d at 128, the retaliatory act must "be more than *de minimis* or trivial," *Brennan v. Norton*, 350 F.3d 399, 419 (3d Cir. 2003) (quotation omitted). "[C]ourts have declined to find that an employer's actions have adversely affected an employee's exercise of his First Amendment rights where the employer's alleged retaliatory acts were criticism, false accusations, or verbal reprimands." *Id.* (quoting *Suarez Corp. Indus. v.*

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[7] The parties dispute whether *Garcetti* and its progeny provide the right test because the Supreme Court there declined to "decide whether [its] analysis . . . would apply in the same manner to a case involving speech related to scholarship or teaching." 547 U.S. at 425. The Third Circuit has addressed this dictum, conceding in a footnote that "[t]he full implications" of the Court's statement "are not clear." *Gorum v. Sessoms*, 561 F.3d 179, 186 n.6 (3d Cir. 2009). Based on this footnote, De Piero urges the Court to forego applying *Garcetti* and instead determine whether his speech was protected by applying the traditional *Pickering-Connick* balancing test. *Connick v. Myers*, 461 U.S. 138, 143-44 (1983); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 569 (1968). Because the implications of *Garcetti*'s dictum do not affect the disposition of De Piero's claim, the Court will not reach this issue.

[8] The Amended Complaint does not allege that the "Performance Expectations Notice" was issued in response to any other conduct by De Piero.

McGraw, 202 F.3d 676, 686 (4th Cir. 2000)); *see also McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006) (citations omitted) ("[N]ot every critical comment—or series of comments—made by an employer to an employee provides a basis for a colorable allegation that the employee has been deprived of his or her constitutional rights."). DelliCarpini's alleged retaliatory conduct does not even rise to the level of critical comments or reprimands. Thus, it cannot form the basis of a First Amendment retaliation claim.

And because the speech that it allegedly punished was not constitutionally protected, the "Performance Expectations Notice" cannot either. The First Amendment only protects speech by public employees that "involve[s] a matter of public concern." *Flora*, 776 F.3d at 175 (quotation omitted). Speech that "addresses only the employee's own problems . . . even if those problems brush . . . against a matter of public concern by virtue of that employee's public employment . . . merely is a personal grievance" and does not receive First Amendment protection. *De Ritis v. McGarrigle*, 861 F.3d 444, 455 (3d Cir. 2017) (internal quotation marks and citation omitted). Thus, in *De Ritis*, a public defender's out-of-court statements to other attorneys expressing concern that he was being targeted for bringing too many cases to trial instead of having his clients plead guilty merely related to his employment, *id.* at 455-56 ("*I'm* being punished." "Apparently, *I'm* taking too many cases to trial." "Judge Kenney thinks *I'm* telling too many defendants they can have trials."), but his conversations with the County Solicitor and the Chairman of the County Council "express[ing] concern for individuals other than himself" were not "confine[d] . . . to his own employment situation," instead "discussing the rights of criminal defendants generally," *id.* at 456, so they implicated a matter of public concern.

Applying those principles, De Piero's comments to Naydan at the anti-racism training did

not, as pled, involve a matter of public concern. To be clear, it cannot seriously be questioned that the underlying issue that gave rise to De Piero's statements—how to address racial inequality in the classroom—is a matter of public concern. But the Amended Complaint describes De Piero airing fundamentally personal grievances towards Naydan and her co-facilitator. He "objected that, given the title of the so-called training session and the fact that he is a white writing instructor, he felt singled out and targeted in the meeting." This made him "uncomfortable," and he explained that he had "felt uncomfortable for the last year and a half" about the discourse about race in the department. He was worried that "*he* was [being] accused of 'reproduc[ing] racist discourses and practices in [the] classroom[]" (emphasis added). Although he asked for "examples" of "what it meant to bring 'equity' into his classroom," De Piero's concerns track the more personal complaints that the Third Circuit in *De Ritis* held merely "brush[ed] . . . against" a matter of public concern and thus constitute "merely a personal grievance." *Id.* at 455 (internal quotation marks and citation omitted). Any discipline he allegedly faced in response to his conduct, then, cannot sustain a First Amendment retaliation claim.

For the reasons stated above, De Piero's Amended Complaint fails to plausibly allege that he was retaliated against for his protected speech, so his Section 1983 claim will be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part Defendants' Motion to Dismiss. An appropriate order follows.

BY THE COURT:

/s/Wendy Beetlestone, J.

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WENDY BEETLESTONE, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZACK K. DE PIERO, **Plaintiff,** **v.** **PENNSYLVANIA STATE UNIVERSITY, MARGO DELLICARPINI, DAMIAN FERNANDEZ, LILIANA NAYDAN, CARME BORGES, ALINA WONG, LISA MARRANZINI, FRIEDERIKE BAER AND ANEESAH SMITH,** **Defendants.**	**CIVIL ACTION** **NO. 23-2281**

O R D E R

AND NOW, this 10th day of January, 2024, upon consideration of Defendants' Motion to Dismiss the Amended Complaint (ECF No. 23), Plaintiff's Response in Opposition (ECF No. 24), and Defendants' Reply in support (ECF No. 28), Defendants' Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**. **IT IS HEREBY ORDERED** that:

1. Counts One, Two, and Five of Plaintiff Zack De Piero's Amended Complaint, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981's guarantee of equal rights to "make and enforce contracts," and the Pennsylvania Human Rights Act, are **DISMISSED WITHOUT PREJUDICE** with respect to their allegations of disparate treatment. Defendants' Motion to Dismiss is **DENIED** with respect to De Piero's allegations of a hostile work environment in Counts One, Two, and Five.

2. To the extent that Count Two of the Amended Complaint alleges that Defendants violated 42 U.S.C. § 1981's "equal benefit clause", it is **DISMISSED WITH PREJUDICE.**

3. Counts Three of the Amended Complaint, alleging violations of Title VI of the Civil Rights Act of 1964, is **DISMISSED WITHOUT PREJUDICE**.

4. Count Four of the Amended Complaint, alleging violations of 42 U.S.C. § 1983, is **DISMISSED WITH PREJUDICE**.

BY THE COURT:

/s/Wendy Beetlestone, J.

WENDY BEETLESTONE, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZACK K. DE PIERO, **Plaintiff,** **v.** **PENNSYLVANIA STATE UNIVERSITY, *et al*.,** **Defendants.**	**CIVIL ACTION** **NO. 23-2281**

OPINION

Plaintiff Zack De Piero, a White man who previously worked as a writing professor at the Abington campus of The Pennsylvania State University ("Penn State" or "Penn State Abington") has sued Penn State and its employees: Liliana Naydan, Friederike Baer, Carmen Borges, Alina Wong, and Aneesah Smith (together, "Defendants"). His claims against them are predicated on a hostile work environment in violation of: (1) Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000d *et seq.*; (2) 42 U.S.C. § 1981; and, (3) the Pennsylvania Human Relations Act (the "PHRA"), 43 Pa. C.S. § 951 *et seq*. Defendants now move for summary judgment pursuant to Federal Rule of Civil Procedure 56. Defendants' Motion shall be granted, for the reasons that follow.

I. FACTS

De Piero worked as an Assistant Teaching Professor of English Composition in the Writing Program at Penn State Abington from August 2018 to August 2022, when he resigned to take a position at another college. His claims are premised on twelve incidents over the course of around three-and-a-half years:

1. A March 28-29, 2019, e-mail thread which discussed scholarship regarding antiracist writing assessments;

2. A June 5, 2020, Zoom "Campus Conversation" about racial injustice;

3. A June 19, 2020, e-mail commemorating Juneteenth;

4. E-mails in August 2020 regarding Penn State Abington's hiring of a White police officer;

5. E-mails in that same month regarding the academic focus of the 2020-21 Writing Program professional development meetings;

6. October 2020 e-mails promoting an event on campus regarding the "rhetoric and writing of critical race theory";

7. A Writing Program professional development meeting held on November 2, 2020, which discussed racism in writing assessments;

8. An internal complaint filed by Defendant Naydan in March 2021 against De Piero;

9. Penn State's handling of an internal complaint filed by De Piero in September 2021 which raised concerns about discrimination and harassment on the basis of color;

10. An October 18, 2021, Writing Program professional development meeting in which antiracist approaches to teaching and learning in writing courses were discussed;

11. Penn State's handling of an internal complaint filed by Defendant Naydan in October 2021 which accused De Piero of harassment on the basis of sex and political ideology; and,

12. Subsequent disciplinary actions taken by Penn State against De Piero.

Turning now to the details of De Piero's concerns.

A. March 28-29, 2019, E-mail Thread Regarding Asao Inoue's Scholarship

The first incident of which he complains sprang from a discussion that took place on a listserv called "Writing Program Administration"[1] regarding the scholarship of Asao Inoue—a professor at a different university whose work focuses on antiracist and social justice theory and practices in writing assessment. Following that listserv discussion, De Piero and Defendant

[1] De Piero described the "Writing Program Administration" as an "organization of writing researchers and teachers" whose listserv "is open to the public."

Naydan—who served as the Coordinator of the Writing Program during his tenure at Penn State Abington—engaged in the following e-mail conversation, over a period of two days (March 28-29, 2019). De Piero started the conversation with an e-mail he sent to Naydan and two other colleagues stating in relevant part:

> So check it out: I draw on Inoue's work quite a bit; his scholarship is usually there, somewhere, sprinkled into almost all of the stuff I write/think about, and I agree with most of what he says—but not *everything* and I think *that's OK* . . . . Inoue's work, along with everyone else's is subject to scrutiny and critique—it's part of what scholars do—and to hear some people on that listserv viciously attack other people ("take your white sheet and go home because all your KKK fuckery isn't going [sic] derail our fields important conversations") for any questioning of his work (namely, his "antiracist writing assessment" theory/idea) is just so, so out of line. . . . Like, who have we become as a field—or, maybe more technically, a discourse community within a field—when we can't try to push against ideas for productive purposes. . . .
>
> Honestly, I very genuinely wonder what, exactly, Inoue means by "antiracist writing assessment" (What, *specifically* is/isn't that? And who, exactly is arguing for the opposite of that?! And is the comp field really the audience who needs to hear this—don't we embrace diverse language practices?) but I couldn't *DARE* post those questions to the listserv—not even in the spirit of intellectual curiosity. If I did, I would get eaten alive, painted as a racist, etc. . . . .

The following day, Naydan replied, "Zack, I so very much appreciate your message. Like you, I think the conversation on the listserv has been totally insane." She then clarified:

> I personally think that racist structures are quite real in assessment and elsewhere regardless of the good intentions that teachers and scholars bring to the set-up of those structures. For me, the racism is in the results if the results draw a color line. But that notion didn't always make sense to me. And there are ways in which I still sometimes struggle with it when I hear colleagues of color struggle with it because the designation of racism is ideally supposed to do inclusive, anti-racism work. So I get your struggle with the idea Zack, and I think it's frustrating that it feels like such a challenging thing to talk about.

Naydan concluded by saying that she "respect[s] and appreciate[s] [De Piero] even if [he] hate[s] everything" she said. He responded a few hours later, thanking the group for entertaining his thoughts and stating, "It seems to me that a common refrain in our exchanges is something to the

tune of: open, respectful dialogue can go a long way towards coming together, alleviating tensions, disrupting preconceptions, bridging misunderstandings, etc." Despite the conciliatory tone in his responsive e-mail, De Piero maintains in this lawsuit that Naydan's correspondence with him "expressed [a] corrosive race-based ideology."

B. June 5, 2020 "Campus Conversation"

The next incident of which De Piero complains came on June 4, 2020 (over a year after his e-mail exchange with Naydan about Inoue's work) when Damian Fernandez, Penn State Abington's then-Chancellor, sent the following e-mail to all faculty and staff, entitled "Campus Conversation":

> Please join the campus community in an open dialogue about the current racial justice movement, the tragic death of George Floyd and others, and ongoing actions. The Zoom meeting will be an opportunity to support each other, and to learn from and with each other.[2]

That meeting, which took place the following morning on Zoom, was facilitated by Defendant Alina Wong, Penn State's then-Assistant Vice Provost for Educational Equity. De Piero attended and recorded the meeting.[3] There, Wong provided introductory remarks during which she spoke about Black people who have been killed by police. She talked about some of their

[2] Under Federal Rule of Evidence 201, the Court takes judicial notice of the following excerpt from an article about the May 25, 2020, murder of George Floyd: "Floyd, a 46-year-old Black man, was killed in police custody in Minneapolis. A bystander's video showed police officer Derek Chauvin kneeling on Floyd's neck for more than nine minutes as Floyd pleaded for help, saying he couldn't breathe. . . . Floyd's death sparked widespread protests and rekindled the Black Lives Matter movement. It also elevated a national conversation about race, police brutality and social injustice." https://www.cnn.com/2021/05/21/us/gallery/george-floyd-protests-2020-look-back/index.html; *see also Benak ex rel. All. Premier Growth Fund v. All. Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006) (concluding that the district court did not abuse its discretion when it took judicial notice of newspaper articles when they "serve[d] only to indicate what was in the public realm at the time").

[3] Penn State asserts that De Piero's recordings of various meetings and events violate the Pennsylvania Wiretap Act, which prohibits intentional interception of any oral or electronic communication without the consent of all parties involved. *See* 18 Pa. Cons. Stat. §§ 5703, 5704(4). Here, it argues that De Piero intentionally recorded several meetings with Baer, Naydan, Borges, and other Writing Program faculty, without obtaining consent from any of them. However, putting aside the question of whether such conduct violates the Pennsylvania Wiretap Act, Penn State makes no argument as to the inadmissibility of these recordings for purposes of the present Motion, so they will be considered as part of the record.

last words: "I can't breathe." She opined that "breathing has a become a privilege" in our society. She continued:

> Like breathing, a privilege, it happens and we benefit from it whether we want it or not. We have to choose to hold our breath and that is what we are doing today in honor of George Floyd, Manuel Ellis, and Eric Garner. . . . We are choosing to hold our breaths for those who can no longer breathe. When we hold our breaths, there will come a time when we want to release. We want the relief. We need the oxygen and the mechanics that go along with breathing. And I just ask us to think about who can exhale? Who can release and who can find that relief?
>
> It's a challenge for all of us today, and especially for White and non-Black people of color, is to hold our breaths just a little bit longer, to not give into our privilege to not give in to our ability to release, to exhale. To give just a bit more air to Black communities so that they can have another breath.

To move forward, she asked the participants to "sit in the sadness and pain and anger and discomfort, and those of us with privileged racialized identities need to sit in it just a bit longer." By doing so, she said, the meeting participants could "move forward with intention and care and solidarity." With that, she said "let us take a breath. Collectively, together. Hold it in for as long as you can." She further invited "those of us who are White and non-Black people of color to hold it just a little bit longer to feel the pain just a little bit, knowing that it's nowhere near the pain, it's metaphorical at best, so let's do that now."

Other presenters also shared comments throughout the meeting. In response to a Black colleague's remark that he was "concerned about the looting" and its impact on cities, Wong stated:

> There has been a disruption, I think, in all of our lives. Again, what I'm interested in doing is staying in the disruption and actually disrupting more because I think that's what we haven't seen and that's what we haven't done. That if after the COVID-19 pandemic, if after the protests and things that are happening now, we go back to the normal. We go back to shopping at Target and not thinking about the businesses. And so I think, you know, what we call looting, I think of just as getting what, getting what you're due because we as a capitalist country prioritize material goods and property over lives, over humanity especially for Black folks. And how do we continue that disruption?

Near the end of the conversation, Wong offered to support the creation of affinity groups on campus. For instance, she asked "[D]o you want to create a White anti-racism group? So that the White folks at Penn State Abington are doing your work with each other, teaching each other. . . . I can provide some resources." She made the same offer to "Black faculty and staff" as well as "non-Black communities of color" on campus. She also challenged faculty to "incorporate antiracism curriculum and pedagogy and practices into" their "classes," "work environments," and "advising." Specifically, she said:

> One of the things that I hear from faculty sometimes is "I teach calculus. There's no racism in calculus." Yes there is. Racism is everywhere. The sexism is everywhere. The homophobia is everywhere, the classism is everywhere. Classism is built into our higher education system. We are founded upon White supremacy.

Following the meeting, De Piero filed a "government fraud" complaint with the Pennsylvania Office of Inspector General ("OIG") alleging that he was "concerned" that Wong's "looting" comment represented a "possible call to engage in illegal activity." He said that such rhetoric created threats to not only the "safety and security" of the campus, but also to "the security of [his] employment in the Penn State system," since the issue is "intensely politicized" and divergent perspectives do not seem welcome. OIG subsequently informed De Piero that it had no jurisdiction over his complaint.

De Piero maintains that Wong's presentation demonstrated "her own anti-White bias." He was offended by her comments—particularly those about breathing and looting—and said that they "reveal[] PSU's race-essentialist stereotypes."

C. June 19, 2020, E-mail Commemorating Juneteenth

Two weeks after the Zoom "Campus Conversation," on June 19, 2020, Defendant Aneesah Smith, Penn State Abington's then-Director of Diversity, Equity, and Inclusion, sent an e-mail to the campus listserv commemorating Juneteenth—a federal holiday marking the ending

of slavery in the United States. After describing the origins of the holiday, Smith stated that "[t]oday more than ever, Black and Brown people are calling on white people to stand with them and take action. We've been fighting too hard and too long." She then provided "a few ways you can celebrate Juneteenth and continue to fight for racial justice beyond today," which included:

1. Stop talking and listen to what needs to be done.

2. Find an accountability partner and make the list public of what actions you will take. You CAN do this on social media. A lot of those actions will be giving up privilege and making room for folks who you may not have noticed have no room at all.

3. Spend time in spaces with folks who are not like you.

4. Stop being afraid of your own internalized white supremacy. Search and look within at hard facts of thought and deed. Who cares about being comfortable? What about being true, brave and real instead.

5. Hold other White people accountable not on social media, instead with measured voices that call folks in to look and wrestle—to change. Engage in courageous conversations, in hearing folks out and in allowing yourselves to feel terrible and to let that feeling be a crucible for change.

Fernandez later responded to "add just one essential caveat to" the message—namely, that "[a]ll Americans and all peoples of good will should acknowledge, honor, and celebrate Juneteenth. Coming together on this day will help heal our nation."

De Piero avers that he "would have happily joined the celebration," but felt "singled out" because of his race and the insinuation that "white supremacy was or is a reality" at Penn State.

D. August 2020 E-mails Regarding the Hiring of a White Police Officer

During the summer of 2020, on August 10-11, Penn State e-mailed the "Abington listserv" to introduce two police officers to the campus community: Officer Badie, a Black man, and Officer Lacey, a White man. In response to the e-mail regarding Office Lacey, a faculty member replied to the entire listserv, stating:

> Welcome to Office [sic] Lacey. He sounds like exactly the background who could benefit from a serious anti-racism program at the Police Department. I'm not imputing anything to him personally. But I hope you can see that, in hiring experienced officers of his caliber, you do emphasize the need for in-place, up-front anti-racism training.

After a different faculty member responded to admonish his colleague for the tone of her e-mail, Naydan wrote: "I respect you very much, but Black Lives Matter. That's not always a comfortable or easy thing to say if you're a white person trying to say it right." She continued, "I think it's ok to feel uncomfortable by a string of email messages from our police because those messages are political . . . . The messages from our police have been making me uncomfortable." After a third faculty member asked Naydan to give Officer Lacey "a fair chance to be a part of our community," Naydan wrote back, "The problem for me is that our country is in a state of crisis because the police are killing Black people. This doesn't mean that I look at an individual police officer and feel hostility toward that individual." Rather, she explained, "I look at the police and see a systemic problem." Eventually, Andrew August, Penn State Abington's then-Interim Chancellor, wrote to the listserv expressing his concern about the comments made about Officer Lacey. He wrote that "[i]t is important that we all approach one another and all members of our community with sensitivity and recognize our biases and assumptions. I would also encourage us all to maintain civility and promote a culture of mutual respect and collegiality."

De Piero claims that he viewed this e-mail chain as Penn State's endorsement of the notion that "Whites are automatically oppressors" while "Blacks [are] automatically the oppressed." He echoed the sentiment of a staff member, who at some point during the conversation opined that the situation was "dangerously close to the textbook definition of a 'Hostile' and 'Toxic' work environment."

E. August 2020 E-mails Regarding the Focus of the 2020-21 Writing Program Meetings

In preparation for the fall semester, on August 3, 2020, Naydan shared with the Writing Program faculty a statement from the Conference on College Composition and Communication ("CCCC")—an organization regarded by the parties as the "major professional organization for writing studies." This, according to Naydan, was not unusual: she regularly circulated statements and documents from CCCC "in case anyone isn't a member and they wouldn't get it then and I want[ed] them to see it."

But De Piero complains about the one she shared on August 3 because it focused on a demand for "Black linguistic justice"—in essence, a call for the academic community to "stop teaching Black students to code-switch" and instead inform "Black students about anti-Black linguistic racism and white linguistic supremacy" through "political discussions and praxis that center Black language." In her e-mail, Naydan noted that CCCC's statement "calls on all of us to engage in antiracist work through the thorny process of reviewing and revising our teaching materials and our perspectives." Naydan then expressed her "hope" that the faculty would "join [her] in this important work to assure that Black students can find success in our classrooms and to assure that all students see that white supremacy manifests itself in language and in writing pedagogy."

Days later, Naydan, along with two Professors who were also in the Writing Program—Stephen Cohen and Grace Lee-Amuzie—engaged in an e-mail conversation about putting together a grant application to "support some kind of dialogue about Black linguistic justice" for the Writing Program faculty. Naydan suggested using the grant money to bring in speakers who would focus on race and racism in the classroom and composition field to present at the Program's monthly professional development meetings. Specifically, she said, "[t]here's no way

I would be ok with not talking about racism right now as a Writing Program. We need to talk about what's happening in our historical moment and how it pertains to our teaching." Cohen, for his part, floated the idea of Inoue as a potential speaker and continued to brainstorm topics for the meetings. He also remarked, "I'd like to see you (Lila)[4] channel communication about" the initiative "so that it seems 'official' and sanctioned by the English program (rather than just the community of practice)." The three were ultimately awarded the grant from Penn State's Schreyer Institute for Teaching Excellence.

De Piero alleges that Naydan's e-mail amounted to an instruction from the Coordinator of the Writing Program for the faculty to "teach that white supremacy exists in language itself, and therefore, that the English language itself is racist . . . and white supremacy exists in the teaching of writing, and therefore writing teachers are themselves racist white supremacists."

F. October 2020 Promotion of Aja Martinez's Presentation

Once the fall 2020 academic semester was underway, on October 22, 2020, Penn State's Interim Division Head for Arts and Humanities, David Ruth, e-mailed all faculty inviting them to several upcoming events in the "Arts and Humanities as Activism series." One of the events, scheduled for November 13, 2020, was "a faculty discussion with Aja Y. Martinez," an Assistant Professor of Writing and Rhetoric at the University of North Texas who was to present on "the rhetoric and writing of critical race theory." Later in the semester, Naydan forwarded Ruth's e-mail to the Writing Program faculty to amplify the invitation. De Piero replied to her e-mail saying that while he would not be able to attend the presentation, he was "interested in Dr. Martinez's ideas, though, so if a recording is made available, please send it my way." Although it was not ultimately recorded, De Piero was able to find and watch a similar presentation

[4] Naydan's first name is Liliana—but is referred to at various points in the record as "Lila".

delivered by Martinez through the National Council of Teachers of English.

De Piero alleges that Martinez's work framed objectivity, race neutrality, and merit around a White "master narrative." He also took issue with her description of Ward Connerly, a Black scholar opposed to affirmative action, as telling a "white story," and Penn State's framing of the event as a "faculty discussion," since his objections to its content later resulted in disciplinary action.

G. November 2, 2020, Writing Program Meeting

On October 6, 2020, Cohen sent an e-mail to Writing Program faculty to remind them about a Writing Program professional development meeting scheduled for November 2, 2020, about "racism and writing assessments." The associated materials for that meeting were several chapters from Inoue's book, *Labor-Based Grading Contracts*, and a video interview titled "White Teachers are a Problem | A Conversation with Asao Inoue." De Piero attended the meeting, having reviewed both materials ahead of time.

The title of the Inoue interview, according to its moderator, was an homage to the "famous passage in *The Souls of Black Folk* where W.E.B. Du Bois describes being or feeling constantly asked as a Black man, 'How does it feel to be a problem?'" Of relevance to De Piero's claim, the moderator and Inoue engaged in the following dialogue:

> MODERATOR: Probably the most difficult passage in your talk is this one: You say to your colleagues: I'm going to quote several sentences here—"You perpetuate white language supremacy in your classrooms because you are white and stand in front of your students as many white teachers have before you, judging, assessing, grading, professing on the same kinds of language standards, standards that come from your group of people. It's the truth. It ain't fair but it's the truth. Your body perpetuates racism." And I see two things running together here. One is white actions, specifically the action of judging by white standards. And then the other is white bodies, simply being in the room as a white person. And now I know I can change my actions, but I can't change my body. I can change what I do but not who I am, and if both are bad then I'm wondering, where does that leave us?

> INOUE: Yeah. Great question, and again, another one that I'm really thankful and humbled that you brought up. . . . So, I think this passage that was part of the address came out of me needing to tell my white colleagues, most of whom I love and care about, that it fucking sucks and hurts and is hard to be the problem. So it's a paradox, and a paradox cannot be solved. Both sides are equally true, or all sides are equally true or have some truth to them. So yeah, I'm not offering a way out of this paradox. It's a paradox, one of those white supremacist structures that have been created historically and maintained and cultivated and nurtured throughout history, right? So it's a situation that we didn't create but we're in. So I'm not blaming people for being white. Being white is not a problem. It is the conditions within which white people live that is the problem. So the problem is the condition of being white in a white supremacist world that gives favor and privileges to white bodies, and then those bodies get read differently. So that same issue or that same dynamic works in a different direction when you're a body of color, when you're Black, or you're Latinx, and so forth. So for me it's really more about the conditions in which we do this . . . . We should be questioning and thinking about it. We should be finding ways. I think this is an absolutely vital question for every writing teacher to think about when they teach language and then judge that language or grade that language in a classroom, which, when we know what that means for our students, it means doling out opportunities and prizes to folks.

The Writing Program featured Inoue's work on at least two additional occasions during the 2020-21 academic year. Its members met on March 29, 2021, to discuss "racism and writing assessments," reading additional chapters of Inoue's book. And the following month, with funding from Penn State's Center for Intercultural Leadership & Communication, Naydan and her colleagues arranged for Inoue to speak with the Writing Program faculty. The title of Inoue's presentation was "Understanding and Addressing White Language Supremacy in Antiracist Writing Assessments Ecologies." In advance of the talk, De Piero reached out to Naydan to ask whether his students could attend the lecture. He suggested that "Inoue's talk . . . could present an interesting opportunity for students to dig further into the various concepts we've been studying throughout the semester." Naydan replied that "sadly" the presentation was only open to faculty but thanked De Piero "for always thinking about professional experiences for your students."

As set forth in greater detail below, De Piero alleges that he was deeply offended by Inoue's scholarship—particularly the notion that "white teachers are a problem." He claims that such discourse "enforce[d] a raft of other stereotypes" about the White race and disturbed him.

H. March 2021 Bias Report Filed by Naydan

In March 2021, Naydan submitted an internal "Bias Report" with Penn State's Affirmative Action Office ("AAO") accusing an unnamed faculty member of harassment on the basis of "[g]ender or gender identity." She alleged that this faculty member had been creating a hostile environment by, among other charges: (1) flippantly dismissing his colleagues' concerns about resistance to mask wearing on campus by White students; (2) frequently objecting to the Writing Program's yearlong focus on "antiracist writing pedagogy"; and, (3) circumventing her administrative responsibilities and, in particular, her role advising students. Naydan later confirmed that the report was about De Piero. She said that she did not pursue this course of action to get him "into any trouble," but instead to find strategies to better manage the situation and ultimately help "dissipate" the hostility between them.

After Naydan shared some of her concerns with Defendant Friederike Baer, Abington's Division Head of Arts and Sciences, Baer requested a meeting with De Piero, which took place via Zoom on April 15, 2021. Although Baer and De Piero both took notes during the meeting, De Piero told a friend that he also "recorded it just in case this gets legal." To that end, the recording indicates that Baer said that Naydan is very committed to antiracist pedagogy, to which De Piero replied, "I am too." De Piero also told Baer that some of Naydan's approaches to antiracist pedagogy were "needlessly divisive, and there are better ways of achieving the same end goal, which is getting the most out of every student, treating them fairly, respecting their individuality." He said that he wanted "a much more inclusive framing of how we tackle some of this stuff" and asked Baer to "try[] to remind [Naydan] that some of these conversations and

strategies might be counterproductive at times, or possibly even demeaning, borderline on harassment."

I. September 2021 Bias Report Filed by De Piero

On September 1, 2021, De Piero received an e-mail from Penn State's "Office of the President" which stated that "Penn State encourages the reporting of misconduct. If you see something, say something." The e-mail also included links to various mechanisms for reporting misconduct. Relying on these resources, De Piero filed a Bias Report with the AAO on September 13, 2021, in which he complained of discrimination and harassment on the basis of "race and color." Citing Naydan and another faculty member in the Writing Program, De Piero alleged, in relevant part, that "[o]ver the past year—and on multiple occasions—some members of my department (English) have made discriminatory/biased remarks against White students and White faculty (not specific ones, but in general terms)." The "most egregious example," he explained, was when he was asked to view the interview with Inoue titled "White Teachers Are a Problem" in advance of the November 2020 Writing Program meeting.

Within three days of receiving the complaint, Defendant Carmen Borges, an AAO Officer, met with Baer to discuss De Piero's allegations. Borges took handwritten notes during this meeting, which included the following statements: "Lila very committed to diversity issues. Sometimes too much;" and, "[Baer] agreed that Lila does easily puts things/interactions in the microaggression category." When asked if Borges' notes accurately reflected her impressions of Naydan—namely, that "she was too preoccupied with microaggressions—Baer testified: "[n]o, that's not how I would explain this. I think that what I meant to say is the first part, Lila is very committed to diversity issues." Regarding the second quote—that Naydan's commitment was "sometimes too much"—Baer declared that what she meant to convey was that it was "Zack's perception that it's too much . . . I personally don't think it's too much, so that's I think what

Carmen meant or at least that's what I meant."

On September 20, 2021, Borges e-mailed De Piero to request his availability for a Zoom meeting. The meeting took place two days later. Unbeknownst to Borges at the time, De Piero recorded it. During the conversation, De Piero recounted how Naydan repeatedly asked the Writing Program faculty to engage and reckon with offensive scholarship, including works by Inoue and an article titled: "The Myth of the Colorblind Writing Classroom: White Instructors Confront White Privilege in Their Classrooms." Because of the constant focus on antiracism, De Piero bemoaned that, "I feel awful every single day. I wake up and think to myself, I'm a white teacher, I'm a problem. I go to bed, I think to myself, white teachers are a problem. My colleagues think I'm a problem."

In response, Borges reassured him, "No. It's not about you, it's about a group of people. It's about a historical problem that involves a group of people. It's not about you." Borges also noted that while Naydan's conduct was perhaps "too much" and "too focused" at times, she may not have been aware that the antiracist rhetoric did not "fall well with some people." In that vein, she asked whether De Piero had considered not attending Writing Program meetings, to which De Piero responded:

> I didn't attend yesterday's meeting for the pretty much the first time since I've been here. I asked my supervisor when I met with her, Friederike Baer, two weeks back. She asked me how what she could do to support me, and I said, I didn't want anything more to do with [Naydan] moving forward in the future except bare necessities. . . . And she said, fine. So she you're your suggestion you just offered it sounds like [Baer] is okay with that. The unfortunate thing is, I'm no longer able to participate in my programmatic meetings. I can't help to think, this might be unfavorable to me in future teaching evaluations which are usually conducted by my colleagues.

To this, Borges told De Piero that she understood his concerns but stressed that this type of discourse—whether it be published by Inoue or shared by Naydan—likely fell under the

umbrella of academic freedom. Borges said that De Piero should try, as a professor and scholar, to "be open-minded to different perspectives."

De Piero rejected this notion and instead asked her whether he should willingly subject himself to what he deemed university-sanctioned harassment and discrimination. The two then engaged in the following dialogue:

> BORGES: As an academician . . . it's not about you. It's not an attack on your person as a White person. It's not about you. We don't carry the burden of our race, of our people. We don't carry it individually. We don't. That's . . . you know, that's a broad thing in society. You're not responsible. You are a White person, but you're not responsible for everything that has happened or what White people have done or not done. But the important thing is to have . . . the ability to look at it from a broader perspective, not from an individual perspective. And then you adopt from there what you what makes sense to you. . . . [O]r you see what doesn't make sense you don't have to agree. But start by opening up and listening to what it is that's happening without seeing it as an attack on your person. This is not about you, at all. This agenda is going on and it's not about any race. It's about people understanding each other and participating and including each other.
>
> DE PIERO: "White Teachers are a Problem" is about just one race. One color of skin that I have no control over.
>
> BORGES: But it's not about you. It's about the White race, yes, it's about the White race, but it's not about you.
>
> DE PIERO: Even though I'm a member of the White race, it's not about me?
>
> BORGES: No. It's not about you at all.

Borges met with Naydan shortly thereafter. Following their conversation, Naydan sent her an e-mail summarizing "a snapshot of what [she saw] as the beginning" of her issues with De Piero.

On November 12, 2021, Borges sent De Piero a letter informing him that the AAO did not "find sufficient evidence to substantiate [his] allegation of discrimination." She explained that "[t]he particular topic for academic discussion, while it may be offensive to [him], does not constitute discrimination towards [him] as an individual and does not rise to a violation of the

University's Non-Discrimination policy." Borges noted that Naydan, as the Coordinator of the Writing Program, had an ongoing "responsibility to identify topics of current interest beneficial for discussion and professional development for the faculty in the English Writing Program." Further, the decision to select Inoue's research for a presentation and as a topic for discussion was "made in collaboration with [Writing] Program faculty and Campus administration in line with the Campus Strategic Plan." And in any event, attendance at any "monthly discussion meetings is voluntary." Borges concluded by acknowledging that De Piero "may disagree" with this outcome but "trust[s] that [he] will appreciate that [it] was made in a neutral and objective fashion with respect for the rights of all parties involved."

De Piero viewed the AAO's letter—specifically the reference to the "Campus Strategic Plan"—and an endorsement of Naydan's "race-essentialist pedagogy."

J. October 18, 2021, Writing Program Meeting

In advance of the October 18, 2021 Writing Program meeting, Naydan sent an e-mail to the faculty informing them that she and Lee-Amuzie planned to facilitate a discussion about Octavio Pimentel, Charise Pimentel, and John Dean's article, "The Myth of the Colorblind Writing Classroom: White Instructors Confront White Privilege in Their Classrooms."[5] She asked that the faculty to "please read and come prepared to discuss" the piece. Naydan also circulated an agenda for the meeting, which included plans for a discussion of four quotes selected by her and Lee-Amuzie.

The meeting took place via Zoom as scheduled. De Piero attended and recorded the discussion. Naydan started the meeting with a disclaimer that "anybody who doesn't feel comfortable talking about any of this does not have to be here by any means." De Piero later

[5] All the authors are professors at other universities.

testified that while he was not comfortable with the content of the meeting, he stayed because he "want[ed]" and "deserve[d] to be an active member" of the Writing Program and thought his annual "service evaluation[]" might be negatively impacted by not participating. Naydan next provided the group a set of guidelines to steer the meeting, including "listening actively with an ear to understanding others' views, criticize ideas not individuals, commit to learning, not debating, avoid blame, speculation and inflammatory language, and allow everyone the chance to speak."

With that, the group started its discussion of the first quote, which read as follows:

> The practice of not labeling White European American texts as cultural texts serves to keep them as the unstated cultural norm, the norm to which all other texts can be differentiated from. Thus, despite its inclusive qualities, the diversity approach to teaching writing, in many ways, reinforces the status quo.
>
> The other critique of the diversity approach is its inability to deconstruct race. In its insistence that we are all equal because we are all different, the diversity approach, or what Gilyard refers to as the "formulaic polycultural curriculum" neglects to examine how race indeed shapes different life experiences and opportunities for people. Nieto and Bode critique the diversity approach by stating, "To be effective, multicultural education needs to move beyond diversity as a passing fad. It needs to take into account our history of immigration as well as the social, political, and economic inequality and exclusion that have characterized our past and present, particularly our educational history." Without attending to issues of inequity and particularly the role race [plays] in constructing social inequities, we remain unaware of and thereby unwittingly reproduce racist discourses and practices in our classrooms.
>
> The diversity approach, without the deconstruction of race and white privilege, can do more harm than good in classrooms.

Following several minutes of discussion, De Piero chimed in and stated, "It's a pretty extreme charge to suggest that teachers are reproducing racist discourses and practices in their classrooms, uh especially with I guess I took the one I modified it by removing unwittingly, which is also maybe even heightens that extreme charge." He then asked what the authors meant by "attending to issues of inequity," because "if I'm not doing that, then I open myself up to

accusations that I am quote reproducing racist discourses and practices." After no one responded, De Piero clarified that his question specifically was for Naydan and Lee-Amuzie since, to his knowledge, they assigned the piece. After some brief discussion by other faculty members, De Piero expressed his dissatisfaction with the lack of "concrete" answers, immediately after which Naydan called upon Lee-Amuzie, stating, "I don't, I don't know how to respond to this because it's your segment of the meeting. I also feel very uncomfortable right now, and I just wanted to say that." De Piero then remarked: "I couldn't agree more. I felt uncomfortable the last year and a half at these meetings. I did think, though, that uncomfortable conversations were a part of, were an explicit goal for some of these. So I'm a little confused about that, too." Lee-Amuzie and Naydan then attempted to answer De Piero's question with examples from their personal and professional lives.

Lee-Amuzie subsequently transitioned to the second excerpted quote for discussion, which read:

> Once [White European Americans] recognize instances of whiteness and how they benefit from it, whiteness begins to lose its invisibility and its power to influence. To redesign social systems we need first to acknowledge their colossal unseen dimensions. The silences and denials surrounding privilege are the key political tools here. Once white instructors begin to identify how whiteness operates in their own lives, they can begin to deconstruct how white privilege operates within their writing classrooms.

After another faculty member shared his reaction to the quote, De Piero asked why White teachers were the sole focus of the article. He said that this quote reminded him of the "White Teachers Are a Problem" interview and sought specific suggestions as to how he and other White teachers should behave in the classroom. In response, Lee-Amuzie clarified that this concept is "not about individual instructors" and spoke about the history of structural racism in the country by analogy to the dynamics of an ecosystem. But De Piero was again dissatisfied

with her response and asked: "If it's not about the individual then who is it about?" A different faculty member tried to provide him with another analogy to explain the concept, to which De Piero stated "There are legal um descriptions for what falls under discrimination and harassment. And it's when it's you attribute negative characteristics to certain protected groups based on thing outside out of their control. All forms of discrimination and harassment are a problem. And in many cases, they're illegal." Naydan and others provided additional thoughts to relate the scholarly texts to their personal lives, and the meeting concluded shortly thereafter.

K. October 2021 Bias Reports Filed by Naydan and Lee-Amuzie

Naydan e-mailed Baer a few hours after the meeting ended to inform her that she felt as though De Piero "bullied and harassed her" throughout the conversation. Baer met with Naydan shortly thereafter and sent an e-mail to Borges summarizing their exchange. She noted that Naydan seemed reluctant to file a Bias Report, as Naydan was "worried that [De Piero] may see this as retaliation" for his complaint against her. And indeed, De Piero now alleges that Naydan "could not tolerate anyone who called antiracist work into question" and therefore "retaliated by submitting a formal grievance against [him]."

To that end, Naydan ultimately filed a Bias Report accusing De Piero of harassment on the basis of "sex" and "political ideas" based on his conduct at the meeting as well as several other incidents from 2019-21—many of which she had previously detailed in her March 2021 complaint. In her view, De Piero's Bias Report was "a form of harassment" against her. In the days that followed, Borges spoke with the other attendees at the October 18, 2021, Writing Program meeting to hear their perspectives. She also spoke with De Piero, who again told her that "it's very difficult to talk about race . . . and, on my behalf, it's been very, very difficult to be asked to see videos titled 'White Teachers Are a Problem.'" Borges immediately responded that De Piero should "get beyond that." She continued:

> When I saw it, I had the same impression initially. . . . It takes a little thing to get beyond that. What is this all about? What are they trying to say here? It takes a while . . . you can't get stuck with first impression. Going beyond that, you begin to see, ok, this is what they mean. You know, we put it in historical context, this is a lot of abstract material, and this is what . . . the discussions need to go around with.

After De Piero asked Borges whether the video also bothered her the first time she saw it, Borges acknowledged that it did "shock" her when she viewed it. But she eventually came to understand that it was about a "broader . . . historical context."

Later in the conversation, De Piero confronted Borges with her suggestion from their initial meeting in September 2021 wherein Borges said that he should consider continuing to attend the Writing Program meetings to better understand the other participants' perspectives. To that Borges said:

> Well, I may have [said that] because I told you that you are entitled to engage and find out. The issue is the manner in which you did it. The problem was the manner. It came across hostile, aggressive, intimidating. And, and that's consensus among others that I have spoken to that were in the meeting. . . . It's not what you're trying to clarify for yourself. It's not how you tried to ask the question. It's the manner in which it was done. The tone, the body language is the aggressiveness [and] the insistency . . . .

Ultimately, on December 8, 2021, Borges sent Naydan a letter regarding the outcome of her Bias Report, which provided the AAO's conclusion that "De Piero's conduct was unprofessional and contrary to the University Values Statement." The AAO could not, however, "conclude that the conduct meets the definition of unlawful harassment and constitutes a violation of University Policy." That was because the AAO found "professional and programmatic disagreements at play here, and that De Piero's conduct is more appropriately categorized as unprofessional and not respectful of your role as the supervisor." The letter further noted that "[c]onversations with the Division Head and Human Resources will take place to discuss appropriate mechanisms to address this faculty member's conduct."

De Piero received a similar letter from the AAO the next day, which noted that "[i]nformation gathered during the investigation indicated that your behavior during the meeting was aggressive and disruptive, in large part due to your frustration of not receiving answers to your questions about the topic under discussion."

De Piero maintains that this outcome demonstrates that "[a]t Penn State, it is perfectly acceptable to harangue faculty (as well as students and staff) on the basis of race for being white, but it is 'bullying' to ask questions about it at a meeting."

L. January 2022-June 2022 Disciplinary Actions Against De Piero

Baer and Lisa Marranzini, Penn State's Regional HR Strategic Partner, scheduled a meeting with De Piero for January 13, 2022, to set expectations for his interactions with colleagues going forward. The meeting went forward as planned. On January 20, 2022, Baer sent De Piero a memorandum titled "Performance Expectations," to summarize their meeting, a copy of which was placed in his personnel file. Among other things, Baer "reviewed with [him] some of the University values that are germane to this incident including respect, responsibility, excellence, and community." De Piero was also advised that he "need[s] to be mindful of how [his] behavior impacts others," and that "it is an expectation that [he] will be respectful to [his] colleagues." This included avoiding actions that "circumvent [Naydan's] authority" as Writing Program coordinator. De Piero asked for an opportunity to "tell [his] side of what happened at the meeting in October," but Baer informed him that he had already done so during the AAO's investigation, which they would not be reopening. Baer concluded by informing him that "[w]e will be continuing to monitor your performance to ensure you are taking appropriate steps to address the[se] concerns."

On May 27, 2022, Baer reached out to August, who by then had returned to his role as Dean of Academic Affairs, to request his "help in formulating language for Zack De Piero's

[Faculty Annual Review] letter." He replied a few days letter, stating: "Perhaps in the service section- something like—This year also saw significant challenges in your interactions with colleagues . . . . ?" To that end, when De Piero finally received his review from Baer in June 2022, he was rated "Very Good" in the "Scholarship of Teaching and Learning" category, which was consistent with his prior evaluations. But he was downgraded to "Fair to Good" in the "Service and the Scholarship of Service to the University, Society and the Profession" category, which De Piero now submits was "clearly retaliation . . . for his complaints of racial harassment." The evaluation read, in relevant part:

> Thanks for your service as an Abington Faculty Senator (concluded Spring 21), your membership on the Academic Integrity Committee, and your participation in the Fall 2021 Commonwealth Connections Instructor Days.
>
> As you know, an investigation into your conduct during a meeting with colleagues on October 18, 2021 by the AAO concluded that it was "aggressive, disruptive, unprofessional, and in opposition to the University's Values Statement." Civility and mutual respect are essential requirements for meaningful and effective service contributions designed to fostering an inclusive, welcoming and intellectually rich academic community. I would like to reiterate the expectation that I included in the summary of our meeting in January 2022: that you will be respectful to your colleagues and that you will conduct yourself professionally in all communications and behaviors. I rate your performance in the area of Service and the Scholarship of Service as Fair to Good.

Meanwhile, De Piero applied for and got a position as a full-time Assistant Professor of English at another college. He resigned from Penn State Abington on August 2, 2022.[6]

II. SUMMARY JUDGMENT STANDARD

A party is entitled to summary judgment if it shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

[6] Following his resignation, Penn State asked him to return $3,386.47 of his July 2022 paycheck pursuant to a requirement in his contract that he "refund the university any part of [his] annual salary that has not been earned but paid to [him] when [his] service with the University terminates." De Piero argued that Penn State's attempt to recoup his paycheck was unwarranted because he had performed work over the summer before he resigned—namely, helping a student advisee register for courses at the request of the Acting Chair of the English Department. But he ultimately abandoned this effort and returned the funds to Penn State.

56(a). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "Inferences to be drawn from the underlying facts contained in the evidential sources must be viewed in the light most favorable to the party opposing the motion." *Peters Twp. Sch. Dist. v. Hartford Acc. & Indem. Co*., 833 F.2d 32, 34 (3d Cir. 1987).

"A genuine issue is present when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the non-moving party in light of his burden of proof." *Doe v. Abington Friends Sch*., 480 F.3d 252, 256 (3d Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-26 (1986); *Anderson*, 477 U.S. at 248-52). "The non-moving party may not merely deny the allegations in the moving party's pleadings; instead, he must show where in the record there exists a genuine dispute over a material fact." *Id*. (citation omitted). A moving party is entitled to judgment as a matter of law where the "nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 323.

"As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. . . . More important . . . summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

III. DISCUSSION

As stated previously, De Piero alleges that Defendants violated Title VII, the PHRA, and Section 1981 by "creat[ing] a racially hostile environment" at Penn State Abington. Title VII

makes it illegal to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The PHRA makes it unlawful "[f]or any employer because of the [employee's] race" to "discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract . . . ." 43 Pa. C.S. § 955(a). And, Section 1981 guarantees that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts." 42 U.S.C. § 1981(a).

Title VII, along with the PHRA and Section 1981, renders employers liable for workplace harassment that is "sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *see also Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181-82 (3d Cir. 2009). Because the same framework is used to evaluate employment discrimination claims brought under Title VII, the PHRA, and Section 1981, *Jones v. Sch. Dist. of Phila.*, 198 F.3d 403, 410 (3d Cir. 1999); *Branch v. Temple Univ.*, 554 F. Supp.3d 642, 648 (E.D. Pa. 2021), De Piero's claims will be addressed together.

To succeed on his hostile work environment claim, De Piero must show that: (1) he suffered intentional discrimination because of his protected status; (2) "the discrimination was severe or pervasive;" (3) it "detrimentally affected" him; and, (4) it "would detrimentally affect a reasonable person in like circumstances." *Castleberry v. STI Grp.*, 863 F.3d 259, 263 (3d Cir. 2017) (quoting *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013). To determine employer liability, the plaintiff also must show that *respondeat superior* liability exists. *Mandel*, 706 F.3d at 167.

A. Severe or Pervasive Harassment

i. Legal Standard

Defendants argue that its Motion should be granted because De Piero has not presented sufficient evidence on any of the elements. The question of whether the complained-of discriminatory harassment was "severe or pervasive" is dispositive here. So only that element will be discussed below.

"[S]evere" harassment and "pervasive" harassment are not the same thing. The terms represent two distinct types of hostile work environment claims. *Castleberry*, 863 F.3d at 264. "[S]ome harassment may be severe enough to contaminate an environment even if not pervasive; other, less objectionable, conduct will contaminate the workplace only if it is pervasive." *Id.* Thus, in certain circumstances, a single incident can support a hostile work environment claim. *Id*. at 265. But in other cases, plaintiffs seek to remedy "the cumulative effect of a thousand cuts," and acts "which are not individually actionable" but "may be aggregated to make out a . . . claim." *O'Connor v. City of Newark*, 440 F.3d 125, 127-28 (3d Cir. 2006).

In analyzing De Piero's claims of "severe" or "pervasive" harassment, the "totality of the circumstances" must be considered "rather than pars[ing] out the individual incidents." *Mandel*, 706 F.3d at 168; *see also Qin v. Vertex, Inc*., 100 F.4th 458, 471 (3d Cir. 2024) (directing courts to "concentrate not on individual incidents, but on the overall scenario" (quoting *Caver v. City of Trenton*, 420 F.3d 243, 262-63 (3d Cir. 2005)). In so doing, several factors are to be balanced, including: "the frequency of the 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 Sys., Inc*., 510 U.S. 17, 23 (1993).

ii. Severity

Starting first with the question of whether the complained-of events in this case, taken as

a whole, constitute severe harassment. The Third Circuit has vindicated severe harassment hostile work environment claims only when they are predicated on "extremely serious" misconduct, *Caver*, 420 F.3d at 262, such as the use of racial slurs accompanied by threats of termination, or sexual harassment and assault. *See, e.g.*, *Castleberry*, 863 F.3d at 265-66 ("Plaintiffs alleged that their supervisor used a racially charged slur in front of them and their non-African-American coworkers. Within the same breath, the use of this word was accompanied by threats of termination (which ultimately occurred). This constitutes severe conduct that could create a hostile work environment."); *Starnes v. Butler Cnty. Ct. of Com. Pl., 50th Jud. Dist*., 971 F.3d 416, 428 (3d Cir. 2020) (finding severe harassment where the plaintiff's supervisor "coerced her into engaging in sexual relations, shared pornography with her, asked her to film herself performing sexual acts, engaged in a pattern of flirtatious behavior, scolded her for speaking with male colleagues, assigned her duties forcing her to be close to him, and treated her differently than her male colleagues"); *Moody v. Atl. City Bd. of Educ*., 870 F.3d 206, 215 (3d Cir. 2017) (finding severe harassment where the plaintiff's employer "made sexually charged comments to her"; "grabbed her" and "attempted to take her shirt off"; "called her into his office, and when she entered" encountered him "sitting naked on a chair"; and, "sent her a text message stating 'am I getting all three holes' and thereafter showed up at her house uninvited and pressured her into having sex with him by threatening her job"); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 146-47 (3d Cir. 1999) (finding severe harassment where a supervisor told the plaintiff that she "made too much money" for a woman, belittled her, and "grabbed [her] buttocks from behind while she was bending over her files and told her that she smelled good").

The events underlying De Piero's claim, while unpleasant to him, share little in common with these cases. No rational trier of fact could view occurrences such as receiving campus-wide

e-mails about the murder of George Floyd, Juneteenth, and the hiring of police officers; being invited to review scholarly materials and engage in conversations about antiracist approaches to teaching and learning; and, discussing allegations of harassment levied by and against him as sufficiently "extreme" to sustain his charge of "severe" harassment. *Wright v. Providence Care Ctr., LLC*, 822 F. App'x 85, 97 (3d Cir. 2020).

To the contrary, several courts have granted summary judgment on claims predicated on similar comments made to White plaintiffs, finding that the conduct was insufficiently severe as a matter of law—even when such comments were accompanied by downgraded performance reviews, altered work responsibilities, or threats of retaliation. *See, e.g.*¸ *Vitt v. City of Cincinnati*, 250 F. Supp.2d 885, 890 (S.D. Ohio 2002), *aff'd*, 97 F. App'x 634 (6th Cir. 2004) (granting summary judgment where the plaintiff, a White woman, alleged her Black supervisor "singled [her] out" and "gave her less than satisfactory performance evaluations" because of her race, finding that the allegations did not amount to "severe or pervasive" harassment);[7] *Mufti v. Aarsand & Co*., 667 F. Supp.2d 535, 550 (W.D. Pa. 2009) (granting summary judgment on a hostile work environment claim brought by a White woman who "was taken off the schedule, or terminated, in retaliation for complaining" about severe harassment where co-workers "made comments to the effect" that they "hated White people"); *Diemert v. City of Seattle*, 2025 WL 446753 (W.D. Wash. Feb. 10, 2025) (granting summary judgment on a hostile work environment claim brought by a White male alleging severe harassment and retaliation where presenters at mandatory trainings remarked: "racism is in white people's DNA" and "white people are like the devil").

[7] De Piero contends that "this Court has already considered and rejected" *Vitt* as "unpersuasive." *See De Piero v. Pennsylvania State Univ.*, 711 F. Supp.3d 410, 422 (E.D. Pa. 2024). Indeed, the Court found *Vitt* unpersuasive at the motion to dismiss stage only because it was "resolved after discovery on motions for summary judgment." *Id.* Such concerns are not present here when the Motion before the Court requests summary judgment.

Defendants' Motion shall accordingly be granted as it concerns the theory that Plaintiff's hostile work environment claims are premised on the severity of the incidents he describes.

iii. Pervasiveness

De Piero's remaining hostile work environment claims therefore rest on a theory of pervasive harassment. Pervasive harassment is demonstrated by "a continuous period" of misconduct. *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 863 (3d Cir. 1990). When the complained-of conduct involves "racist comments, slurs, and jokes," there must be "more than a few isolated incidents of racial enmity, meaning that instead of sporadic racist slurs, there must be a steady barrage of opprobrious racial comments." *Al-Salem v. Bucks Cnty. Water & Sewer Auth.*, 1999 WL 167729, at *5 (E.D. Pa. Mar. 25, 1999) (citing *Schwapp v. Town of Avon*, 118 F.3d 106, 110-11 (2d Cir. 1997)); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (stating that most "offhand comments" and "isolated incidents" are insufficient as a matter of law to make out a hostile work environment claim). That is because "a lack of racial sensitivity does not, alone, amount to actionable harassment," and the "[m]ere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not sufficiently alter [the] terms and conditions of employment to violate Title VII." *Id.* at 787. Further, when the claim pertains to conversations about "the influence of racism" at colleges and universities, this Court previously explained:

> [D]iscussing in an educational environment the influence of racism on our society does not necessarily violate federal law. In allowing De Piero's hostile work environment claim to proceed, the Court does not contemplate that it is, or should be, the norm to maintain a workplace dogmatically committed to race-blindness at all costs. To do so would "blink [at] both history and reality in ways too numerous to count." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 385 (2023) (Jackson, J., dissenting). Training on concepts such as "white privilege," "white fragility," implicit bias, or critical race theory can contribute positively to nuanced, important conversations about how to

> form a healthy and inclusive working environment. Indeed, this is particularly so in an educational institution. And placing an added emphasis on these issues in the aftermath of very real instances of racialized violence like the murder of George Floyd does not violate Title VII, Section 1981, or the PHRA.

De Piero, 711 F. Supp.3d at 424.

Although "courts may look to conduct directed at individuals other than the plaintiff" when determining the viability of a given claim, *Nitkin v. Main Line Health*, 67 F.4th 565, 572 n.4 (3d Cir. 2023), "comment[s] not made directly" to the plaintiff are less likely to cause a court to deem such conduct sufficiently pervasive, as they are more akin to "offhand comments." *Watkins v. Pennsylvania Dep't of Corr.*, 2023 WL 5925896, at *4 (3d Cir. Sept. 12, 2023) (quoting *Caver*, 420 F.3d at 263); *cf. Lamb v. Montgomery Twp.*, 734 F. App'x 106, 112 n.8 (3d Cir. 2018) ("[O]ccasional derogatory comments not intentionally directed at a plaintiff, but simply overheard by a plaintiff, are not sufficient to establish a hostile work environment.").

Frequency of the Conduct. Looking initially at the frequency of the complained-of conduct, no reasonable jury could determine that Defendants' conduct, when viewed as a whole as is required, constituted pervasive harassment. Even when drawing all inferences in De Piero's favor, the record demonstrates that he was not continuously harassed "on a daily or even a weekly basis" over the three-and-a-half-year period at issue. *Deans v. Kennedy House, Inc.*, 998 F. Supp.2d 393, 416 (E.D. Pa.), *aff'd*, 587 F. App'x 731 (3d Cir. 2014). Instead, the incidents were more "sporadic" in nature, as they were "separated in time by months" in many cases. *Id.*

Moreover, although the sheer "number of incidents" should not be examined "in a vacuum," *Nitkin*, 67 F.4th at 571, hostile work environment claims involving a similar frequency of allegedly discriminatory actions to those at issue here have been rejected as not sufficiently pervasive. *See, e.g.*, *Hamera v. County of Berks*, 248 F. App'x 422, 425-26 (3d Cir. 2007) (affirming district court's conclusion that the plaintiff failed to show that the allegedly harassing

comments were pervasive as a matter of law where his coworkers "made nine comments over a year and four months"); *Nitkin*, 67 F.4th at 571 ("[T]he seven comments [Plaintiff] identified were spread out over a span of over three-and-a-half years. The relative infrequency of [Defendant's] remarks—reflecting one or two statements in a given six-month period—indicates that his actions were not severe or pervasive harassment."); *Stephenson v. City of Philadelphia*, 2006 WL 1804570, at *11 (E.D. Pa. June 28, 2006), *aff'd*, 293 F. App'x 123 (3d Cir. 2008) ("[Plaintiff] presents nine specific occurrences over nineteen months in support of her claim of a hostile work environment. However, these incidents collectively lack the frequency to constitute a hostile work environment claim."); *Cooper-Nicholas v. City of Chester, Pa.*, 1997 WL 799443, at *3 (E.D. Pa. Dec. 30, 1997) (regarding eight alleged incidents of unwelcome comments over nineteen months as neither "frequent or chronic"); *Piety Foley v. Drexel Univ.*, 2024 WL 3540445, at *10 (E.D. Pa. July 25, 2024) ("Although [Plaintiff's] Department was far from a model workplace, a rational factfinder could not conclude that these incidents, which took place over the course of more than a decade, amounted to the sort of steady barrage of opprobrious . . . comments that characterize claims of pervasive harassment." (citations and quotations omitted)).

This is especially the case given, of the twelve incidents at issue, only a few involved actions that were personally "directed" at De Piero by name. *See Lamb*, 734 F. App'x at 112 n.8; *Watkins*, 2023 WL 5925896, at *4. To be sure, none of the parties dispute that De Piero received the following e-mails: (1) the March 28-29, 2019 e-mail thread discussing Inoue's scholarship regarding "antiracist writing assessments"; (2) Smith's June 19, 2020 e-mail commemorating Juneteenth; (3) Naydan's August 2020 e-mails regarding the hiring of a White police officer and the academic focus of the 2020-21 Writing Program meetings; and, (4) Naydan's October 2020 emails promoting a presentation about the "rhetoric and writing of critical race theory." Or that

he attended the following meetings: (1) the June 5, 2020 "Campus Conversation"; (2) the November 2, 2020, Writing Program meeting discussing racism in writing assessments and Inoue's scholarship; and, (3) the October 18, 2021, Writing Program meeting discussing "The Myth of the Colorblind Writing Classroom: White Instructors Confront White Privilege in Their Classrooms." But "no racist comment, written or spoken, was ever directed at [the plaintiff] *himself*" during those incidents. *Caver*, 420 F.3d at 263 (emphasis added); *see also Washington v. S.E. Pennsylvania Transportation Auth.*, 2021 WL 2649146, at *25-26 (E.D. Pa. June 28, 2021) (concluding that the plaintiff failed to establish that the complained-of conduct cleared the requisite threshold of pervasiveness where, of the thirteen incidents that allegedly took place over a seventeen-month period, only eight were specifically directed at the plaintiff).[8] Rather, the conversation was about racial injustice and antiracism more generally.

Whether the Conduct was Physically Threatening or Humiliating, or Merely an Offensive Utterance. Moving to the question of whether the complained-of conduct was "physically threatening or humiliating, or a mere offensive utterance," *Mandel*, 706 F.3d at 168—the surrounding "context is . . . crucial because courts must distinguish between the non-actionable mere utterance of an epithet and actionable uses of epithets" or other discriminatory language. *Riley v. Borough of Eddystone*, 2024 WL 4844794, at *3 (E.D. Pa. Nov. 20, 2024) (cleaned up); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) ("Context matters. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." (citation omitted)).

[8] De Piero contends that several of the cases cited in this section, including *Washington* and *Stephenson*, are "inapposite," because far from being "sporadic incidents," the complained-of incidents represented Penn State's "strategic plan." However, he has not pointed to any evidence in the record that Penn State had such a plan.

As an initial matter, no reasonable jury could determine that the incidents at issue here were "physically threatening," as De Piero levies no allegations of the sort. De Piero does submit, however, that he was repeatedly "singled out for ridicule and humiliation because of the color of his skin" as a result of "Penn State's race-based dogma" and "essentialist stereotypes." For instance, when discussing with Borges the impact that the "White Teachers are a Problem" interview had on him, he said: "I feel awful every single day. I wake up and think to myself, I'm a white teacher, I'm a problem. I go to bed, I think to myself, white teachers are a problem. My colleagues think I'm a problem." Likewise, when Wong said that "[i]t's a challenge for all of us today, and especially for white and non-black people of color, . . . to hold our breath just a little longer to not give into our privilege," De Piero experienced "discomfort" at the notion that he should feel more pain simply because of his skin color. And in Smith's e-mail commemorating Juneteenth, "no other ethnic or racial group" aside from the White race was asked to "feel terrible." Moments like these, argues De Piero, demonstrate that he was not subjected to mere "offhand comments or isolated incidents," but rather a highly offensive "state-sponsored campaign to denigrate white . . . employees."

But Penn State counters that the circumstances surrounding these incidents are critical to the analysis and ultimately carry the day. It argues that "most of these messages and meetings occurred in the aftermath of George Floyd's murder during a time when, contextually, these discussions were happening all across the country." And, in any event, it stresses that De Piero "opt[ed] in" to the discussions of race, as Penn State neither "required [him] to do anything in response to the emails he received" nor engage with any of the materials or events circulated by Naydan and others.

In support of its argument, Penn State draws attention to *Diemert v. City of Seattle*, 2025

WL 446753 (W.D. Wash. Feb. 10, 2025), a case concerning allegations that this Court previously examined and subsequently noted "go beyond what De Piero says happened here." *De Piero*, 711 F. Supp.3d at 423-24 (citing 689 F.Supp.3d 956, 959-64 (W.D. Wash. Aug. 28, 2023). In that case, a White man alleged that his employer, the City of Seattle, created a hostile work environment through its mandatory "Race and Social Justice Initiative"—"a citywide effort to end institutional racism and race-based disparities in City government." 2025 WL 446753, at *2. During one of the initiative's training sessions, which the plaintiff attended, a presenter made essentialist statements that the plaintiff found to be highly offensive, including "racism is in white people's DNA" and "white people are like the devil." *Id.* He also had to participate in a "privilege bingo"—an activity "in which all employees, notwithstanding their race, identified different 'privileges' they may have, including height, religion, and gender"—and attend meetings where "supervisors forced their employees to identify their race" and "rank themselves on a defined 'continuum of racism.'" *Id.*

Ultimately, the *Diemert* Court granted summary judgment and found that the complained-of conduct did not rise to the level of "severe or pervasive harassment" in large part due to "the context in which" the offensive "statements [were] made." *Id.* at *11-13. It noted that "[a]t least some of the comments that [the plaintiff] takes issue with were made during . . . trainings," and determined that "[r]acially charged comments made in this setting, while still potentially harmful, are better framed as attempts to express perspectives or challenge ideas within the training's scope." *Id.* at *12. This is because "[s]uch comments made in the presence of a skilled facilitator can be addressed constructively, turning the moment into a learning opportunity, not a personal attack." *Id.*

Diemert, though not binding on this Court, is however instructive. Here, the record

similarly establishes that several of the allegedly discriminatory comments made by Penn State employees were done in the context of scholarly discussions—whether it be at a professional development meeting, a campus-wide town hall, or a presentation from a guest lecturer. Although De Piero expressed his discomfort with certain statements like "White Teachers Are a Problem," individuals like Borges repeatedly reminded him that such discourse was "not an attack" on him personally. She reassured him that he does not "carry the burden of" the White race and is "not responsible for everything that has happened or what white people have done or not done."

De Piero nonetheless contends that "every [Penn State] deponent has testified that any topic deriding Black people" or "Black privilege . . . would be unacceptable . . . and would likely result in a civil-rights complaint." But even if that were the case, precedent is clear that equally offensive comments directed at Black employees have been found to be insufficiently pervasive. *See, e.g.*, *Sherrod v. Phila. Gas Works*, 57 F. App'x 68, 75-77 (3d Cir. 2003) (finding derogatory comments referring to the "culture" of African American employees; a manager's statement that he was "going to sit at [their] desks with a whip"; placing their desks "directly in front of their white supervisor's office windows"; excluding certain employees from meetings; turning away from certain employees to "snub" them; and screaming at an employee all were insufficiently "pervasive" to establish a hostile work environment claim); *Exantus v. Harbor Bar & Brasserie Rest.*, 386 F. App'x 352, 354 (3d Cir. 2010) (affirming summary judgment for defendant on a hostile work environment claim because the use of "unpalatable and inappropriate" racial epithets was not "pervasive"); *Woodard v. PHB Die Casting*, 255 F. App'x 608, 609-10 (3d Cir. 2007) (affirming summary judgment on a hostile work environment claim because a Black plaintiff being "asked questions using the phrase 'you people'" and whether "he intended to

complete a drug deal during a bathroom break" are the type of "offhand comments that are insufficient to support a hostile work environment claim"); *Russo v. Bryn Mawr Tr. Co*., 2022 WL 15535045, at *12 (E.D. Pa. Oct. 27, 2022), *aff'd*, 2024 WL 3738643 (3d Cir. Aug. 9, 2024) (collecting cases).

Therefore, while the complained-of conduct undoubtedly "engender[ed] offensive feelings" in De Piero, *Faragher*, 524 U.S. at 787, no rational trier of fact could determine that he was subjected to the "steady barrage of opprobrious racial comments" required to sustain his pervasive harassment claim. *Al-Salem*, 1999 WL 167729, at *5.

Whether the Conduct Unreasonably Interfered with De Piero's Work Performance. Context is also important in understanding whether the conduct at issue here "unreasonably interfere[d]" with De Piero's work performance. *Castleberry*, 863 F.3d at 264. Here, the record reveals that several of the complained-of incidents involved meetings or events that were optional in nature, which suggest that De Piero took it upon himself to engage with the antiracist materials. For instance, De Piero voluntarily engaged with Naydan regarding the contentious conversation that took place on the "Writing Program Administration" listserv by asking questions about what "Inoue mean[t] by 'antiracist writing assessment.'" Far from expressing a "corrosive race-based ideology" based on essentialist stereotypes, the record reveals that Naydan politely responded to De Piero to clarify her understanding of the piece, stating that she "personally thinks that racist structures are quite real in assessment and elsewhere regardless of the good intentions that teachers and scholars bring to the set-up of those structures." And she concluded her e-mail by saying that she "respect[s] and appreciate[s] [De Piero] even if [he] hate[s] everything" she had just said. Although Naydan did remark that, for her, "the racism is in the results if the results draw a color line," she later testified that she has never instructed, asked,

or pressured any faculty member to grade students based in any way on their race, nor has she done so herself.

Similarly, De Piero voluntarily attended the various Writing Program meetings discussing antiracist teaching and learning practices—even when he was told by multiple individuals that attendance was optional. At the start of the October 18, 2021, meeting, Naydan explicitly stated that "anybody who doesn't feel comfortable talking about any of this does not have to be here by any means." Baer and Borges shared similar suggestions with De Piero after he complained to them about the content of those meetings, which was reiterated in the AAO's November 2021 conclusion letter regarding De Piero's Bias Report. There, Borges explicitly wrote that attendance at any "monthly discussion meetings is voluntary." And in at least two other instances—namely, the November 2020 event about "the rhetoric and writing of critical race theory" featuring Martinez and the April 2021 presentation from Inoue—De Piero appears to have specifically sought out opportunities to engage with the content that he found so deeply offensive. For instance, regarding the former, he asked Naydan for a copy of the recording since he was unable to attend the lecture and later viewed a similar presentation through the National Council of Teachers of English. And with respect to the latter, he inquired if his students could attend Inoue's talk, as, in his words, it "could present an interesting opportunity for [them] to dig further into the various concepts we've been studying throughout the semester."

To be sure, De Piero disputes the notion that his attendance at these types of events was not required. As he told Borges, he feared that his lack of professional engagement might result in an "unfavorable . . . future teaching evaluation which are usually conducted by my colleagues." And according to De Piero's 2022 annual review, his behavior at the October 18, 2021, Writing Program meeting in opposing the discourse surrounding antiracism contributed to

the downgrade in the service component. But even crediting that argument and drawing all inferences in his favor as the non-moving party, as is required on summary judgment, De Piero was not terminated as a result of his opposition to antiracist discourse. Nor did Penn State impose any changes to his job responsibilities or benefits thereafter. To the contrary, Penn State renewed his contract for the 2022 academic year, and he received a pay raise. Considering these circumstances, no rational trier of fact could determine that the conduct at issue here unreasonably interfered with De Piero's work performance. *See, e.g.*, *McCullough v. Gateway Health LLC*, 2021 WL 4284582, at *17 (D. Del. Sept. 21, 2021) (determining that the conditions of the plaintiff's employment were not unreasonably altered because, among other things, "[s]he received a raise and bonus" during the years in question); *Vitt*, 250 F. Supp.2d at 890 (finding that the plaintiff, a White woman who brought a hostile work environment claim based on accusations that her Black supervisor "singled [her] out" because of race, "was subjected to, at most, mere offensive utterances, and the facts show that her work performance did not suffer unreasonably. Her performance evaluations were not materially affected, and she continued to receive raises and step-up in pay for meeting expectations.").

Contemporaneous text messages between De Piero and his friends also indicate that he appeared to seek out opportunities to rustle up disharmony amongst his colleagues, which further suggests that the alleged harassment did not "so pervade[]" Penn State Abington so as to alter the conditions of his employment. *Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013). To take just a few examples, following Wong's June 5, 2020, "campus conversation" about racial injustice, De Piero informed a friend about the OIG complaint that he intended to file regarding the presentation, writing, in relevant part:

> A PSU Main Park administrator who co-facilitated this healing meeting said . . . I want us to stay in this state of disruption. In fact, I want us to be more disruptive.

> And now I qupte [sic] "What some people call looting . . . I call it getting their due." So you know what I'm doing now?
>
> About to call PA's "Office of State Inspector General" to call that cunt out and get whistleblower protection.

And, after he filed a Bias Report against Naydan in September 2021, he wrote to another friend: "I have some pretty massive news . . . So even after I reported it to my top supervisor twice, my other supe—this department chair crazy woke cunt— just won't stop." He went on to tell this friend about his meeting with Borges, stating that "the jokes on her: [I] recorded it. And sent it to my new lawyer, who is taking me on as a 'public interest' case[.]"

A similar situation unfolded in *Diemert.* There, certain "offensive" incidents raised by the plaintiff were not characterized as unwelcome for the purposes of pervasive harassment, as the record suggested that he was the actor who "instigated the dynamic that unfolded." 2025 WL 446753, at *11. For instance, the plaintiff argued that "he was attacked online by his co-workers" in response to a provocative comment he made on the "City's Internal SharePoint page about the Tulsa Massacre of 1921." *Id.* But contrary to his claim, the exchanges between him and his co-workers "show that [the plaintiff] gave as good as he got, and that far from being unwelcome interactions, [the plaintiff] relished the opportunity to express a contrarian view." *Id.* Thus, no rational trier of fact could find that the complained-of conduct unreasonably interfered with De Piero's work performance.[9]

[9] Because De Piero's claim of "severe or pervasive" harassment fails under Title VII, Section 1981, and the PHRA, there is no need to consider the remaining elements of his hostile work environment claims. That said, De Piero contends that Defendants Naydan, Borges, Baer, Wong, and Smith still face individual liability under the PHRA, which makes it unlawful "[f]or any person, employer, employment agency, labor organization or employe, [sic] to aid, abet, incite, compel or coerce the doing of . . . an unlawful discriminatory practice." 43 Pa. Stat. Ann. § 955(e); *Dici v. Commonwealth of Pa.*, 91 F.3d 542, 551-53 (3d Cir. 1996). He makes the same argument for individual liability under Section 1981.

But De Piero's argument is unavailing because "[f]or liability to be imposed" under the PHRA "on an aiding and abetting theory, there must be a cognizable predicate offense, *i.e.*, a violation by the employer of the PHRA."

For the reasons set forth above, no reasonable jury could determine that the twelve incidents at issue here constitute "a constant drumbeat of essentialist, deterministic, and negative language" that warrants his hostile work environment claims to go to trial. *De Piero*, 711 F. Supp.3d at 424. Thus, summary judgment shall be granted in Defendants' favor on Plaintiff's hostile work environment claims.[10]

An appropriate order follows.

BY THE COURT:

S/ **WENDY BEETLESTONE**

WENDY BEETLESTONE, J.

Williams v. Aramark Campus LLC, 2020 WL 1182564, at *10 (E.D. Pa. Mar. 12, 2020) (collecting cases). Having just determined that Penn State has not violated the PHRA at the institutional level, his claim of individual liability under that statute necessarily fails. Further, De Piero has failed to marshal any evidence in his argument to demonstrate an "affirmative link to causally connect the actor with the discriminatory action," which is required to maintain Section 1981 claims against individual defendants at summary judgment. *Suero v. Motorworld Auto. Grp., Inc*., 2017 WL 413005, at *6 (M.D. Pa. Jan. 31, 2017) (citation omitted); *Abington Friends Sch*., 480 F.3d at 256 (3d Cir. 2007) (citations omitted).

[10] De Piero asserts that Penn State never moved to dismiss the Title VII and PHRA retaliation claims as pleaded in the Amended Complaint. As a result, he submits that those claims should proceed to trial. Penn State counters that it previously moved to dismiss the Amended Complaint in its entirety, and this Court's Opinion and Order made it clear that De Piero's only remaining cause of action pursuant to Title VII, Section 1981, and the PHRA was for hostile work environment.

But the Opinion and Order made no such pronouncements. *See De Piero*, 711 F. Supp.3d at 418-24; ECF No. 32. Nevertheless, "authority has developed to allow a court to grant summary judgment" *sua sponte* even in the absence of any motion filed by a party. *Chambers Dev. Co. v. Passaic Cty. Utils. Auth*., 62 F.3d 582, 584 n.5 (3d Cir. 1995); *see also DL Res., Inc. v. FirstEnergy Sols. Corp*., 506 F.3d 209, 223 (3d Cir. 2007) ("District courts may grant summary judgment *sua sponte* in appropriate circumstances."). In such cases, courts are required to provide notice to the party against whom summary judgment would be granted that a *sua sponte* decision is under consideration and provide that party "with an opportunity to present relevant evidence in opposition." *Chambers Dev. Co*., 62 F.3d at 584 n.5. Accordingly, De Piero is hereby on notice that this Court is considering granting summary judgment *sua sponte* in Penn State's favor on the Title VII and PHRA retaliation claims pleaded in the Amended Complaint. As the adverse party, De Piero may "present relevant evidence" and arguments "in opposition." *See id.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZACK K. DE PIERO, **Plaintiff,** **v.** **PENNSYLVANIA STATE UNIVERSITY, *et al*.,** **Defendants.**	**CIVIL ACTION** **NO. 23-2281**

O R D E R

AND NOW, this 6th day of March, 2025, upon consideration of Defendants' Motion for Summary Judgment (ECF No. 52) and all responses and replies thereto (ECF Nos. 56-58), **IT IS HEREBY ORDERED** as follows:

1. Defendants' Motion is **GRANTED** with respect to Plaintiff's hostile work environment claim under Title VII, 42 U.S.C. § 2000d *et seq.*; 42 U.S.C. § 1981; and, the Pennsylvania Human Relations Act, 43 Pa. C.S. § 951 *et seq*.; and,

2. Plaintiff is **HEREBY ON NOTICE** that this Court is considering granting summary judgment *sua sponte* in Defendants' favor on the Title VII and PHRA retaliation claims pleaded in the Amended Complaint. As the adverse party, Plaintiff may present relevant evidence and arguments in opposition in the form of a ten-page brief **on or before March 20, 2025**, and Defendants may file a reply brief of the same length **on or before March 27, 2025**.[1]

BY THE COURT:

S/ WENDY BEETLESTONE

WENDY BEETLESTONE, J.

[1] "[A]uthority has developed to allow a court to grant summary judgment" *sua sponte* even in the absence of any motion filed by a party. *Chambers Dev. Co. v. Passaic Cty. Utils. Auth*., 62 F.3d 582, 584 n.5 (3d Cir. 1995); *see also DL Res., Inc. v. FirstEnergy Sols. Corp*., 506 F.3d 209, 223 (3d Cir. 2007) ("District courts may grant summary judgment *sua sponte* in appropriate circumstances."). In such cases, courts are required to provide notice to the party against whom summary judgment would be granted that a *sua sponte* decision is under consideration and provide that party "with an opportunity to present relevant evidence in opposition." *Chambers Dev. Co*., 62 F.3d at 584 n.5.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZACK K. DE PIERO, **Plaintiff,** **v.** **PENNSYLVANIA STATE UNIVERSITY, FRIEDERIKE BAER, CARMEN BORGES LILIANA NAYDAN, ANEESAH SMITH, and ALINA WONG,** **Defendants.**	**CIVIL ACTION** **NO. 23-2281**

MEMORANDUM OPINION

This is the tail end of a dispute that Plaintiff Zack De Piero, a White man who previously worked as a writing professor at the Abington campus of The Pennsylvania State University ("Penn State" or "Penn State Abington"), has with Penn State and several of its employees—Friederike Baer, Carmen Borges, Liliana Naydan, Aneesah Smith, and Alina Wong (together, "Defendants").

The Court granted in part Defendants' Motion to Dismiss, dismissing the following claims: (a) Counts One, Two, and Five of the Amended Complaint to the extent they alleged disparate treatment in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000d *et seq.*; 42 U.S.C. § 1981; and, the Pennsylvania Human Rights Act (the "PHRA"), 43 P.S. § 951 *et seq.*; (b) Count Two to the extent it alleged that Defendants violated the "equal benefit clause" of 42 U.S.C. § 1981; (c) Count Three to the extent it alleged violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; and, (d) Count Four to the extent it alleged unconstitutional retaliation under the First Amendment in violation of 42 U.S.C. § 1983. *See generally De Piero v. Pennsylvania State Univ.,* 711 F. Supp.3d 410 (E.D. Pa. 2024); ECF No. 32.

After the close of discovery, the Court granted Defendants' Motion for Summary Judgment on Plaintiff's hostile work environment claims brought under Title VII, Section 1981, and the PHRA, which were pleaded in Counts One, Two, and Five of the Amended Complaint respectively. *See generally De Piero v. Pennsylvania State Univ.*, 2025 WL 723029 (E.D. Pa. Mar. 6, 2025); ECF No. 60.

Following that dismissal, Plaintiff's only remaining claims against Defendants are for retaliation in violation of Title VII and the PHRA, as pleaded in Counts One (Title VII retaliation against Penn State and Penn State Abington) and Five (PHRA against all Defendants) of the Amended Complaint. In Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment, he asserted that those claims should proceed to trial, on the grounds that Defendants had failed to ever seek their dismissal. *See* ECF No. 56. Defendants countered that they previously moved to dismiss the Amended Complaint in its entirety. *See* ECF No. 57. They also argued that this Court's Opinion and Order at the pleading stage made clear that De Piero did not have a live retaliation claim under Title VII and the PHRA. *See* ECF No. 57.

In its Summary Judgment Opinion, the Court clarified that it had made no pronouncements with respect to the status of Plaintiff's Title VII and PHRA retaliation claims. *See De Piero*, 2025 WL 723029, at *21 n.10 (citing *De Piero*, 711 F. Supp.3d at 418-24). However, it put Plaintiff on notice that it was "considering granting summary judgment *sua sponte* in [Defendants'] favor on the Title VII and PHRA retaliation claims pleaded in the Amended Complaint." *Id.* (citing *Chambers Dev. Co. v. Passaic Cty. Utils. Auth.*, 62 F.3d 582, 584 n.5 (3d Cir. 1995)); *see also DL Res., Inc. v. FirstEnergy Sols. Corp.*, 506 F.3d 209, 223 (3d Cir. 2007) (explaining that a District Court may grant summary judgment *sua sponte* on a given claim even in the absence of any motion filed by a party in appropriate circumstances). It then,

as it is required to do in such circumstances, provided the Plaintiff "with an opportunity to present relevant evidence in opposition" in the form of a ten-page brief in support of a denial of summary judgment. *See Chambers Dev. Co*., 62 F.3d at 584 n.5; ECF No. 60. It also permitted Defendants to file a reply brief of the same length. *See* ECF No. 60. Having considered those briefs, the Court finds as follows.[1]

Title VII prohibits an employer from retaliating against an employee "because he opposed any practice made unlawful by this section . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). The PHRA, meanwhile, "forbids an employer to discriminate against an employee because that 'individual has . . . testified or assisted, in any manner, in any investigation, proceeding or hearing under this Act.'" *Marra v. Philadelphia Hous. Auth*., 497 F.3d 286, 300 (3d Cir. 2007) (quoting 43 P.S. § 955(d)).

A retaliation claim under each statute requires a plaintiff-employee to either produce direct evidence of retaliatory treatment or circumstantial evidence that would permit a reasonable jury to infer retaliation on the part of the defendant-employer. *See Connelly v. Lane Const. Corp*., 809 F.3d 780, 792 n.9 (3d Cir. 2016) (explaining that retaliation claims brought under Title VII and the PHRA are analyzed under the same framework); *Mardell v. Harleysville Life Ins. Co*., 31 F.3d 1221, 1225-26 n.6 (3d Cir. 1994), *rev'd on other grounds*, 514 U.S. 1034 (1995) (detailing burdens of production). Where, as here, a plaintiff relies on circumstantial evidence, his Title VII and PHRA retaliation claims are analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Daniels v. School Dist. of Philadelphia*, 776 F.3d 181, 193 (3d Cir. 2015) (applying framework to Title VII

[1] The Court writes primarily for the benefit of the parties and assumes familiarity with the facts pertaining to the underlying dispute, which are set forth in prior opinions.

claim); *Blakney v. City of Philadelphia*, 559 F. App'x 183, 185 n.4 (3d Cir. 2014) (same for PHRA claim).

Under the first step of that framework, the plaintiff-employee bears the initial burden of stating a *prima facie* case of retaliation against the defendant-employer by establishing that: (1) he engaged in a protected activity; (2) the employer took some adverse action against him, either after or contemporaneous with the protected activity; and, (3) there was a causal connection between the protected activity and the adverse action. *Canada v. Samuel Grossi & Sons, Inc*., 49 F.4th 340, 346 (3d Cir. 2022) (citing *Daniels*, 776 F.3d at 193).

At summary judgment, "the evidence must be sufficient to convince a reasonable factfinder to find all of the elements of [the] *prima facie* case." *Burton v. Teleflex Inc*., 707 F.3d 417, 426 (3d Cir. 2013) (citations and internal quotation marks omitted). If the employee fails to raise a genuine dispute of material fact as to any element of his *prima facie* case, summary judgment in favor of the employer is warranted. *See Geraci v. Moody-Tottrup, Int'l, Inc*., 82 F.3d 578, 580 (3d Cir. 1996). "A genuine issue is present when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the non-moving party in light of his burden of proof." *Doe v. Abington Friends Sch*., 480 F.3d 252, 256 (3d Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-26 (1986)); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248-52 (1986)). "The non-moving party may not merely deny the allegations . . . instead, he must show where in the record there exists a genuine dispute over a material fact." *Id*. (citation omitted). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

Neither party disputes that De Piero engaged in protected activity when he filed a

complaint with the Equal Employment Opportunity Commission and an internal grievance (a "Bias Report") with Penn State's Affirmative Action Office (the "AAO") alleging racial discrimination. They have entirely different views, however, as to whether Penn State took any adverse actions against De Piero after he submitted his complaints.

Adverse employment actions are those material enough to "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 68 (2006). Here, the crux of De Piero's argument is that Penn State retaliated against him for filing the two complaints by: (1) placing a "Performance Expectations" memorandum—a document he refers to as a "written reprimand" (an assumption Penn State challenges)—in his personnel file; and, (2) subsequently downgrading his annual performance review.[2] This Court previously sketched out that sequence of events as follows:

> Baer [Penn State Abington's Division Head of Arts and Sciences] and Lisa Marranzini, Penn State's Regional HR Strategic Partner, scheduled a meeting with De Piero for January 13, 2022, to set expectations for his interactions with colleagues going forward. The meeting went forward as planned. On January 20, 2022, Baer sent De Piero a memorandum titled "Performance Expectations," to summarize their meeting, a copy of which was placed in his personnel file. Among other things, Baer "reviewed with [him] some of the University values that are germane to this incident including respect, responsibility, excellence, and community." De Piero was also advised that he "need[s] to be mindful of how [his] behavior impacts others," and that "it is an expectation that [he] will be respectful to [his] colleagues." This included avoiding actions that "circumvent [Naydan's] authority" as Writing Program coordinator. De Piero asked for an opportunity to "tell [his] side of what happened at the meeting in October," but Baer informed him that he had already done so during the AAO's investigation, which they would not be reopening. Baer concluded by informing him that "[w]e will be continuing to

[2] De Piero also argues that Naydan retaliated against him by filing a separate Bias Report against him. However, he has not provided any support for this argument as required by Rule 7.1 of the Local Rules of Civil Procedure of the Eastern District of Pennsylvania. *See* E.D. Pa. R. Civ. P. 7.1(c) ("Every motion not certified as uncontested, or not governed by Local Civil Rule 26.1(g), shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion."). "Courts in this District have consistently held the failure to cite any applicable law is sufficient to deny a motion as without merit because zeal and advocacy is never an appropriate substitute for case law and statutory authority in dealings with the Court." *Anthony v. Small Tube Mfg. Corp*., 535 F. Supp.2d 506, 511 n.8 (E.D. Pa. 2007) (citations and quotations omitted). Therefore, because De Piero's argument "consist[s] of no more than a conclusory assertion," it shall be "deemed waived." *Reynolds v. Wagner*, 128 F.3d 166, 178 (3d Cir. 1997) (citation omitted).

> monitor your performance to ensure you are taking appropriate steps to address the[se] concerns."
>
> On May 27, 2022, Baer reached out to [Andrew] August, who by then had returned to his role as Dean of Academic Affairs, to request his "help in formulating language for Zack De Piero's [Faculty Annual Review] letter." He replied a few days letter, stating: "Perhaps in the service section-something like—This year also saw significant challenges in your interactions with colleagues . . . . ?" To that end, when De Piero finally received his review from Baer in June 2022, he was rated "Very Good" in the "Scholarship of Teaching and Learning" category, which was consistent with his prior evaluations. But he was downgraded to "Fair to Good" in the "Service and the Scholarship of Service to the University, Society and the Profession" category, which De Piero now submits was "clearly retaliation . . . for his complaints of racial harassment." The evaluation read, in relevant part:
>
> Thanks for your service as an Abington Faculty Senator (concluded Spring 21), your membership on the Academic Integrity Committee, and your participation in the Fall 2021 Commonwealth Connections Instructor Days.
>
> As you know, an investigation into your conduct during a meeting with colleagues on October 18, 2021 by the AAO concluded that it was "aggressive, disruptive, unprofessional, and in opposition to the University's Values Statement." Civility and mutual respect are essential requirements for meaningful and effective service contributions designed to fostering an inclusive, welcoming and intellectually rich academic community. I would like to reiterate the expectation that I included in the summary of our meeting in January 2022: that you will be respectful to your colleagues and that you will conduct yourself professionally in all communications and behaviors. I rate your performance in the area of Service and the Scholarship of Service as Fair to Good.

De Piero, 2025 WL 723029, at *12.

De Piero concedes that written reprimands, like the "Performance Expectations" memorandum, do not themselves constitute adverse employment actions. *See, e.g.*, *Mieczkowski v. York City Sch. Dist.*, 414 F. App'x 441, 447 (3d Cir. 2011) ("Beyond alleging that the letters of reprimand were unjustly issued and placed in her permanent personnel file, [Plaintiff] has not demonstrated how the letters materially changed her employment status. In the absence of such evidence, and in light of the fact that the letters neither warned of future disciplinary action nor termination, we find that [Plaintiff] failed to demonstrate that the letters constituted adverse

employment actions."); *McKnight v. Aimbridge Emp. Serv. Corp.*, 2016 WL 8716275, at *7 (E.D. Pa. Sept. 16, 2016), *aff'd*, 712 F. App'x 165 (3d Cir. 2017) ("Even a written reprimand is insufficient, by itself, to establish an adverse employment action.").

However, citing *Skoorka v. Kean University*, 2019 WL 1125592 (D.N.J. Mar. 11, 2019), De Piero contends that his situation went beyond that of a garden variety written reprimand because the surrounding circumstances "contribute to a material dispute of fact." In *Skoorka*, a *pro se* plaintiff alleged that his employer—Kean University—took a series of retaliatory actions against him after he lodged complaints to his superiors about discriminatory treatment on campus. *Id.* at *5-8. For instance, he averred that the University issued him a written warning, initiated formal disciplinary hearings that sought to revoke his tenure, suspended him, and stripped him of his teaching responsibilities, among other things. *Id.* The District Court found these allegations to be plausible at the pleading stage, concluding that a "transfer from a teaching to a nonteaching position is severe enough to qualify as a potential retaliatory act. Likewise, disciplinary actions, assuming they are unwarranted, may be severe enough to qualify as a potential retaliatory action." *Id.* at *8.

Here, De Piero points to the following events, which, in his view, demonstrate that the purportedly adverse employment actions—placing the "Performance Expectations" memorandum in his personnel file and subsequently downgrading his annual performance review—warrant that his claims should proceed to trial:

(1) Naydan repeatedly "lied about [him] to get him disciplined and punished";

(2) Defendant Carmen Borges, the AAO Officer assigned to investigate De Piero and Naydan's respective Bias Reports, "selectively enforced nearly identical claims of discrimination raised by [ ] De Piero against Naydan";

(3) "Borges prejudged the complaint, and did not even bother taking notes on her investigative interview with Naydan";

(4) "Borges merely provided another sounding board for Naydan's catalogue of 'microaggressions' in a pretextual 'investigative interview'";

(5) "Borges then substantiated Naydan's bogus complaint and fabricated allegations never raised by anyone, *e.g.*, that [ ] De Piero made threatening gestures";

(6) "On Dean of Academic Affairs Andrew August's instructions," Baer "told De Piero not to attend Naydan's 'antiracist' meetings"; and,

(7) When De Piero "understandably left [Penn State's] toxic environment to get a new job," it "insist[ed] on clawing back his pay."

Even if one were to put aside the question of whether *Skoorka*, a non-precedential and out-of-district case involving a *pro se* litigant at the pleading stage, has any application here, De Piero points "to no evidence in the record, and [the Court] find[s] none, that would sufficiently substantiate [these] claim[s] so as to create a genuine issue of material fact." *Versarge v. Twp. of Clinton*, 984 F.2d 1359, 1370 (3d Cir. 1993); *cf. Abington Friends Sch.*, 480 F.3d at 256 ("The non-moving party may not merely deny the allegations . . . instead, he must show where in the record there exists a genuine dispute over a material fact." (citation omitted)).

Taking each of De Piero's arguments in turn, he did not include any record citations to substantiate events (1) - (3). Regarding event (4), no rational trier of fact reviewing the cited document—an email from Naydan to Borges in which Naydan summarizes her complaints about De Piero's conduct—could determine that it supports his claim that Borges engaged in a "pretextual investigative interview." The citation provided by De Piero to substantiate event (5) similarly sheds no light as to whether Naydan's complaint was "bogus" or contained "allegations never raised by anyone." Instead, the discussion between De Piero and Borges about his behavior at the October 2021 Writing Program meeting was as follows:

> Later in the conversation, De Piero confronted Borges with her suggestion from their initial meeting in September 2021 wherein Borges said that he should consider

> continuing to attend the Writing Program meetings to better understand the other participants' perspectives. To that Borges said:
>
> Well, I may have [said that] because I told you that you are entitled to engage and find out. The issue is the manner in which you did it. The problem was the manner. It came across hostile, aggressive, intimidating. And, and that's consensus among others that I have spoken to that were in the meeting . . . . It's not what you're trying to clarify for yourself. It's not how you tried to ask the question. It's the manner in which it was done. The tone, the body language is the aggressiveness [and] the insistency . . . .

De Piero, 2025 WL 723029, at *11.

Next, the record citation provided by De Piero to support event (6) mischaracterizes the statements made therein. That document does not state that Baer "told De Piero not to attend Naydan's 'antiracist' meetings"; it instead provides that if "there is a meeting where attendance is not required, and where you think a similar kind of situation may arise, *you may want to choose not to attend*." And finally, as to event (7), this Court previously rejected a similar argument made by De Piero at summary judgment in support of his hostile work environment claim, explaining:

> Following his resignation, Penn State asked him to return $3,386.47 of his July 2022 paycheck pursuant to a requirement in his contract that he "refund the university any part of [his] annual salary that has not been earned but paid to [him] when [his] service with the University terminates." De Piero argued that Penn State's attempt to recoup his paycheck was unwarranted because he had performed work over the summer before he resigned—namely, helping a student advisee register for courses at the request of the Acting Chair of the English Department. *But he ultimately abandoned this effort and returned the funds to Penn State*.

De Piero, 2025 WL 723029, at *13 n.6 (emphases added).

The only remaining arguments advanced by De Piero, then, are that Penn State retaliated against him by issuing the "Performance Expectations" memorandum and downgrading his annual performance review. But as stated above, it is well-established that written reprimands are not, without more, adverse employment actions. *See, e.g.*, *Weston v. Pennsylvania*, 251 F.3d

420, 431 (3d Cir. 2001), *overruled in part on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (finding that the plaintiff failed to establish that two written reprimands constituted adverse employment actions because they had not caused "a material change in the terms or conditions of his employment" where he was not subsequently demoted in title or reassigned to another unit, suffered no reduction in pay, and maintained the same schedule); *Mieczkowski*, 414 F. App'x at 447. The same is true of negative performance evaluations. *See, e.g.*, *Walker v. Centocor Ortho Biotech, Inc.*, 558 F. App'x 216, 220 (3d Cir. 2014) ("A negative evaluation, by itself, is not an adverse employment action, and here [Plaintiff] concedes that . . . she received raises each year she worked for [Defendant]."); *Clark v. Philadelphia Hous. Auth.*, 701 F. App'x 113, 117 (3d Cir. 2017) (finding that the plaintiff "failed to allege any facts" to suggest that a statement in her performance review, which noted she could "improve on her attendance record to enhance her career potential even further" somehow "adversely affected the terms or conditions of her employment"); *Harris v. Keystone Cement Co*, 2021 WL 672416, at *9-11 (E.D. Pa. Feb. 22, 2021) (holding that the "several reprimands, criticisms, and performance reviews" did not "constitute adverse employment actions" under Title VII's anti-retaliation provision). And here, no rational trier of fact could determine that Penn State materially changed the terms or conditions of De Piero's employment after he filed the two complaints—he "was not terminated as a result of his opposition to antiracist discourse. Nor did Penn State impose any changes to his job responsibilities or benefits thereafter. To the contrary, Penn State renewed his contract for the 2022 academic year, and he received a pay raise." *De Piero*, 2025 WL 723029, at *20.

Given the undisputed facts, De Piero has failed to carry his burden of making out a *prima facie* case of retaliation at step one of the *McDonnell Douglas* framework. *See Geraci*, 82 F.3d

at 580; *Samuel Grossi & Sons, Inc*., 49 F.4th at 346. Accordingly, summary judgment shall be granted in Penn State's favor on his Title VII and PHRA retaliation claims.

An appropriate order follows.

BY THE COURT:

S/ WENDY BEETLESTONE

WENDY BEETLESTONE, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZACK K. DE PIERO, **Plaintiff,** **v.** **PENNSYLVANIA STATE UNIVERSITY, MARGO DELLICARPINI, DAMIAN FERNANDEZ, LILIANA NAYDAN, CARME BORGES, ALINA WONG, LISA MARRANZINI, FRIEDERIKE BAER AND ANEESAH SMITH,** **Defendants.**	**CIVIL ACTION** **NO. 23-2281**

O R D E R

AND NOW, this 16th day of April, 2025, upon consideration Plaintiff's Response in Opposition (ECF No. 62) and Defendants' Reply (ECF No. 63), **IT IS HEREBY ORDERED** that summary judgment is **GRANTED** in Defendants' favor on the Title VII and PHRA retaliation claims as pleaded in Counts One and Five of the Amended Complaint all in accordance with the accompanying Memorandum Opinion.

The Clerk of Court is **DIRECTED** to **TERMINATE** this matter and mark it as **CLOSED**.

BY THE COURT:

S/ WENDY BEETLESTONE

WENDY BEETLESTONE, J.