UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KENT OVERTON,

Plaintiff,

vs.

CITY OF YPSILANTI,

Defendant.
_____/

Civil Action No.
09-CV-13283

HON. MARK A. GOLDSMITH

OPINION AND ORDER (1) DISMISSING PLAINTIFF'S CLAIM UNDER 42 U.S.C. § 1981 and (2) DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITH REGARD TO PLAINTIFF'S REMAINING CLAIMS

I. INTRODUCTION

This is a reverse discrimination case brought under 42 U.S.C. §§ 1981 and 1983 and Michigan's Elliott-Larsen Civil Rights Act (ELCRA), Mich. Comp. Laws § 37.2101 et seq. Plaintiff Kent Overton, a white male police officer, claims that Defendant the City of Ypsilanti and its chief of police, Matthew Harshberger, passed him over for a promotion to sergeant in favor of a less qualified, African-American candidate by the name of Eddie Davis. Defendant argues that Plaintiff cannot satisfy his burden of proving reverse discrimination under applicable law.

Defendant has moved for summary judgment. The matter is fully briefed and oral argument was heard on January 13, 2011. For the reasons that follow, Plaintiff's § 1981 claim will be summarily dismissed, but summary judgment will be denied as to Plaintiff's § 1983 and ELCRA claims.

II. BACKGROUND[1]

Plaintiff, a white male, has been a police officer with Defendant's police department (YPD) since August 1999. Am. Compl. ¶ 6. The record establishes that Plaintiff was unquestionably a stellar police officer by any standard. Plaintiff's performance evaluations contain nothing short of glowing and enthusiastic reviews. Pl. Ex. F (performance reviews). For example, in Plaintiff's 2005 performance evaluation, the reviewer used the following language to describe Plaintiff: "eager to learn," "continues to challenge himself on a daily basis," "can be counted on to do the job asked of him," "is able to handle his cases with little assistance," "a self starter," "takes orders and directions well," "has exceptional decision making abilities and organization of his cases," "maintains a professional appearance and positive demeanor while at work," does "an excellent job investigating," "is able to properly coach and teach new Officers as a Firearms Instructor and very knowledgeable in that area," and "assures that Detective Bureau is always clean and in an orderly fashion." Id.

Plaintiff received similar praise during the 2007, 2008, and 2009 rating periods. In 2007, Plaintiff's reviewer described him as follows: "can be counted on to make good, informative decisions," "excellent investigator," "his written reports are concise, worded correctly, and well written," "requires little supervision," "respectful of Command," "very cognizant of his personal appearance," "keeps his uniform and work stations in excellent condition," "does a good job of passing on knowledge of the job," "exhibits a great deal of passion and commitment," "always willing to take on extra work," "a huge help to [command]," "knows who is who on the street," "one of the most dedicated Officers in this department, "participates in 'extra curricular'

[1] The background facts are taken primarily from the evidence attached to the parties' motion papers. Undisputed facts for which no citation to the record is provided by the parties are taken from the Amended Complaint.

activities," "represents this department in a positive light," "an asset to this department," and "will make a very good command officer." Id.

Very similar words were used to describe Plaintiff's workplace performance in 2008 and 2009. In addition to the usual glowing language used in the two prior years, Plaintiff's commanding officer noted numerous specific occasions on which Plaintiff's exemplary performance was "singled out." The 2008 review concluded with the following remark:

> [Plaintiff] is a dedicated and valuable asset to this department. He is one of the people I can always count on to step up whether it is to take a call on duty or to perform a task for the department. He reaches out to other officers to assist them both professionally and personally. He will make an excellent command officer and I hope to see this happen soon.

Id. In his 2009 performance review, Plaintiff's commanding officer noted that Plaintiff "is an excellent Police Officer and a model employee" and that he "continued to be a dedicated and valuable asset to this department and someone that I can trust to do the right thing in his job performance." Id. No deficiencies were noted in any of Plaintiff's performance evaluations, with one exception: Plaintiff's performance evaluation for a two-month rating period from November 1, 2004 through December 31, 2004, states, among numerous statements of praise, that Plaintiff "will work on voicing his opinions and beliefs so abruptly – that such abruptness could be construed by others as dogmatic." Def. Ex. M.

In contrast to Plaintiff, the record establishes, quite clearly, that Eddie Davis, an African-American police officer with the YPD, was a less-than-stellar employee. Davis' 2007 performance review contains a balanced mix of both positive and negative/critical statements about his work performance. Def. Ex. N (Davis performance review for 2007). In addition, YPD command officials, in their depositions, testified that Davis' workplace performance was mediocre and, at times, lacking. For example, then-chief of police Harshberger testified that

Davis "has had a long road at the department," that "his career as a patrol officer was not stellar," that he was "lazy" and "inactive," that he "didn't show much initiative," that "every now and again he would get emotional and would have an outburst of some sort," that "there was a period of time when [he] did not appear to aspire to do a whole lot, he was just there to get a paycheck," that "his productivity as an officer was lackluster, . . . he could have and should have done better," and that he did not know the law "thoroughly inside and out." Harshberger Dep. at 31-32, 70-71.

Moreover, Sergeant Charles Eberts of the YPD testified that younger officers do not like the way they are treated by Davis, in part due to Davis' foul language, and that officers have complained about Davis sleeping while on duty. Eberts Dep. at 23-24. Lieutenant Paul DeRidder of the YPD testified that he once disciplined Davis for sleeping during a training session. DeRidder Dep. at 34. Lieutenant Craig Annas testified that although Davis was never caught, he would regularly sleep while on duty during the night shift. Annas Dep. at 20-21.

In addition, Davis was disciplined for using unnecessary force on a prisoner on August 14, 2006. Pl. Resp. at Ex. A ("Personnel Order"). According to the personnel order imposing discipline, which is dated September 29, 2006, Davis "pull[ed] [the prisoner's] arms up too far behind his back" and "exacerbated the situation by pinning [the prisoner] to the floor of the booking room with [Davis'] hand on or near [the prisoner's] throat while yelling at [the prisoner] threats of bodily injury." Then-chief of police Harshberger determined that Davis "disregard[ed] . . . proper procedure," and that his behavior "demonstrated unprofessional and improper conduct . . . unbecoming of a law enforcement professional." Davis received a one-day suspension without pay as a result of this incident.[2] Id.

[2] The record contains a DVD recording of this incident. Pl. Resp. at Ex. P.

In August 2007, an opening for a sergeant position with the YPD became available. Defendant, in its brief, described the promotion process:

> The process for promotion was controlled by the collective bargaining agreement between the Police Officers Association of Michigan (POAM) and the City of Ypsilanti. Pursuant to the collective bargaining agreement, promotions were based upon merit with both a written and oral interview/examination ("the Assessment Center"). All officers who passed the written exam were eligible to participate in the Assessment Center. The City retained an outside company (EMPCO) to administer the Assessment Center. Based upon the results of both the written test and the oral interview, the top five candidates were eligible for final selection by the then Chief of Police, Matthew Harshberger. Pursuant to the collective bargaining agreement, the Chief had complete discretion to chose [sic] one of the five top candidates.

Def. Br. at 1-2 (citing Harshberger Dep. at 18-19). Based on their test scores, Plaintiff, Davis, and three others emerged as the top five candidates.[3] In selecting a winner among the candidates, Harshberger testified that he considered the following factors:

> I think basically, I look at who I believe has the, you know, wherewithal, can make the decisions that I want to have be made, has experience, thinks much the same way that I do, know that's going to follow through and be a team player with my philosophy, my leadership philosophy, who can be a leader of personnel.

Harshberger Dep. at 21. When asked if an applicant's employment history with the YPD is a factor when deciding who to promote, Harshberger responded that "[p]ast performance is an indicator of future performance, and it should be one of many factors" considered. Harshberger Dep. at 29-30.

In August 2007, Harshberger ultimately chose Eddie Davis for the promotion over Plaintiff and the other three finalists. Id. at 31, 118. Harshberger testified that he chose Davis for the promotion because he had grown into a "mature senior officer":

[3] Plaintiff received the highest score on the written examination and the second highest score on the assessment center. Am. Compl. ¶¶ 18, 21. When the written examination and assessment center scores were totaled, Plaintiff achieved the highest combined score. Id. ¶ 22.

> Over the course of the long period that [Davis] was [at the YPD], I . . . got to know Eddie really well . . . and I can say that he matured over that period of time. Prior to his term as an interim or acting sergeant, I saw Eddie as a mature senior officer. I wouldn't classify him as a ball of fire out on the streets but someone that I know I could rely on making sound decisions when doing case investigations and whatnot.
>
> Did he have limitations on experience and knowledge? Certainly, but something that I saw could be rectified with training. Again, . . . knowing Eddie as I know him, he's a good person, he's honest, a hard worker when you give him a task that he wants to sink his teeth into, and he had passed an assessment center prior to being named as an acting sergeant, was looking to take on additional roles in the department at the time.
>
> So at some point I think what I'm trying to say in a nutshell is that there was that before and after period where I think most people in the department would probably agree that there was a period of time when Eddie Davis did not appear to aspire to do a whole lot, he was just there to get a paycheck, and there was that time afterwards when he made that decision that I'm here and I want to make something of myself and I want to move forward in the organization, and I saw it and we saw it and we talked about it at the command level that there was a change, a visible change. And that's where I saw him maturing as an individual, as a person.

Id. at 32-33.

Harshberger testified that he did not choose Plaintiff for the promotion because he lacked maturity and was overly opinionated:

> [O]ne of my concerns with [Plaintiff] was his maturity and the fact that he has always been very blunt, very straightforward, very quick to give his thoughts and his opinion, even in front of others, had no problem confronting other officers or saying his piece regardless of . . . the situation.

Id. at 67-68. Plaintiff admits that he is "opinionated" and "dogmatic" and that he has a reputation within the department for these attributes. Pl. Dep. at 53-54.

Harshberger testified that race did not play a role in his decision to promote Davis over Plaintiff, nor did Harshberger feel pressure from anyone to make the decision based on racial considerations. Harshberger Dep. at 118-119. However, Harshberger did testify that it is important that a police force reflect the community that it serves and that, specifically, it is

important for the racial composition of a police department's command staff to reflect the community that is serves. Id. at 28-29.

Lieutenant Annas testified that Plaintiff was most qualified for the promotion: "[Plaintiff] truly was head over heels superior than who they picked [referring to Davis], sure." Annas Dep. at 23-24. Annas further testified that he believes that race was a "definite contributing factor" motivating Harshberger's decision to promote Davis over Plaintiff, and that he would have chosen Plaintiff for the promotion over Davis. Id. at 32, 48. Lieutenant DeRidder also testified that he would have chosen Plaintiff for the promotion over Davis. DeRidder Dep. at 35-36. Sergeant Eberts testified that he would rank Davis "toward the bottom" of the list of the top five candidates, and that Plaintiff would rank first on the list. Eberts Dep. at 9. According to Eberts, Davis was not qualified to be sergeant and had a reputation in the department "as someone who didn't do a lot of work." Id. at 10-11. In Eberts' opinion, Davis was promoted over Plaintiff based on race. Id. at 17. When asked to explain, Eberts testified:

> I didn't think Eddie was qualified. He never showed himself to be the type of employee that I thought should be given a promotion and promotions aren't handed out every day in our department and they're getting to be rarer and rarer due to the size of the department. And I think it should be based on merit, strictly merit and I don't think there was any merit in that promotion. There was seniority and that is about it.

Id.

III. SUMMARY JUDGMENT STANDARD

A court "shall grant summary judgment if the movant 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. 56(a). When evaluating a summary judgment motion,

> credibility judgments and weighing of the evidence are prohibited. Rather, the evidence should be viewed in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d

> 202 (1986). Thus, the facts and any inferences that can be drawn from those facts [ ] must be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Biegas v. Quickway Carriers, Inc., 573 F.3d 365, 373 (6th Cir. 2009) (quotation marks omitted).

IV. ANALYSIS

Plaintiff's Amended Complaint contains three counts: race discrimination under 42 U.S.C. § 1981, race discrimination under 42 U.S.C. § 1983, and race discrimination under the ELCRA. The two federal claims are duplicative, see Arendale v. City of Memphis, 519 F.3d 587, 598-599 (6th Cir. 2008) (§ 1983 constitutes the "exclusive federal remedy" for violations of § 1981 and "no independent cause of action against municipalities is created by § 1981(c)"); thus, Plaintiff's § 1981 claim will be summarily dismissed. The § 1983 claim is analyzed under the legal framework governing Title VII disparate treatment claims. Sutherland v. Mich. Dep't of Treasury, 344 F.3d 603, 614 (6th Cir. 2003).

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise 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). Under the Title VII disparate treatment framework, a plaintiff must first set forth a prima facie case giving rise to an inference of discrimination. Sutherland, 344 F.3d at 614. A plaintiff establishes a prima facie case based on a failure to promote by showing:

> (1) that he is a member of a protected class; (2) that he applied and was qualified for a promotion; (3) that he was considered for and denied the promotion; and (4) other employees of similar qualifications who were not members of the protected class received promotions.

Id. However, in cases of reverse discrimination such as this one where a member of the majority is claiming discrimination based on race, the first and the fourth elements of the prima facie framework are modified. In order to satisfy the first element in the reverse discrimination context, a plaintiff must show "background circumstances" supporting the suspicion that the defendant is that unusual employer who discriminates against the majority. Id. In order to satisfy the fourth element of the disparate treatment framework, the plaintiff must show that the defendant treated differently employees who were similarly situated but were not members of the protected class. Id. Notably, however, the Sixth Circuit has cautioned against allowing the modifications applicable in reverse discrimination cases to "impermissibly impose a heightened pleading standard on majority victims of discrimination." Zambetti v. Cuyahoga Cmty. Col., 314 F.3d 249, 257 (6th Cir. 2002). See also Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 801 n.7 (6th Cir. 1994) ("[w]e have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts").[4]

If the plaintiff satisfies his or her prima facie case, the burden shifts to the defendant to offer a legitimate, non-discriminatory reason for the denial of the promotion. If the defendant

[4] In his brief, Plaintiff asserts that the modified framework applicable in the reverse discrimination context but not in the traditional discrimination context is unconstitutional and urges the Court not to apply it. Plaintiff points out, correctly, that the doctrine has been rejected as unconstitutional by the Third and Eleventh Circuits. See Bass v. Bd. of County Com'rs, Orange County, Fla., 256 F.3d 1095, 1102-1103 (11th Cir. 2001); Iadimarco v. Runyon, 190 F.3d 151, 162 (3d Cir. 1999). However, the Sixth Circuit continues to apply the modified framework in a manner that does not impose a heightened standard for majority victims of discrimination. See, e.g., Arendale, 519 F.3d at 604-605; Simpson v. Vanderbilt Univ., 359 F. App'x 562, 569 (6th Cir. 2009) (unpublished); Anderson v. Avon Prods., Inc., 340 F. App'x 284, 288 (6th Cir. 2009) (unpublished); Morris v. Family Dollar Stores of Ohio, Inc., 320 F. App'x 330, 339-340 (6th Cir. 2009) (unpublished). This Court is without authority to deviate from established Sixth Circuit case law.

satisfies its burden of articulation, then the burden shifts back to the plaintiff to demonstrate that the proffered reason is a pretext. Zambetti, 314 F.3d at 255-256.

The ELCRA provides that employers shall not "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . race." Mich. Comp. Laws § 37.2202(a). Claims under the ELCRA involve the same analysis as Title VII claims, Sutherland, 344 F.3d at 614 n.4, except that, under Michigan law, the first and fourth elements of a plaintiff's prima facie case are not modified in reverse discrimination cases. Lind v. City of Battle Creek, 681 N.W.2d 334, 335 (Mich. 2004) (the legal standards governing traditional discrimination claims and reverse discrimination claims are the same; a plaintiff claiming reverse discrimination need not show background circumstances).

A. Plaintiff's Prima Facie Case

The only element of Plaintiff's prima facie case in dispute is the first element: background circumstances. One way in which a plaintiff may establish background circumstances is to proffer evidence tending to show that an employer "has some reason or inclination to discriminate invidiously against whites." Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993). A plaintiff may satisfy this burden by showing the existence of (i) political pressure to promote a particular minority because of the candidate's race, (ii) pressure to promote minorities in general, or (iii) proposed affirmative action plans. Mastro v. Potomac Elec. Power Co., 447 F.3d 843, 851 (D.C. Cir. 2006). See also Preston v. Wisconsin Health Fund, 397 F.3d 539, 542 (7th Cir. 2005) (evidence that those "running the company are under pressure from affirmative action plans, customers, public opinion, the EEOC, a judicial decree, or corporate

superiors imbued with belief in 'diversity' to increase the proportion of [a minority] in the company's workforce" is sufficient to establish background circumstances).

Another way in which a plaintiff may establish background circumstances is by showing that there is something suspicious or "fishy" about the facts of the case at hand such that an inference of discrimination is raised. Mastro, 447 F.3d at 851. By way of example, the following circumstances would suffice under the "fishiness" approach: (i) evidence that a plaintiff was given little or no consideration for a promotion and that the supervisor never fully reviewed the qualifications of the minority promote, and (ii) evidence that a minority applicant was promoted over four objectively better-qualified white applicants in an unprecedented fashion. Importantly, the background circumstances requirement is "minimal, in keeping with [the] belief that the requirement is not intended to be an additional hurdle for white plaintiffs, and the general under-standing [sic] that the plaintiff's burden of establishing a prima facie case of discrimination under the McDonnell Douglas framework is not onerous." Id. at 852.

Plaintiff advances several theories in support of his argument that he has established requisite background circumstances. First, Plaintiff contends that the circumstances surrounding Davis' promotion are suspicious. In support, Plaintiff points out that:

- Harshberger falsely testified that Annas, Angott, and DeRidder supported his decision to promote Davis;[5]
- Davis was promoted soon after the incident in which he used unnecessary force on a prisoner; and
- there is a "huge disparity in credentials between Davis and Plaintiff." Resp. at 15.

The Court believes that a reasonable jury could find the circumstances surrounding Davis' promotion to be suspicious. First, it is somewhat perplexing, as Plaintiff notes, that Davis was

[5] Plaintiff does not provide a citation to the record in support of this assertion.

chosen to be promoted to a command-level position shortly after a major incident of misconduct against a prisoner, which warranted a formal investigation that concluded in a finding of unnecessary force and conduct unbecoming a police officer. A jury could find it "fishy" that Davis was chosen for a promotion within a mere year of this severe instance of misconduct.

In addition, the Court agrees that a reasonable jury could find a significant disparity between the credentials of Plaintiff and those of Davis based on the evidence contained in the record. Specifically, as discussed extensively in the background section above, the record is full of evidence that Plaintiff was a stellar police officer with an impeccable reputation within the YPD while Davis was a mediocre police officer, at best, with a reputation for laziness and inactivity within the YPD. Harshberger testified that Davis had "turned the page" on this negative chapter of his work life at the time of his promotion; however, other parts of the record tell a different story:

- Davis' 2007 performance evaluation contains both positive and negative comments (in contrast to Plaintiff's performance evaluations, which are glowing by any standard);
- the record contains evidence that Davis was known to sleep on the job and was disliked by other officers;
- Sergeant Eberts testified that Davis was "toward the bottom" of the final list of candidates for the promotion; and
- Lieutenant Annas testified that Plaintiff was "truly was head over heels superior" to Davis.

In sum, the record as a whole supports Plaintiff's position that there is a significant disparity between Plaintiff's credentials and those of Davis. This disparity bolsters Plaintiff's argument on background circumstances. See Harding, 9 F.3d at 153 (evidence of "superior qualifications" is "equally valuable" to the other types of evidence commonly used to show background circumstances).

Plaintiff also argues that he has satisfied the background circumstances element of his prima facie case because Defendant vigorously promotes diversity. Resp. at 7-11. In support, Plaintiff points out:

- that Ypsilanti's logo contains the word "diversity";
- that an influential community activist, Lee Tooson, and two influential city council members, Lois Richardson and Trudy Swanson, have advocated "race-based hiring and promotions" within the YPD;
- the testimony of Ypsilanti City Manager, Edward Koryzno, who testified that the YPD has "hired minorities when available to become police officers," Koryzno Dep. at 26;
- Harshberger's testimony that a police force should reflect the community that it serves, Harshberger Dep. at 28-29;
- the testimony of Harshberger's predecessor, former YPD Chief of Police George Basar, who testified that "[a]ny police chief . . . is always going to try to develop a police department that mirrors the makeup of the community as best as possible," and that diversity (including race) is one factor considered by police chiefs in the promotion process, Basar Dep. at 18-19;
- that the hiring process to fill Basar's seat for chief of police was "re-opened" because "[t]here was a question as to whether the field had been broad enough to include minority candidates," Koryzno Dep. at 8; and
- when Koryzno interviewed DeRidder for an interim chief of police vacancy, DeRidder was asked only four questions: How does he "get along with" Tooson, Swanson, Richardson, and Robert Hunter, all community activists who advocate for race-based employment decisions within the YPD. Annas Dep. at 9-10.

Defendant believes that much of this evidence is inadmissible, inaccurate, or not probative. The Court need not resolve whether Defendant is correct because Plaintiff has satisfied the "minimal" background circumstances requirement by showing that the circumstances surrounding Davis' promotion are "fishy," as discussed above. See Mastro, 447 F.3d at 852 (a plaintiff may establish background circumstances by proffering evidence that the employer has a reason or

inclination to discriminate against the majority, or by proffering evidence of "fishy" circumstances; offering both types of evidence is not necessary).

Considering the facts in the light most favorable to Plaintiff and cognizant of the well-established rule that the burden of showing background circumstances is "minimal," Plaintiff has met his burden. The background circumstances element is the only element of Plaintiff's prima facie case in dispute; thus, Plaintiff has established his prima facie case.[6]

B. Defendant's Burden of Articulation

Because Plaintiff has satisfied his prima facie case, the burden shifts to Defendant to offer a legitimate, non-discriminatory reason for the denial of the promotion. Zambetti, 314 F.3d at 255-256. Defendant argues that it has satisfied its burden of articulation here because Plaintiff was not chosen for the promotion due to his maturity level and bluntness. Harshberger Dep. at 67-68. The Court finds that this is a legitimate, non-discriminatory reason for denying Plaintiff the promotion.

C. Pretext

Since Defendant has satisfied its burden of articulation, the burden now shifts back to Plaintiff to demonstrate that the proffered reason is a pretext. Zambetti, 314 F.3d at 255-256.

A party claiming discrimination can establish that a proffered reason is pretextual by showing that the reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct. Clay v. United Parcel Serv., Inc., 501 F.3d 695, 703-704 (6th Cir. 2007). "Qualifications evidence" (i.e., evidence that the rejected applicant is more qualified than the successful applicant) is sufficient

[6] As noted above, Plaintiff's ELCRA claim is not subjected to the modified background circumstances framework; rather, it is subjected to the framework used in traditional Title VII disparate treatment cases. Lind, 681 N.W.2d at 335; Sutherland, 344 F.3d at 614 n.4. Defendant advances no argument as to why Plaintiff has not satisfied his prima facie case with regard to his ELCRA claim.

to raise a question of fact on pretext when combined with other probative evidence showing discrimination, but it is insufficient to raise a question of fact standing alone unless the rejected applicant's qualifications are "so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former." Bender v. Hecht's Dep't Stores, 455 F.3d 612, 626-627 (6th Cir. 2006). See, e.g., Jenkins v. Nashville Public Radio, 106 F. App'x 991, 995 (6th Cir. 2004) (summary judgment improper where, in addition to evidence of superior qualifications, the plaintiff provided evidence of "irregularities in the application and selection process," "inconsistencies in the reasons given . . . for not hiring her," and "the lack of African-American women in supervisory positions" at the company).

On the one hand, a reasonable jury could find, on this record, that Plaintiff was substantially more qualified for the promotion than Davis. On the other hand, the Court cannot determine, as a matter of law, whether Plaintiff's qualifications were "so significantly better" than Davis' such that "no reasonable employer would have chosen" Davis over Plaintiff. However, the Court need not determine whether qualifications evidence is alone sufficient in this case because Plaintiff has proffered other evidence that a reasonable jury may deem probative of discrimination:

- Davis was promoted just one year after Harshberger determined that Davis was responsible for a substantial incident of misconduct in which Harshberger determined that Davis "disregard[ed] . . . proper procedure," "demonstrated unprofessional and improper conduct," and engaged in conduct "unbecoming of a law enforcement professional";

- former chief of police Basar testified that race is one factor considered in YPD's hiring and promotion process;

- Sergeant Eberts, another command officer, testified that Davis was not qualified to be sergeant;

- although Harshberger testified that Plaintiff was not selected for the promotion due to his lack of maturity and his bluntness, this criticism is not reflected in Plaintiff's recent performance evaluations.[7]

Taking the facts in the light most favorable to Plaintiff, the evidence described above, if believed, constitutes additional evidence of pretext and, when combined with the qualifications evidence presented in this case, is sufficient to defeat summary judgment on the issue of whether Defendant's proffered reason for denying Plaintiff the promotion is pretextual.

V. CONCLUSION

For the reasons stated above, Plaintiff's § 1981 claim is summarily dismissed pursuant to Arendale, 519 F.3d at 598-599. Summary judgment is denied with regard to Plaintiff's § 1983 and ELCRA claims.

SO ORDERED.

Dated: February 16, 2011

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on February 16, 2011.

s/Deborah J. Goltz
DEBORAH J. GOLTZ
Case Manager

[7] As noted above, Plaintiff's performance evaluation for a two-month rating period from November 1, 2004 through December 31, 2004, states that Plaintiff "will work on voicing his opinions and beliefs so abruptly – that such abruptness could be construed by others as dogmatic." Def. Ex. M. However, his subsequent performance evaluations (years 2005, 2007, 2008, 2009) say nothing about this criticism (or any criticism, for that matter). Had Plaintiff's maturity or bluntness been deemed problematic at or around the time the promotion decision was made in 2007, one would expect to see the 2004 criticism repeated in Plaintiff's 2005 or 2007 performance evaluations. Instead, in the "deficiencies" section of Plaintiff's 2005 and 2007 performance reviews, the reviewer writes "Nothing for this rating period" and "None noted," respectively. This evidence may be deemed probative on the issue of pretext by a jury.