IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DAVID GRIFFITH,	)	
	)	
Plaintiff,	)	4:01-CV-10537
	)	
vs.	)	
	)	
CITY OF DES MOINES, RONALD	)	
WAKEHAM and JERRY COHOON	)	ORDER
	)	
Defendants.	)	
	)	

The Court has before it defendants' motion for summary judgment, filed March 6, 2003. Plaintiff resisted on May 1, 2003, and defendants replied on May 9, 2003. Plaintiff filed a supplemental resistance on June 24, 2003, to which defendants replied on June 25, 2003. The matter is now fully submitted.

I. BACKGROUND

The following facts are undisputed or viewed in a light most favorable to plaintiff.

Plaintiff, David Griffith, is a Hispanic male of Mexican descent. He began working for the City of Des Moines Fire Department in January 1989. Plaintiff's App. (Ex. 13). Until December 1999, Griffith was stationed at Fire Station 8, where he worked as a firefighter and emergency medical technician. *Id*. (Ex. 51) (Griffith Dep.). Plaintiff alleges that he and other minority employees were subjected to a racially tense environment at the Fire Department.

The Fire Department has been charged with excluding minorities in the past. In 1982, a

Consent Decree was entered ordering the Des Moines Fire Department to hire African Americans. *Id.* Until that time, only one African American had been employed by the Fire Department. *See* Plaintiff's App. (Ex. 8 at 2) (Consent Decree, Civil No. 82-460-D). There have been more recent charges of discrimination as well. In 1998, the EEOC made a probable cause finding that the Fire Department had again discriminated against African American applicants in the hiring process. *Id.* (Ex. 60) (EEOC Letter).

- Racially-Charged Language Plaintiff Heard

Plaintiff alleges that Fire Department employees have made derogatory remarks about Hispanics. For example, in 1997 or 1998, plaintiff responded to a fire at apartment buildings predominately inhabited by Hispanics located on Indianola and Park Avenues. Defendant's App. at 245 (Griffith Dep.). *Id.* While at the scene, firefighter Gary Lathrum (Lathrum) said, "Boy, if this isn't as close [sic] you can get to a barrio in Des Moines, I'll kiss your ass for that." *Id.* at 245. Griffith asked Lathrum what he meant by "barrio." *Id.* Lathrum replied, "Isn't it the place that you'd like to live in [sic] a place with a bunch of low-rent Mexicans?" *Id.* at 246. Firefighter Larry Van Baale (Van Baale), who had not yet been promoted to lieutenant at the time, chuckled at Lathrum's remark. *Id.* at 64 (Van Baale Declaration, ¶ 1). Plaintiff told Lathrum that he did not appreciate the downgrading comment, but did not document the incident or tell anyone about it. *Id.* at 246-47.

In 2000 or 2001, while using the computer in the Captain's office at the Fire Department, plaintiff overheard Lathrum talking to firefighters Curlee Ware and Sam Jacob in the kitchen.[1] Lathrum

[1] Plaintiff could not see the kitchen from the Captain's office. Defendants' App. at 257.

stated, "David Griffith, because he's Latino, he thinks he can get by with everything and that the rules aren't held to the same standard for him as they are for us."[2] *Id.* at 252 (Griffith Dep.). Plaintiff then walked into the kitchen and asked Lathrum, "Who do you know or what do you know that I've ever done to try to get away with anything because of my nationality?" *Id.* at 258-59. Lathrum replied, "I was just trying to get Curlee Ware hyped up to go in and give you shit." *Id.* at 259. Plaintiff responded, "Well, I still want to know. Obviously, you feel that way." *Id.* After this exchange Lathrum left the room. *Id.* Later, he returned and told plaintiff that he was "sorry and wrong." *Id.* Plaintiff did not report this incident. *Id.*

Plaintiff alleges that on May 5, 2001, while working in the Captain's office, he overheard another conversation taking place in the kitchen between Van Baale and Lathrum about the recent closing of a local packing plant. *Id.* at 252, 256-57.[3] Van Baale stated, "Why do we need all the spics here? We ought to send them all back to Mexico." *Id.* at 251-52. Lathrum responded, "I'm tired of paying for their welfare and their medical help." *Id.* at 252. Plaintiff did not document or tell anyone about this episode. *Id.* at 259. Van Baale denies having the conversation and denies being at work on May 5, 2001. *Id.* at 64 (Van Baale Declaration, ¶2). Fire Department records show that Van Baale was on sick leave that day. *Id.* at 65 (Fire Department Duty Roster for May 5, 2001).

Plaintiff has heard firefighters make derogatory comments about non-Hispanic minorities. In 1998, while watching a movie at Station 6, Lathrum referred to African Americans as "niggers." *Id.* at

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[2] According to plaintiff, Lathrum did not know plaintiff was in the Captain's office when he made his remark. *Id.* at 252-53.

238-41. When an orangutan appeared on the movie, Lathrum said, "If that ain't the fucking link between the blacks and the apes, I'll kiss your ass." *Id.* In 1999, plaintiff heard another fire fighter, Billy Burt, say, "You put a basketball in those niggers' hands, they know what to do, but you ask them to do something on the fire ground, and they don't know what to do."[4] *Id.* at 242. In 2000 or 2001, while on a call to a house owned by Asians, plaintiff told Lathrum, "That's a strong, strong smell." *Id.* at 261 (Griffith Dep.). Lathrum replied, "The whole fucking country smells like that. I should have shot all their fucking asses in Vietnam when I had the chance." *Id.*

Plaintiff has never personally heard Chief Ronald Wakeham make any comments that disparaged plaintiff's ethnicity. *Id.* at 304. Chief Wakeham denies ever discriminating against plaintiff on the basis of his race and denies ever observing anyone else discriminate against plaintiff on the basis of his race. *Id.* at 151 (Wakeham declaration, ¶ 2).

- Racial Comments Heard By Other Employees

In addition to plaintiff's allegations, the record contains testimony given by other firefighters who have heard racial comments at the Fire Department. In his deposition, firefighter Patrick Daughenbaugh (Daughenbaugh) stated, "We definitely have issues of racism on this job." *Id.* at 383. He recalls that someone at Station 2 once called plaintiff a "stupid Mexican." *Id.* at 383 (Daughenbaugh Dep.).[5] Daughenbaugh stated that he heard what he believed to be racially derogatory remarks about Hispanics

[4] In his deposition, when asked who made this remark, plaintiff stated, "I cannot remember who it was. It sticks in my mind that it was Billy Burt . . . He was constantly making some type of derogatory remark towards some nationality, towards some person of the fire department." *Id.* at 242-43.

[5] Daughenbaugh does not recall who made the remark and does not recall whether plaintiff was on his leave of absence at the time the remark was made. *Id.* at 384, 387-88.

when called to a trailer park on the south side of Des Moines, an area another firefighter referred to as "Little Mexico." *Id.* at 389-90. He stated, "Any time you go to those south side trailer parks, you're going to hear something, whether it's quiet or, you know, nod-nod, wink-wink, or this or that. Yeah, you hear that stuff all the time." *Id.* at 390. Daughenbaugh specifically recalled hearing the following comments: "thank God we keep them all in one place;" "they should go back to their own country;" "they're sucking our resources;" and "see where your tax money is going." *Id.* at 389, 394-95. As the Court understands Daughenbaugh's Deposition., he also once heard a firefighter refer to a Hispanic person as a "beaner." *Id.* at 394. Daughenbaugh could not identify which firefighters made these remarks. *Id.* at 394-95.

David Bernal, another Hispanic firefighter, stated that he heard racial remarks that were "kind of off" on a monthly basis when assigned to Station 8. *Id.* at 431-32. For instance, sometime in 2001 or 2001, he heard another firefighter, whose nickname was Nature Boy, make the following comment: "They ought to take all them fucking wetbacks and send them all back over the border where they belong." *Id.* 418-19 (Bernal Dep.). Nature Boy then used some other racially derogatory words, including "greasers." *Id.* at 419. Bernal told Nature Boy that as a Hispanic, he was offended by Nature Boy's remarks. *Id.* at 419. Nature Boy replied, "Go ahead. Sue me. Do what you want to do. Go ahead, Bernal, are you going to sue me? Take me downtown. Are you going to take me downtown about it?" *Id.* at 421-22. Bernal did not report the incident to anyone, does not know if any supervisor heard it, and cannot recall which supervisors were at the station at the time. *Id.* at 422-23.

Bernal also told plaintiff about a comment he heard in about January 2002 by his Acting

Captain, Timothy Hartman. Hartman asked Hispanic District Chief Chia, "What kind of self-respecting Mexican doesn't go around carrying a stiletto?" *Id.* at 416-17 (Bernal Dep.). According to Bernal, Chia did not appear offended at all, but took the question as a good-humored joke. *Id.* at 417, 427. Bernal stated: "Chia is probably the one who gets most of the racial jokes and things said to him, because he takes it and it's a fun thing for him and the people that do it to him. They enjoy it." *Id.* at 427.

Firefighters have complained of non-Hispanic racially derogatory language being used at the Fire Department as well. In his deposition, firefighter Kevin Carroll stated that he had been called "nigger" by another firefighter. Plaintiff's App. (Ex. 50a) (Carrol Dep. at 86-87). Firefighter Robert Stanton complained that on January 8, 2002, firefighter Rick Fite publicly called him a "nigger" and his children "half breeds." Plaintiff's App. (Ex. 53). Stanton reported the incident to Chief Wakeham, and Fite received a written reprimand for his behavior. *Id.* (Exs. 54, 55).

Other Fire Department employees have complained that Chief Wakeham himself has made inappropriate racial remarks while at work. On June 6, 2002, Assistant Chief Douglas Rubin sent a letter to Human Resources Director, Tom Turner, concerning "off-color comments" made by Wakeham. Plaintiff's App. (Ex. 56). Rubin generally stated that the off-color remarks from Chief Wakeham "are numerous, ongoing, and cross all protected classes" and have placed Rubin in an "untenable position." *Id.* Rubin gave four examples of offensive comments Wakeham allegedly made. Of the four, two statements contained gender-based slurs; one involved the use of, or at least the

suggestion of, profanity;[6] and one included the term "nigger." The comment including the term "nigger" was not made in the context of an employment decision.[7] Rubin stated that he had been advising the City of Wakeham's behavior for four years. *Id.*

On February 25, 2003, Rubin signed a declaration stating that he has "never heard []Wakeham say anything racially derogatory about David Griffith." Defendant's App. at 158 (Rubin Declaration). He further stated that he has "never heard [] Wakeham say anything racially derogatory about Hispanics generally." *Id.* Rubin's statements were made under penalty of perjury. *Id.*

In addition to Rubin, three others have complained about Wakeham. Barbara Rodgers, an Administrative Analyst for the fire department, stated that Wakeham made racially derogatory remarks, including "nigger." *Id.* (Ex. 57) (Rodgers Letter). Ahman Douglas, an African American firefighter, complained that Wakeham told him to be part of a television interview, because "they need some color." *Id.* (Ex. 59, at 3). David Keenan stated that during a meeting about the importance of interpreting the different types of smoke at a structure fire, Wakeham made a reference to Indians. *Id.* (Ex. 58, at 1). None of these three remarks were made in connection with any adverse employment action. *See Id.* (Exs. 57-59). Like Rodgers and Ahman, Keenan documented his complaint with Tom

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[6] Rubin complained that Wakeham gave the following introduction at a senior staff meeting: "Well, let me tell you a little bit about myself . . . I come from Norfolk, Virginia. You know how that's pronounced, no drink, no smoke, No Fulk."

[7] Rubin recalled the following incident:

> On May 8, 2002, [Wakeham] and I went to Nolen Plaza for the Mayor's Spring Bash. We spoke with our personnel there then grabbed some ice cream and walked around. When it got to be around 11:30 a.m., I asked [Wakeham] if he wanted to stick around . . . or go to lunch. He turned his head in the direction of Amelia Hamilton-Morris who had a table set up and said: 'Well, I guess we could always throw the nigger in the pool.'

Turner of Human Resources. *Id.*

- Criminal Charges Against Plaintiff

In October 1999, plaintiff was arrested and pled no contest to a charge of simple assault for a non-work-related incident that took place between him and a woman at Drake University. Defendant's App. at 503-04, 507 (Griffith Dep.). At the time, plaintiff feared that he might lose his job due to the assault charge that was filed against him. *Id.* at 505-06.

Two months later, a warrant was issued for plaintiff's arrest on three counts of 3rd Degree Sexual Abuse. *Id.* at 4 (12/13/99 Arrest Warrant). One day, a Des Moines police officer arrived at Station 8 and told several firefighters that plaintiff was going to be charged with "serious sexual acts towards a minor." *Id.* at 351 (Carrol Dep.) Plaintiff was arrested on December 14, 1999. *Id.* at 5 (Warrant Return of Service). His arrest was reported in The Des Moines Register. *Id.* at 15 (12/15/99 The Des Moines Register).[8] After plaintiff's arrest, his lawyer, Kent Balduchi, contacted Assistant City Attorney, Carol Moser, in order to determine whether the criminal charges would affect plaintiff's employment with the Fire Department. *Id.* at 318-19 (Balduchi Dep.). Moser informed

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[8] The Des Moines Register article provided:

> Three counts of third-degree sexual abuse have been filed against a Des Moines firefighter for incidents dating back several years.
> David Lee Griffith . . . was arrested Tuesday by Des Moines police. Officials allege Griffith fondled a teen-age girl who was under the legal age of consent. Later, when she was an adult, Griffith is alleged to have forcibly fondled the woman. The complaint was filed by the woman, now 22, on Saturday.

Id.

Balduchi that plaintiff would receive a pretermination hearing, and that he would continue to receive his pay until that hearing was held. *Id.* She further advised that the City had a policy allowing it to terminate an employee when felony charges had been brought against the employee. *Id.* at 320

Balduchi understood that a pretermination hearing would not necessarily result in plaintiff's termination, but he feared plaintiff's employment was in jeopardy. *Id.* at 319. On December 15, 1999, he sent a letter requesting a leave of absence for plaintiff. The letter stated, in relevant part:

> [Plaintiff] is aware of the public concerns which may be raised regarding his service as a firefighter, whether founded or not. In an effort to allay those fears, [plaintiff] is requesting a leave of absence until these charges are resolved or for one year, whichever is less. We believe a leave of absence will protect the City's interest and thereby avoid the pressure to take any premature punitive measures such as suspension or termination of [plaintiff's] employment.

Id. at 17. In a second letter sent on the same date, plaintiff's lawyer stated that he was under the impression that the Fire Department was planning to terminate plaintiff, and that plaintiff's request for leave of absence was an offer of compromise. *Id.* at 18.

In a letter dated December 16, 1999, Fire Chief Ronald Wakeham ("Wakeham") granted plaintiff a 90-day leave of absence, beginning on December 17, 1999. *Id.* at 21. Wakeham advised that he would review the leave status after 60 days. *Id.* During the short period of time between his arrest and Wakeham's grant of the 90-day leave of absence, plaintiff was placed on paid administrative leave. *Id.* at 334-35 (Balduchi Dep.).

On January 20, 2000, plaintiff was charged with three counts of Sexual Abuse in the 3rd Degree. *Id.* at 7 (Trial Information). The charges were based upon information gathered by the Des Moines Police Department, including a tape-recorded interview with the victim, and a tape-recorded

telephone call between the victim and Griffith. *Id.* at 434-55 (Des Moines Police Report). Defendants claim that this evidence of plaintiff's alleged misconduct was sufficient to support a discharge from employment under Iowa Code Section 400.19.

On March 13, 2000, Balduchi wrote Moser a letter requesting a copy of the City's policy regarding leave for employees facing felony charges. *Id.* at 22. Moser informed Balduchi that the City did not have a written policy, but that it had been the City's practice "to place similarly situated employees on leave pending the outcome of the criminal charges." *Id.* at 23 (3/17/00 Moser Letter). She indicated that "[t]here were other circumstances when discipline ha[d] occurred immediately without waiting for the outcome of criminal charges." *Id.* Moser further advised:

> While your client requested the leave of absence granted by the fire chief, it is likely that he would have been put on leave without his request and it is my understanding that the leave will continue until the sex abuse charge is resolved. Public employees particularly those in the public safety arena are held to a high standard of conduct and continued leave is in the public interest.

Id. Finally, Moser acknowledged that plaintiff could use his vacation time during his leave of absence. *Id.*

Plaintiff did not appeal his leave of absence to the Des Moines Civil Service Commission. *Id.* at 321-22 (Balduchi Dep.).

In May 2000, Balduchi informed Moser that a plea agreement had been reached in plaintiff's criminal case, and that plaintiff's charges would be reduced to a misdemeanor level. *Id.* at 323-24 (Balduchi Dep.) Moser represented that the City would allow plaintiff to return to work in anticipation of the plea. *Id.* at 24, 325. Upon his return, plaintiff was assigned to 8-hour workdays at Station 1 in Des Moines, Iowa. *Id.* at 216-18 (Griffith Dep.).

On May 16, 2000, plaintiff pled guilty to the charges of Assault with the Intent to Inflict a Serious Injury and Harassment in the First Degree. *Id.* at 10-12 (Petition to Plead Guilty and Order of Conviction). The court suspended the sentence of imprisonment and placed him on probation for two years. *Id.* at 13 (Order of Conviction). The conditions of probation included attending assaultive behavior classes and a prohibition on coaching, training, or running with any persons under the age of 18.[9] *Id.*

- Plaintiff's Post-Plea Employment

Plaintiff continued to work for the Des Moines Fire Department after he pled guilty to the criminal charges against him. On or about May 18, 2000, Assistant Chief Cohoon granted plaintiff's request to ride a fire truck at Station 5. *Id.* at 219-20 (Griffith Dep.). He worked as a firefighter, rather than a medic, on that assignment. *Id.* On May 21, 2000, plaintiff was assigned to work as an acting medic at Station 9. *Id.* at 224. Plaintiff thought that his skills were inadequate for that assignment, since he had not been on a medic squad for six months. After sharing his concern with District Chief Douglas, plaintiff was reassigned to the ladder truck at Station 9, a non-medic assignment. *Id.* at 224-27.

In the weeks that followed, plaintiff received instruction on how to operate extrication equipment that had been installed on the fire trucks. *Id.* at 231-32.

On or about July 24, 2000, Acting District Chief Sanders assigned plaintiff to drive the medic

[9] Plaintiff's relationship with his victim began when the victim was 15 years-old. Plaintiff gave his victim running instruction.

squad at Station 3. *Id.* at 227. When plaintiff arrived at Station 3, he informed the Paramedic on duty that his assistance would be limited, as he had not used his EMS skills for more than six months. *Id.* at 277. After Griffith stated his concern, he was given a different assignment. *Id.* at 277, 306. In an effort to officially notify the Fire Department that he did not believe his medic skills were adequate, plaintiff wrote Assistant Chief Cohoon a memorandum stating that the Fire Department "had done nothing with helping [him] regain the training that [he] lost during [his leave of absence]." Plaintiff's App., Exhibit 21 (Des Moines Fire Department Official Report); and *Id.*, Exhibit 48 (Cohoon Dep. at 33-35).

The next day, plaintiff went to Station 1 to speak with Cohoon about whether he had to maintain his chauffeur's license and EMT-B certification.[10] *Id.* at 199-200. During the discussion with Cohoon, plaintiff said that he did not want to be put in "acting" positions, and he asked Cohoon to sign a memo that plaintiff had drafted.[11] *Id.* at 203-04. Cohoon did not sign the memo, and he told plaintiff that the license and certification were mandatory. Plaintiff then asked Cohoon to produce documentation regarding the certification and licensing policy. *Id.* at 207. Cohoon told plaintiff to put his request in writing, and that he would look for the documentation later. *Id.* When Cohoon said he was too busy to immediately look for the documentation, plaintiff replied, "You're always too busy." *Id.* at 207-08. Plaintiff then questioned whether he had received sufficient training to be put in an acting medic position. *Id.* Cohoon stated that either he had, or he would, make arrangements for plaintiff to

[10] Plaintiff secretly tape-recorded the July 25, 2000 discussion between him and Cohoon. *See* Defendant's App., at 433 (Compact Disc, Griffith & Cohoon Conversation).

[11] The nature of plaintiff's memo was not made clear in the record. The Court assumes that this memo was the one drafted the day before concerning plaintiff's medic training.

ride "third man" on a medic squad to get additional training. *Id.* Plaintiff then sarcastically commented that Cohoon was a "great leader" and "a joke." *Id.* at 208-09. Cohoon stated, "Don't you push me, mister." *Id.* at 209. Plaintiff then exclaimed, "He just threatened me. He just assaulted me. I want to call the police." *Id.* Afterwards, plaintiff left Cohoon's office. *Id.*

Cohoon reported this incident to Chief Wakeham. *Id.* at 339 (Wakeham Dep.) Plaintiff received a pre-disciplinary hearing on August 23, 2000. *Id.* at 35, 339-40. At the hearing, Balduchi argued on behalf of plaintiff that "an appropriate outcome to [the] situation may be a letter of reprimand or discipline to [plaintiff]." *Id.* at 327 (Balduchi Dep.). Following the hearing, Chief Wakeham found that plaintiff "did not exhibit the acceptable level of decorum and respect for the position of Assistant Chief[,]" and that [plaintiff's "aggressive demeanor [was] not conducive to the required order to safely and efficiently extend fire services to the public." *Id.* at 35 (9/5/00 Wakeham Letter). Plaintiff received an oral reprimand and was referred to the Employee Assistance Program for an evaluation and consultation regarding his anger manifestations. *Id.*

In August 2000, District Chief Stookey developed a training program for plaintiff. *Id.* at 278-80 (Griffith Dep.). He asked plaintiff to make a prioritized list of the things on which he needed additional training. *Id.* Plaintiff did so and requested training on "standard operating procedures" and "equipment familiarization on apparatus." *Id.* at 36 (8/23/00 Griffith Request). Stookey subsequently assigned plaintiff to ride as a "third man" on a medic squad, and he allowed plaintiff to drive the squad in a non-emergency situation for practice. *Id.* at 236-37 (Griffith Dep.).

On September 28, 2000, plaintiff sent Chief Wakeham a letter in which he addressed his concern that "for months the Administration of the Des Moines Fire Department attempted to force me

into hazardous tasks without complete training and re-certification." *Id.* at 37. That same day, Chief Wakeham called a meeting, attended by plaintiff, Stookey, Cohoon, and a union representative. *Id.* at 39 (Disciplinary Meeting Notes), 281 (Griffith Dep.). Plaintiff was reassigned to a 40-hour work week, 8-hour day shift, for the purpose of "up to date training in all aspects of fire disciplines." *Id.* at 39.

Plaintiff went through training for about a month and was then reassigned to his station. *Id.* at 306-07. He believed he was fully skilled in his position by about October 2000. *Id.* at 309-10. In November or December 2000, plaintiff was assigned to work on a ladder truck. *Id.* at 232-33. For several weeks, plaintiff worked without incident. In January 2001, he received a favorable job evaluation from Lieutenant Van Balle and Captain Williams, with only the area of "driving ability" evaluated as "needing improvement." *Id.* at 70.

- Fire Scene Misconduct

On July 31, 2001, plaintiff was called to the scene of a house fire on Maury Street. *Id.* at 284 (Griffith Dep.). Jack Kamerick, a Fire/Arson investigator from the police department, and Dave Knutzen, a Fire Inspector from the Fire Department, were also at the scene investigating a juvenile's involvement with the cause of the fire. *Id.* at 46. At the scene, plaintiff overheard Kamerick talking with the juvenile's parents and learned that Kamerick planned to interview the juvenile without his parents present. *Id.* at 288-89 (Griffith Dep.). After plaintiff overheard Kamerick, he walked by the juvenile's parents with firefighter Dave Thompson. *Id.* at 288. According to plaintiff, the following exchange took place between him and Thompson:

I asked [Thompson] if we were allowed to question minors without a parent, because

> on the squad we can't get permission from a minor, we have to get hold of a parent, and [Thompson] said, you know, "I don't know." And I said, "Well, that's because if it was my kid, I'd want somebody there." *Id.*

Plaintiff was aware at the time that the juvenile's parents would probably hear his remarks. *Id.* at 290-91.

According to Kamerick and Knutzen, the juvenile's father attempted to stop the investigators' interview of the juvenile, citing plaintiff's remarks as the reason. *Id.*, at 41 (Kamerick report), and 41 (Knutzen Report). Knutzen interviewed the juvenile's parents the following day. *Id.* at 43 (Transcript of 8/1/01 statement of parents). They identified plaintiff from a group of photographs and said that he made the remarks directly to them. *Id.*

On August 24, 2001, a pre-disciplinary hearing was held regarding plaintiff's conduct at the fire scene. *Id.* at 55 (Wakeham Letter). Plaintiff's union representative read a statement plaintiff prepared that included the following comment: "Firefighters were discussing among themselves if juveniles could be questioned without parents being present." *Id.* at 50 (Hearing Transcript). Plaintiff did not name the firefighters who allegedly were having this discussion. *Id.*

After the hearing, the City and union representatives interviewed the firefighters that were present at the July 31, 2001 fire on Maury Street. *Id.* at 55 (9/12/01 Wakeham Letter); 52 (Turner Dec. ¶ 3). None of the firefighters recalled hearing the discussion plaintiff claimed took place. *Id.*

The Fire Department Administration concluded that plaintiff had interfered with a potential criminal investigation at the fire scene, and that he subsequently provided a "less than candid" version of the events that took place at the fire scene. *Id.* at 55 (9/12/01 Wakeham Letter). As a result, plaintiff received a written reprimand and was suspended without pay for 24 hours. *Id.* at 56.

- Refusal to Sign Check List

As part of their duties with the Des Moines Fire Department, fire fighters are assigned to inspect rescue equipment on a regular basis. On October 2, 2001, Lieutenant Larry Van Baale discovered that the EMS equipment check list had not been signed on several days in September, though the check list indicated that the equipment had been inspected. *Id.* at 67, 69. Plaintiff admitted to Van Baale that he had inspected the EMS equipment on the days where no signature appeared on the check list form. *Id.* at 295. Van Baale asked plaintiff to sign the form, but plaintiff refused. *Id.* at 72 (Griffith Written Statement). Plaintiff's reasons for not signing the sheet upon Van Baale's request were two-fold: first, he stated that he "didn't trust the City;" second, he stated:

> "I didn't want to sign something that had been–had 20 days or 22 days, whatever, had lapsed, because if I check off that [something] was there but the City knew that it wasn't there, then they would say that . . . I'm forging something, or whatever, and try to fire me.

Id. at 293 (Griffith's Dep.). Ultimately, plaintiff told Van Baale, "I would sign the sheet if I am required to do so, but if I am not required to do so, I would prefer to not sign the sheet." *Id.* at 72 (Griffith Written Statement). Plaintiff told Van Baale that he would sign the form if Van Baale would provide him with a written copy of the inventory signature policy. *Id.* at 67 (Van Baale Report).

On October 11, 2001, a pre-disciplinary hearing was held regarding plaintiff's refusal to sign the inventory form. *Id.* at 57 (Wakeham Letter). The Fire Department Administration concluded that plaintiff's behavior was unacceptable, noting that the inventory signature policy was issued in writing in December 2000; that plaintiff previously complied with the policy; and that plaintiff admitted he was the person who failed to sign the form on the days in question. *Id.* The Administration stated: "Refusal

to follow an order from a superior officer is intolerable in the fire service. Immediate compliance with instructions and orders is critical in saving lives of citizens and other firefighters." *Id.* As a result of this incident, plaintiff was suspended for 48 hours without pay. *Id.*

- Comments Regarding Plaintiff's Criminal Charges

While plaintiff was on leave of absence, many fire fighters at the Fire Department commented on plaintiff's criminal charges. Kevin Carrol told plaintiff about the Billy Burt's remarks. *Id.* at 223 (Griffith Dep.). According to Carrol, Burt said that plaintiff was a pedophile, a child molester, a rapist, and was guilty of three felony sexual crimes. *Id.* at 274-75. Carrol stated that he heard Burt make these and similar comments about plaintiff's criminal situation almost every day at work while plaintiff was on leave. *Id.* at 358-60 (Carroll Dep.). Kent Balduchi, plaintiff's attorney at the time, stated that he heard critical comments about plaintiff's pending criminal charges on an average of once a week. *Id.* at 332 (Balduchi Dep.). Neither Carroll or Balduchi ever heard anyone say anything racially derogatory about plaintiff. *Id.* at 330 (Balduchi Dep.), 354-55 (Carroll Dep.). In his Deposition., Carroll stated that he did not recall hearing any racially derogatory terms at work about Hispanics. *Id.* at 370-71.

Captain Morris and Chief Wakeham also made comments about plaintiff's criminal charges. *Id.* at 360-61 (Carroll Dep.), and 376 (Daughenbaugh Dep.). In March or April 2000, Chief Wakeham commented to Firefighter Daughenbaugh, "I've got two child molesters on this job." *Id.* at 376-77 (Daughenbaugh Dep.).

- Griffith's Complaints to the Iowa Civil Rights Commission

On August 18, 2000, plaintiff filed a complaint with the Iowa Civil Rights Commission (ICRC).

See id. at 77 (8/18/00 ICRC complaint). Plaintiff alleged that the Fire Department and the City of Des Moines were prejudiced against him because of his race, and that the Fire Department assigned him to positions which he was not qualified to perform. *Id.* He described the incident that took place on July 24,2000, when he was assigned to drive the medic squad at Station 3. *Id.*

On or about October 4, 2001, plaintiff sent a written complaint to the City's EEO officer, Willie Robinson, about the EMS Inspection Sheet episode that took place on October 2, 2001. *Id.* at 130 (10/4/01 Griffith letter). Robinson conducted an investigation, and on January 18, 2002, he issued a report in which he concluded that plaintiff had not been discriminated against or harassed in that situation. *Id.* at 127-29 (1/18/02 Robinson Report).

On January 23, 2002, plaintiff filed a second complaint with the ICRC. *See id.* at 82 (1/23/02 ICRC complaint). Plaintiff's complaint identified two of his disciplinary hearings and the denial of paid leave for workers' compensation and disability as the discriminatory acts. *Id.* at 85.

- Plaintiff's Application for Disability Benefits

On October 8, 2001, Dr. Garfield, a clinical psychologist, diagnosed plaintiff with a "Major Depressive Episode" and suggested medical leave for at least four weeks. Plaintiff's App., (Ex. 43) (10/8/01 Garfield Letter). Shortly thereafter, plaintiff applied for disability retirement with the Municipal Fire & Police Retirement System of Iowa (MFPRSI).[12] Defendant's App., 475-67 (Application for Disability Retirement). On or about October 24, 2001, the City obtained an evaluation from Dr.

[12] Plaintiff signed the application on October 5, 2001, but Chief Wakeham did not sign the application until October 9, 2001. The Court presumes plaintiff did not submit the request until after he was examined by Dr. Garfield on October 8, 2001.

Peterson regarding the work-relatedness of plaintiff's condition. *Id.* at 488-91. (10/24/01 Peterson Letter). Dr. Peterson concluded: "Unless Mr. Griffith has omitted important facts to me or has misinterpreted the events he has described, it is my opinion that he has experienced significant stress related to the atmosphere of criticism in his workplace and to the difficulty he has had receiving training he has requested." *Id.* at 490-91.

On January 22, 2002, the Medical Board of the MFPRSI opined that plaintiff's disability was "likely to be permanent based on the impression that it will be of at least one year's duration." *Id.* at 493 (1/22/02 letter from University of Iowa College of Medicine). On February 8, 2002, the City sent MFPRSI a letter arguing that plaintiff's condition qualified as an "ordinary disability," rather than an "accidental disability."[13] On February 27, 2002, the MFPRSI Executive Director denied plaintiff's application for disability retirement. *Id.* at 499 (2/27/01 Jacobs Letter). The Director stated:

> The basis for the denial is Iowa Code section 411.6(16)(a)(2). That section provides that a member otherwise eligible to receive a disability pension under chapter 411 shall not be eligible if "the disability is a mental disability proximately caused by appropriate disciplinary actions taken against the member or by conflicts with a superior or coworker if the superior or coworker was acting legally and appropriately toward the member when the conflicts occurred.

Id. In March 2002, plaintiff appealed the MFPRSI's denial of disability retirement. *Id.* at 500 (3/26/02 Jacobs letter).

- Labor Union's Quest for Injury Leave

On January 3, 2002, plaintiff's labor union filed a grievance with the City regarding the City's

[13] Although the parties have not addressed the difference between "accidental disability" and "ordinary disability," the Court assumes that plaintiff would receive more benefits if he qualified for the former.

placement of plaintiff on sick leave rather than injury leave. *Id.* at 58 (1/3/02 TeKippe Letter). In order to determine whether plaintiff qualified for injury leave, the City had to determine the following: (1) whether plaintiff was injured in actual performance of duty; and (2) whether plaintiff's misconduct contributed to the injury. *Id.* at 60 (1/15/02 Turner Letter) (citing Article 18, Fire Labor Agreement). Because these issues were pending before the MFPRSI, the City informed the labor union that it would withhold ruling on plaintiff's grievance. *Id.* On February 1, 2002, the labor union submitted the sick leave/injury leave controversy to arbitration pursuant to the labor contract. *Id.* at 62 (2/1/02 (TeKippe Letter).

- City's Termination of Another Fire Department Employee Charged With Abuse

In June 1998, Fire Department employee Terry Wollesen was charged with two counts of felony sexual abuse. *Id.* at 138 (6/23/98) (Wollesen Trial Information). On July 1, 1998 a No Contact Order issued instructing Wollesen to stay away from all minor children. *Id.* at 139 (No Contact Order). Wollesen subsequently agreed to enter the Intra-Family Sexual Abuse Treatment Program. *Id.* at 140. On February 23, 1999, a new No Contact Order was issued instructing Wollesen to "make every attempt to not be present around children under the age of eighteen during his on-duty hours at the Des Moines Fire Department." *Id.* at 143 (2/23/99 Wollesen No Contact Order).

Cohoon and Wakeham first learned of Wollesen's sexual abuse charges shortly after February 23, 1999. *Id.* at 151 (Wakeham Declaration), 149 (Cohoon Declaration). On March 9, 1999, Wollesen was placed on sick leave.[14] *Id.* at 148 (Wollesen Time Record). Wollesen applied for

[14] Sick leave is paid leave that the employee accrues over time. *Id.* at 176-77 (Labor Agreement).

disability retirement under Iowa Code Chapter 411. *Id.* at 153 (3/16/99 Wakeham Letter).

Wollesen was terminated on May 10, 1999. *Id.* at 154 (5/13/99 Termination Letter). He appealed his termination to the Des Moines Civil Service Commission. On May 2, 2000, the Commission ordered Wollesen reinstated from May 10, 1999 through August 10, 1999, the date of his "normal disability retirement." *Id.* at 156-57 (Civil Service Commission Ruling and Decision).

On May 30, 2000, Wollesen plead guilty to amended criminal charges of lascivious acts with a child. *Id.* at 145 (5/30/00 Wollesen Amended Trial Information).

- The Present Action

Plaintiff filed this lawsuit in Polk County District Court on August 22, 2001, and it was removed to this Court on September 6, 2001. Plaintiff alleged the following causes of action against all defendants: (1) intentional discrimination based on race in violation of Iowa Code § 216 (Count I); (2) retaliation in violation of Iowa Code § 216.(Count I); (3) violation of contractual rights in violation of 42 U.S.C. § 1981 (Count III); and (4) violation of 42 U.S.C. § 1983 (Count IV). Plaintiff also brought the following claims against the City Defendant: (1) unequal treatment in violation of Title VII (Count II); (2) retaliation in violation of Title VII (Count II); and (3) failure to pay wages due in violation of Iowa Code § 91A (Count V).

II. APPLICABLE LAW AND DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is

entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he 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). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

At the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, the court's function is to determine whether a reasonable jury could return a verdict for the nonmoving party based on the evidence. *Id.* at 248. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in the nonmovant's favor. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th cir. 1996). "Because discrimination cases often turn on inferences rather than on direct evidence," the court is to be particularly deferential to the nonmovant. *EEOC v. Woodbridge Corp.*, 263 F.3d 812, 814 (8th Cir 2001) (citing *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994)). "Notwithstanding these considerations, summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case." *Id.*

B. Title VII Race Discrimination

Plaintiff alleges that defendant City of Des Moines discriminated against him because of his race in violation of 42 U.S.C. §§ 2000e *et seq*. Title VII provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1965, Title VII, § 701, 42 U.S.C. § 2000e(m) (as amended by Civil Rights Act of 1991, Pub.L. No. 102-166, § 107(a), 105 Stat. 1071 (1991)). Traditionally, plaintiff's claim would be analyzed under the burden-shifting framework of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), or the burden-shifting framework of *McDonnell Douglas v. Green*, 411, U.S. 792, 802 (1973). In the Eighth Circuit, the *McDonnell Douglas* framework applied where plaintiff's claim was primarily supported by circumstantial evidence; the *Price Waterhouse* framework applied where plaintiff presented direct evidence of discrimination. *See Mohr v. Dustrol, Inc.*, 306 F.3d 636, 639-40 (8th Cir. 2002). This dichotomy was recently called into question by the Supreme Court's decision in *Desert Palace v. Costa*, 2003 WL 21310219 (2003), which interpreted the 1991 amendments to Title VII. *See also Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 *affirmed by Desert Palace v. Costa*, 2003 WL 21310219 (2003). ("[N]othing compels the parties to invoke the *McDonnell Douglas* presumption. Evidence can be in the form of the *McDonnell Douglas* prima facie case, or other sufficient evidence–direct or circumstantial–of discriminatory intent."). In *Dare v. Walmart*, 2003 WL 21382493, at *3-*4 (D. Minn. 2003), the federal district court held that in light of the 1991 amendments to Title VII and the Supreme Court's decision in *Desert Palace*, courts are no longer obliged to apply the *McDonnell Douglas* framework when considering a motion for summary judgment on a "single motive" Title VII claim. This Court agrees with the well-reasoned opinion in *Dare* and

finds that a plaintiff may bring his Title VII claim "according to the burdens articulated in [the] Civil Rights Act of 1991," without being confined to the strictures of the *McDonnell Douglas* burden-shifting framework. *Dare*, 2003 WL 21382493 at *4. *See also Wells v. Colorado Dept. of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J. *dissenting*) ("The *McDonnell Douglas* framework only creates confusion and distracts courts from the ultimate question of discrimination *vel non*. *McDonnell Douglas* has served its purpose and should be abandoned.") (internal quotation omitted). Thus, to survive summary judgment, plaintiff must simply demonstrate that a genuine issue of material fact exists as to whether or not race was a motivating factor in an adverse employment action defendant suffered. *See Dare v. Wal-Mart Stores, Inc.*, 2003 WL 21382493, *4 (D. Minn. 2003) (permitting a plaintiff to proceed under the allocations of burdens articulated in Civil Rights Act of 1991 with a "single-motive" claim); *Costa*, 299 F.3d at 848 ("[I]f the employee succeeds in proving only that a protected characteristic was one of several factors motivating the employment action, an employer cannot avoid liability altogether, but instead may assert an affirmative defense to bar certain types of relief by showing the absence of "but for" causation.").

1. Adverse Employment Action

According to the Eighth Circuit, "[t]o establish a prima facie case for discrimination, [the plaintiff] ha[s] to present evidence showing that [he] suffered an adverse employment action and some evidence of discriminatory motive behind that action." *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1016 (8th Cir. 1999). In describing the first element of a plaintiff's prima facie case, the Eighth Circuit has stated:

The adverse employment action must be one that produces a material employment

> disadvantage. Termination, cuts in pay or benefits, and changes that affect an employee's future career prospects are significant enough to meet the standard, as would circumstances amounting to a constructive discharge. Minor changes in duties or working conditions that cause no materially significant disadvantage do not meet the standard of an adverse employment action, however.

Kerns, 178 F.3d at 1016-17.

Plaintiff argues that the following constitute adverse employment actions: 1) he did not receive the training he requested; and 2) he was disciplined for alleged infractions of Fire Department policy. *See* Plaintiff's Memorandum In Support of Resistance To Defendant City Wakeham And Cohoon Motion For Summary Judgment, at 16.

a. Training

Upon his return to the Fire Department, plaintiff was asked to drive the medic squad twice: first on May 21, 2000 at Station 9, and then again on July 24, 2000 at Station 3. Defendants' App. at 224, 227. Plaintiff expressed his concern that his medic skills were inadequate on both occasions, and each time he was reassigned to a non-medic task. Plaintiff has not offered any evidence suggesting that he documented his concern or requested additional medic training after the May 21st occasion. After the July 24th occasion, plaintiff documented his concern and discussed it with Assistant Chief Cohoon. *See* Plaintiff's Exs. 22 (Des Moines Fire Department Official Report) and 48 (Cohoon Dep. at 33-35). Cohoon told plaintiff that he would make arrangements for him to get additional training. Defendant's App. at 207-08. In the weeks that followed, District Chief Stookey developed a training program and gave plaintiff additional training in the areas plaintiff requested training. *Id.* at 236-37, 278-80 (Griffith Dep.); and 36 (Griffith Request).

On September 28, 2000, plaintiff sent Chief Wakeham a letter stating, "For months the

Administration of the Des Moines Fire Department attempted to force me into hazardous tasks without complete training and re-certification." *Id.* at 37. That day, Chief Wakeham reassigned plaintiff to receive comprehensive training, which plaintiff completed in about one month. *Id.* at 39.

There is nothing in the record to support plaintiff's allegations that he was forced to perform tasks for which he felt unqualified, or that he did not receive the training he requested. To the contrary, the Fire Department granted each of plaintiff's two requests to be reassigned from medic positions, and he ultimately received training which allowed him to be "fully skilled" in his employment position. *Id.* at 39 (Disciplinary Meeting Notes); *Id.* at 309-310 (Griffith Dep.).

b. Discipline

Plaintiff argues that the discipline he received for alleged infractions of Fire Department policy constitutes adverse employment action. The City concedes, for purposes of this motion, that the oral reprimand and the disciplinary suspensions of 24 hours and 48 hours that plaintiff received in September 2000, September 2001 and October 2001, respectively, would qualify as adverse employment actions. Defendants' Brief In Support of Summary Judgment, at 36. The Court will assume, without deciding, that plaintiff's leave of absence from December 1999 to May 2000 also constitutes an adverse employment action.

2. Discriminatory Motivation

Having found that plaintiff suffered adverse employment actions, the Court will next turn to the second element of plaintiff's prima facie case. Specifically, the Court will determine whether there is a genuine issue of material fact as to whether race was a motivating factor in the adverse employment actions. Stated another way, viewing the record in a light most favorable to plaintiff, the Court will

determine whether a reasonable juror could find that, more likely than not, race was a motivating factor in defendant's employment actions. The Court will answer this question by considering each of the four adverse employment actions in turn.

a. September 2000 discipline

The City claimed that the discipline plaintiff received in September 2000 was the result of a heated conversation plaintiff had with Cohoon. After reviewing Griffith's deposition and listening to the recording plaintiff made of Cohoon and Griffith's conversation, the Court concludes that no reasonable juror could find plaintiff did not display anger and disrespect toward Cohoon during the conversation. It is undisputed that during that conversation, plaintiff sarcastically called Cohoon a "good leader" and "a joke." Defendant's App. at 208-09 (Griffith Dep.). Plaintiff has not alleged that Cohoon used racist remarks during that conversation, and nothing in the record suggests that the conversation had anything to do with race. In fact, plaintiff admitted that he has never heard Cohoon disparage anyone's ethnicity, and he presented no other evidence that Cohoon exhibited racist behavior at work or elsewhere. Defendant's App. at 305 (Griffith Dep.). The Court finds that nothing in the record supports the notion that Cohoon acted with racial animus during the September 2000 discussion.

Plaintiff has similarly failed to show a genuine issue of material fact on whether Wakeham acted with racial animus in disciplining plaintiff. First, the Court reiterates that the undisputed facts show that plaintiff exhibited anger and disrespect toward his supervisor. Second, the Court notes that plaintiff has not argued that the discipline he received–an oral reprimand and an order to attend anger management counseling–was unusually severe. Third, plaintiff concedes that he has never heard Wakeham make any comments that disparage plaintiff's ethnicity. *Id.* at 304 (Griffith Dep.). Finally, although there is

evidence that Chief Wakeham made some racially derogatory remarks,[15] nothing in the record indicates that any of those remarks were made to plaintiff, that any of the remarks were about plaintiff, or that the remarks were connected to any decisionmaking process involving an adverse employment action, much less an adverse employment action plaintiff experienced. *See* Defendant's App. at 158 (Rubin Dec.); Plaintiff's App. (Ex. 57) (Rodgers Letter); *Id.* (Ex. 58) (Keenan Letter). *See Weems*, 220 F. Supp.2d at 988 ("Not every prejudiced remark made at work supports an inference of discrimination . . . [;] statements by decisionmakers unrelated to the decisionmaking process have been carefully distinguished from comments which demonstrate a discriminatory animus in the decisional process . . . .") (internal citations omitted). The Court finds that without such evidence, no reasonable juror could find that racial animus motivated Wakeham's decision to discipline plaintiff.[16]

b. September 2001 discipline

The City alleged that the 24-hour suspension plaintiff received in September 2001 was a result

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[15] In a letter written to the Human Resources Director, Assistant Chief Rubin stated that Wakeham used offensive language. Of the four examples Rubin provided, only one involved a racially derogatory remark. This remark was not related to a decisionmaking process involving an employment action, much less an adverse employment action that involved plaintiff. *See supra*, n.7. Although in his letter Rubin generally alleged that Wakeham's "off-color" remarks were "numerous, ongoing, and cross[ed] all protected classes," he did not state that Wakeham had ever been motivated by race in making an adverse employment decision. *See* Plaintiff's App., Ex. 56. Rubin later signed a sworn declaration stating that he had never heard Wakeham use racially derogatory language about plaintiff or Hispanics generally. *See* Defendant's App. at 158. The Court finds that in this case, Rubin's generalized statement is insufficient to allow submission of plaintiff's disparate treatment claim to a jury.

[16] In his brief, plaintiff generally alleges that "nonmembers of the protected class who were similarly situated were not disciplined for infractions of fire Department Policy." Plaintiff's Memorandum at 16. However, plaintiff did not explain who the similarly situated members were, or what alleged infractions went unpunished. Having reviewed the record, the Court finds no evidence to support plaintiff's general assertion.

of plaintiff's misconduct at a fire scene. Specifically, the City alleged that plaintiff told the parents of a juvenile not to allow the fire investigators to interview the juvenile in private.

Plaintiff alleged that the parents overheard a discussion he was having with other firefighters. However, all the firefighters on the scene of that fire were interviewed, and none recalled having such a conversation. *Id.* at 55 (9/12/01 Wakeham Letter); 52 (Turner Dec. ¶ 3). Furthermore, the parents of the juvenile told an investigator that plaintiff made the remark about interviewing juveniles directly to them. *Id.* at 43 (Transcript of 8/1/01 statement of parents).

The relevant inquiry when defendant claims it took an adverse employment action because of employee misconduct, is whether the employer believed the employee was guilty of conduct justifying the adverse employment action. *See Cronquist*, 237 F.3d at 928 (citing *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 n.2 (8th Cir. 1994). In the disciplinary letter Wakeham wrote, he stated that discipline was in order because plaintiff: (1) engaged in conduct that disrupted an investigation of a fire; and (2) gave a "less than candid" recollection of the events. Defendant's App. at 55. Whether the events at the fire scene transpired as plaintiff alleges, the record contains no evidence suggesting that Wakeham did not believe defendant engaged in misconduct for which discipline was warranted. The Court finds that no reasonable juror could find that the discipline plaintiff received in September 2001 was motivated by racial discrimination.

c. October 2001 discipline

The City alleged that the 48-hour suspension plaintiff received in October 2001 was the result of plaintiff's failure to comply with a rescue equipment checklist policy. Plaintiff admitted that he indeed failed to sign the checklist. *Id.* at 295. When Van Baale asked plaintiff to sign the checklist, plaintiff

said he would if Van Baale would provide him with a written copy of the inventory policy. *Id.* at 67. Chief Wakeham found that discipline was in order for this episode, because "immediate compliance with instructions and orders is critical in saving lives of citizens and other firefighters." *Id.* at 57. It noted that the checklist policy was in writing; plaintiff had previously complied with the policy; and plaintiff admitted he failed to sign the checklist. *Id.* at 57.

Plaintiff has not cited any facts in the record indicating that the discipline he received in October 2001 was motivated by racial animosity. Plaintiff does not allege that Van Baale used racially derogatory language when he asked plaintiff to sign the checklist. Although Van Baale made a racially disparaging remark about Hispanics to firefighter Lathrum in May 2001, this single remark made by Lathrum in May 2001 is too attenuated to the action taken in October 2001 to allow it to serve as a basis for inferring discriminatory motive for the October 2001 episode. *See Clearwater v. Independent School Dist.*, 231 F.3d 1122, 1126 (8th Cir. 2000) ("Stray remarks are not sufficient to establish a claim of discrimination.") (internal citation omitted)). Furthermore, although Van Baale may have asked plaintiff to sign the checklist, the record does not suggest that Van Baale was a decisionmaker in the discipline plaintiff received. Instead, it appears that Wakeham was responsible for the adverse employment decision. *See id.* at 57. Plaintiff has not cited to evidence in the record showing that Wakeham's decision was motivated by racial animosity.

d. leave of absence

Plaintiff took a leave of absence from the Fire Department after he was arrested and charged with three counts of sexual abuse. Assuming, *arguendo*, that plaintiff's December 1999 to May 2000 leave of absence constituted an adverse employment action, the Court finds that plaintiff has failed to

create a genuine issue of material fact that this employment action was motivated by race.

The City contends that had plaintiff not voluntarily taken a leave of absence, it would have been justified in discharging plaintiff pursuant to Iowa Code § 400.19. Iowa Code § 400,19 provides, in relevant part:

> [T]he chief of the fire department [] may peremptorily suspend, demote, or discharge a subordinate then under the . . . chief's direction for neglect of duty, disobedience of orders, misconduct, or failure to properly perform the subordinate's duties.

In discussing this code provision, the Iowa Supreme Court has stated:

> In determining whether [a] dismissal was warranted . . . , we must remember the primary objective of section 400.19 is to protect the public interest. Firefighters have a duty to maintain the public trust and confidence, and they run afoul of this duty when they exercise a lack of judgment and discretion. This heightened duty extends to a firefighter's off-duty conduct. Thus, the determinative factor is whether [the firefighter's] conduct was sufficiently detrimental to the public interest.

Dolan v. Civil Serv. Comm. of the City of Davenport, 634 N.W. 2d 657, 664 (Iowa 2001) (citations omitted) (firefighter discharged for the following off-duty misconduct: struggling with police officers before his arrest for operating a vehicle while intoxicated, and sexually harassing a woman).

The Court finds that the factual information gathered by the police regarding plaintiff's three separate sexual assaults would support a determination that plaintiff committed "misconduct" under Iowa Code § 400.19. *See* Defendant's App. at 434-462. Thus, had plaintiff not left voluntarily, the Court finds that the City could have lawfully discharged him pursuant to § 400.19.

In response to the City's argument, plaintiff argues that the circumstances surrounding plaintiff's criminal charges were not known by the City at the time plaintiff took his leave of absence. The record

is unclear as to whether Chief Wakeham had access to the information gathered by the police. Even assuming that Chief Wakeham did not have access to the police reports, the Court finds that plaintiff has nevertheless failed to create a genuine issue of material fact that his leave of absence was based on racial animosity. The undisputed facts show that (1) a policeman came to the fire station and announced to several firefighters that plaintiff was facing charges for sexually abusing a minor; (2) The Des Moines Register reported that plaintiff was arrested on three counts of third-degree sexual abuse for fondling his victim when she was underage and for forcibly fondling his victim when she was an adult; and (3) on the same day The Des Moines Register Article was published, plaintiff's attorney sent the City Attorney a written request for leave of absence due to the "public concerns which may be raised regarding [plaintiff's] service as a firefighter." *Id.* at 349-51 (Carol Dep.); 15 (12/15/99 The Des Moines Register; 17 (12/15/99 Balduchi Letter). Based on these undisputed facts, no reasonable juror could find that the City did not believe plaintiff was guilty of misconduct warranting the adverse employment action. *See Cronquist*, 237 F.3d at 928 ("the relevant inquiry in an employee misconduct pretext case is whether the employer believed [the] the employee [was] guilty of conduct justifying [the adverse action].") (citing *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 n.2 (8th Cir. 1994). The Court concludes that plaintiff has failed to create a genuine issue of material fact as to whether his leave of absence was race-based.[17]

[17] The Court notes that another firefighter, Terry Wollesen, also took a leave of absence after he was charged with two counts of felony sexual abuse in 1998. Defendant's App. at 138 (Wollesen Trial Information); 148 (Wollesen Time Record). Unlike plaintiff, Wollesen was placed on paid sick leave. *Id.* at 148 (3/15/99 Wakeham Letter); 176-77 (Labor Agreement). The record contains no evidence suggesting that Wollesen's leave of absence was in any way based upon his race. In fact, the record contains no evidence of Wollesen's race. Because the record is silent as to Wollesen's race, it follows that the disparate treatment between Wollesen and plaintiff cannot be attributed to race.

In summary, the Court concludes that plaintiff has not created a genuine issue of material fact that racial animus was a motivating factor in the adverse employment actions he experienced. Therefore, the Court enters summary judgment on plaintiff's Title VII racial discrimination claim.[18]

B. Discrimination Under Iowa Code § 216

Plaintiff also alleges violations of the Iowa Human Rights Act, Iowa Code § 216. "The analysis for both the federal and state claims is the same under Iowa law." *Moschetti v. Chicago, Cent. & Pac. R.R.*, 119 F.3d 707, 709 n.2 (8th Cir. 1997). *See also Valline v. Murken*, 2003 WL 21361344,* 2 (Iowa Ct. Ap. 2003). For the same reasons set forth in the previous section of the Court's Order, summary judgment is granted in favor of defendants on plaintiff's Iowa law race discrimination claim.

C. Title VII Retaliation

Plaintiff alleges that defendants retaliated against him in violation of Title VII. In the Eighth Circuit, a plaintiff's retaliation claims traditionally have been analyzed under the burden-shifting framework of *McDonnell Douglas. See Moschetti v. Chicago, Central and Pac. RR. Co.*, 119 F.3d 707, 709 (8th Cir. 1997). However, this analysis has also been called into question by the Supreme Court's interpretation of Title VII in *Desert Palace v. Costa*, 2003 WL 21310219 (2003). *See Gonzalez v. City of Minneapolis*, 2003 WL 21383760, at *6 (D. Minn 2003) (applying the allocations of burdens set forth in 42 U.S.C. § 2000e-2(m) and § 2000e-5(2)(B) to plaintiff's Title VII

[18] The Court notes that it would reach the same result using the *McDonnell Douglas* framework. Under that analysis, plaintiff has not meet his burden of showing that defendants' proffered legitimate reasons for taking the adverse employment actions were pretext.

retaliation claim). This Court agrees with the well-reasoned decision in *Gonzalez* and finds that plaintiff's retaliation claim need not be analyzed under the *McDonnell Douglas* burden-shifting framework.

Regardless of which framework the Court applies, plaintiff must show the following in order to survive summary judgment on his retaliation claim: (1) "he participated in protected conduct;" (2) "he suffered an adverse action;" and (3) "the adverse action had a causal connection to the protected activity." *Id. See also, Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 713-14 (8th Cir. 2000). Upon his return to the Fire Department, plaintiff took the following actions: (1) filed a complaint with the Iowa Civil Rights Commission August 18, 2000; (2) complained of discrimination at a pre-disciplinary hearing in August 2000; (3) complained of discrimination to Wakeham in writing on September 28, 2000; (4) filed his lawsuit on August 22, 2001; (5) filed an internal complaint of discrimination on October 4, 2001; and (7) filed a second ICRC/EEOC complaint alleging retaliation on January 23, 2002. The Court finds that these actions constitute protected activities.

The record also contains evidence showing that plaintiff suffered three adverse employment actions–the discipline he received in August 2000, August 2001, and October 2001. However, for the reasons that follow, the Court finds that plaintiff has failed to set forth facts from which a reasonable juror could conclude that any of these adverse employment actions were retaliatory.

Plaintiff received a predisciplinary hearing on August 23, 2000, five days after he filed his complaint with the Iowa Civil Rights Commission. Although the predisciplinary hearing itself took place shortly after the filing of plaintiff's ICRC complaint, the hearing was in regard to an undisputedly heated conversation plaintiff had with Cohoon on July 25, 2000. Plaintiff does not dispute that he called his

superior, Cohoon, "a joke" during that conversation. Defendants' App. at 208-09 (Griffith Dep.). Under these circumstances, the Court finds that plaintiff cannot solely rely on the proximity in time between the adverse action and the protected activity to prove that defendants intended to retaliate against him. *See Kipp v. Missouri Highway and Transp. Comm'n*, 280 F.3d 893, 897 (8th Cir. 2002) ("[A] mere coincidence of timing can rarely be sufficient to establish a submissible case of retaliatory discharge."). *See also Cronquist*, 237 F.3d at 928 (relevant inquiry when defendant claims it took an adverse employment action because of employee misconduct, is whether the employer believed the employee was guilty of conduct justifying the adverse employment action.)

Plaintiff also received a predisciplinary hearing on August 24, 2001, two days after he filed his lawsuit. However, the predisciplinary hearing was in regard to the episode that took place at the Mary Street fire scene on July 31, 2001. As previously discussed, defendants claimed that plaintiff told two parents not to allow the fire investigators to privately interview their child. Defendant denied telling the parents this, and claimed that the parents overheard him in a conversation with other firefighters. The record shows that the other firefighters at the scene did not recall having any such conversation with plaintiff, and that the parents of the child did recall plaintiff telling them not to allow their child to be privately interviewed. *Id.* at 43, 55. Plaintiff has presented no evidence suggesting that defendants did not really believe that a predisciplinary hearing was warranted in this situation, and that instead, defendants were retaliating against plaintiff. *See Cronquist*, 237 F.3d at 928. Under these circumstances, the Court finds that the mere proximity in time between the adverse action and the protected activity is insufficient to allow a reasonable juror to infer that defendants were retaliating against defendant. *See Smith v. Allen Health Sys.*, 302 F.3d 827, 834 (8th Cir. 2002) (in light of the

legitimate, nondiscriminatory reasons proffered by defendant, "the sole fact that [plaintiff] was fired at about the same time family leave cannot support an inference of pretext" for retaliation); *Sprenger v. Federal Home Loan Bank*, 253 F.3d 1106, 113-14 (8th Cir. 2001) (temporal proximity sufficient to create a prima facie case of disability discrimination, but not to show that defendant's proffered reason was pretextual).

Finally, plaintiff filed an internal complaint of discrimination on October 4, 2001. One week later, plaintiff received a predisciplinary hearing regarding plaintiff's failure to comply with the fire department's equipment checklist policy. It is undisputed that plaintiff admitted his failure to follow the checklist policy on October 2, 2001, two days *before* he engaged in a protected activity. *Id.* at 295. Plaintiff has offered no evidence that defendants did not believe he violated his admission that he violated the checklist policy. The Court finds that under these circumstances, the temporal proximity between the October 4th protected activity and the subsequent adverse employment action is insufficient to allow an inference of a retaliatory motive. *See Smith*, 302 F.3d 827, 834 (8th Cir. 2002); *Sprenger*, 253 F.3d 1106, 113-14 (8th Cir. 2001).

The Court grants summary judgment in favor of defendants on plaintiff's retaliation claims.

D. Iowa Code § 216 Retaliation

For the same reasons articulated in Part C of the Court's order, the Court grants summary judgment in favor of defendants on plaintiff's claim of retaliation in violation of Iowa Code § 216.

E. 42 U.S.C. § 1981

To establish a violation of 42 U.S.C. § 1981, plaintiff must allege facts in support of the

following: "(1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute . . . ." *Thomas v. St. Lukes Health Sys., Inc.*, 869 F.Supp. 1413, 1432 (N.D. Iowa 1994). As noted in *Thomas*, "Section 1981 requires proof of intentional discrimination, as does a disparate treatment claim under Title VII. Therefore, the elements of § 1981 claims and Title VII disparate treatment claims are the same." *Id.* at 1432-33 (internal citations omitted). Traditionally, in the absence of direct evidence of discrimination, courts have analyzed § 1981 claims under the burden-shifting framework of McDonnell Douglas. *Id.* There is a question as to whether this framework still applies post-*Desert Palace*. *See Skomsky v. Speedway SuperAmerica, L.L.C.*, 2003 WL 21382495 (D. Minn 2003) ("Federal anti-discrimination laws such as the ADA are patterned after Title VII, and as such should be evaluated similarly[;] [t]he interests of uniformity require the Court to extend the burden-shifting paradigm articulated in 42 U.S.C. § 2000e-2(m) and § 2000e-5(2)(B) to ADA disparate treatment claims.") The Court need not make that determination in the case at bar. For the same reasons articulated in the Title VII section of this order, the Court finds that summary judgment should be entered in favor of defendants on plaintiff's § 1981.[19]

F. Hostile Work Environment

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be 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, color,

[19] The Court would reach the same conclusion applying the *McDonnell Douglas* framework, because plaintiff has not created a genuine issue of material fact that defendant's proffered reasons were pretextual.

religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). A plaintiff may establish a violation of Title VII by proving that the discrimination based on race created a hostile or abusive work environment. *See Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1050 (8th Cir. 2002). Hostile work environment violations occur where "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21. In determining whether the harassment is sufficiently "severe or pervasive," courts consider 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." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998). In addition to showing "severe and pervasive" harassment, plaintiff must show the employer knew or should have known of the harassment and failed to take prompt and effective remedial measures to end the harassment. *Ross* 293 F.3d at 1050.

Plaintiff filed a complaint of race discrimination with the Iowa Civil Rights Commission and orally complained of harassment at a predisciplinary hearing in August 2000. Plaintiff also wrote Wakeham a letter in which he complained of "harassment and discrimination on September 28, 2000 . Plaintiff's App. (Ex. 28). Thus, the Court finds defendants were on notice of the allegedly hostile work environment plaintiff experienced.

Reviewing the record in a light most favorable to plaintiff, the Court finds that after he complained of harassment, plaintiff heard two racially derogatory comments.[20] On May 5, 2001,

[20] Plaintiff concedes he did not report the two racially derogatory comments he heard. Defendants' App. at 259 (Griffith Dep.).

plaintiff overheard Van Baale ask someone, "Why do we need all the spics here? We ought to send them back to Mexico." Defendant's App. 251-52(Griffith Dep.). On another occasion, plaintiff heard Lathrum make the following comment: "David Griffith, because he is Latino, he thinks he can get by with everything and that the rules aren't held to the same standard for him as they are for us." Defendant's App. at 252. Neither of these two comments were directed at plaintiff. In fact, it is undisputed that plaintiff was not in the same room with the speakers when these comments were made. Plaintiff conceded that Lathrum did not know plaintiff was nearby when he made his remark. *Id.* at 252-53.

Daughenbaugh and Bernal heard some racially derogatory remarks about Hispanics while they were working at the Fire Department. Plaintiff did not testify that he heard these remarks in his deposition. In fact, it is unclear from the record whether plaintiff was even working at the Fire Department when Daughenbaugh and Bernal heard the derogatory remarks. The record is also unclear whether these remarks continued after the time plaintiff complained of harassment. The Court finds that under these circumstances, plaintiff has failed to show that he experienced harassment that was"severe or pervasive" enough to affect a term, condition, or privilege of his employment.[21] *See Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681 (8th Cir. 1998) ("Because the discrimination laws are not a 'general civility code,' 'offhand comments [] and isolated incidents (unless extremely serious) will

[21] The Court notes that the record contains evidence that other firefighters heard remarks that disparaged other races. Plaintiff has not offered evidence that he was at work when those remarks were made and has not otherwise explained how those remarks affected a term or condition of his employment. *See* 42 U.S.C. § 2000e-2(a)(1) ("It shall be 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 . . . .) (emphasis added).

not amount to discriminatory changes in the terms and conditions of employment.") (quoting *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2283-84 (1998)). Summary judgment is entered in favor of defendants on plaintiff's hostile work environment claim.

H. 42 U.S.C. § 1983

In his fourth cause of action, plaintiff alleges that Wakeham, Cohoon, and the City violated 42 U.S.C. § 1983. "To establish a claim under 42 U.S.C. § 1983 [a plaintiff] must show a deprivation of a right, privilege, or immunity secured by the constitution or laws of the United States." *Dunham v. Wadley*, 195 F.3d 1007, 1009 (8th Cir. 1999). Plaintiff alleges that the City, Cohoon, and Wakeham violated 42 U.S.C. § 1981 and § 2000e. As previously discussed in this Order, the Court finds that plaintiff has failed to show violations of 42 U.S.C. §§ 1981 and 2000e. It follows that defendants are not liable under § 1983 on those grounds.

In addition to his § 1981 and § 2000e claims, plaintiff alleges that the City is liable under § 1983 for violating his procedural due process rights. Plaintiff first argues that his procedural due process rights were violated, because "[t]he City has not put individuals on notice through a written policy that it will exercise termination proceedings on individuals who have been arrested and charged, but not convicted of a crime." Plaintiff's Brief at 26. (emphasis in the original). The Court is unconvinced by this argument. First, plaintiff has offered no case law in support of his proposition. Second, the Court finds that although the City's policy may not have been in writing, plaintiff should have known that if he was arrested and charged with committing sexual abuse against a minor, the Fire Department would have an obligation to the community to suspend defendant from his firefighter duties until the charges were resolved.

Plaintiff also claims that the City's practice of terminating individuals who have been arrested and charged with a crime "before they have had an opportunity to clear their name in a court of law" violates procedural due process. Plaintiff's Brief at 26. Plaintiff concedes that after a firefighter has been terminated, he would have the right to appeal that decision through the Civil Service. *Id.*

Courts apply the familiar balancing test outlined in *Mathews v. Eldgridge,* 424 U.S. 319 (1976), to determine what process is due in a particular situation. *See Brewster v. Bd. of Ed. of Lynwood Unified School Dist.,* 149 F.3d 971, 983 (9th Cir. 1998). *Mathews* requires courts to balance the following three factors:

> [f]irst, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 335. The Court finds that the government's interest in protecting the public by suspending or terminating a firefighter who has been charged and arrested for committing a sexual assault outweighs plaintiff's interest in receiving a hearing prior to his suspension or termination. *See FDIC v. Mallen*, 486 U.S. 230, 240 (government's interest in immediately suspending indicted bank officers outweighed the officers' interests in retaining their positions and therefore justified dispensing with predeprivation process). Therefore, the Court finds that the City's policy does not violate plaintiff's due process rights.

The Court enters summary judgment in favor of all defendants on plaintiff's § 1983 claims.

I. Iowa Code 91A

The Court has dismissed all other claims in this controversy over which it has jurisdiction.

Exercising the discretion granted by 28 U.S.C. § 1367(c), the Court declines to exercise supplemental jurisdiction over plaintiff's Iowa Code 91A claim.

III. CONCLUSION

The Clerk of Court is ordered to dismiss plaintiff's Iowa Code 91A claim. The Clerk of Court is ordered to enter judgment in favor of defendants on all the other claims.

IT IS ORDERED.

This 3rd day of July, 2003.