**CRYSTAL N. FINNIE, PLAINTIFF v. LEE COUNTY, MISSISSIPPI and JIM H. JOHNSON, SHERIFF OF LEE COUNTY, MISSISSIPPI, In His Official Capacity, DEFENDANTS**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION**

**2012 U.S. Dist. LEXIS 6679**

**January 17, 2012, Decided**

**January 17, 2012, Filed**

**OPINION BY:** Sharion Aycock

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**BACKGROUND**

In October 2004, Plaintiff Crystal Finnie began working for the Lee County Sheriff's Department. Plaintiff was employed as a detention officer at the Lee County Juvenile Detention Center ("JDC") until her termination in April 2009. Plaintiff had an array of job duties, as she was responsible for booking, searching, feeding, escorting, and transporting detainees, conducting searches of cells, and handling disturbances. It is undisputed that detention officers, like Plaintiff, are subject to a uniform policy that states, in pertinent part, that detention officers must wear pants furnished by the sheriff's department.

Plaintiff abided by this uniform policy, apparently without complaint, until September 2008. Plaintiff asserts that she converted to the Pentecostal faith in August 2008, and, due to this, she was under the conviction that she could no longer wear pants. In September 2008, Plaintiff allegedly met with Sheriff Jim Johnson, informed him that wearing pants would violate her religious beliefs, and requested an exemption from the uniform policy. [Footnote omitted] Plaintiff asserts that Sheriff Johnson was, at that time, "real supportive" of her beliefs. At some point in or around September 2008, [Footnote omitted] Plaintiff asked JDC administrator Steve White for permission to wear a skirt instead of the prescribed "pants-only" uniform. Steve White told Plaintiff that he would have to ask Sheriff Johnson.

Before hearing back from Sheriff Johnson or Steve White, Plaintiff began wearing a skirt [Footnote omitted] to work on or about March 6, 2009. [Footnote omitted] On March 16, 2009, after Plaintiff returned from escorting three juveniles to court, she was confronted by Corey Finnie, [Footnote omitted] who informed Plaintiff that Steve White had stated that if Plaintiff wore her skirt again to work, she would be suspended for three days without pay. Plaintiff was also directly approached by Steve White later that same day, and White confirmed what Corey Finnie had stated. After receiving this directive, Plaintiff asserts that she then personally appealed to Sheriff Johnson to allow her to wear a skirt. Sheriff Johnson told Plaintiff, on March 16, 2009, that he had one more call he was waiting on to confirm whether or not Plaintiff could wear a skirt while at work. He informed Plaintiff that he would get back in touch with her by the end of her shift. Around 5:45 p.m. on the same day, Plaintiff received a call from Steve White, informing her that she could either wear pants in compliance with the uniform policy or turn in a letter of resignation.

The following day, March 17, 2009, Plaintiff called Steve White and asked for permission to begin taking her accumulated vacation leave, apparently hoping that the Sheriff would reconsider his decision while she was on leave. . . . In April 2009, after Plaintiff's vacation time was apparently used up, Plaintiff either called, or met with, Steve White to see if there was any change in the situation concerning the Sheriff's decision with respect to the uniform policy. White told Plaintiff that she would be required to wear pants. Specifically, according to Plaintiff, White stated, "just put your pants on and come back to work." Plaintiff again communicated to White that she could not wear pants based on religious reason. The very next day, Plaintiff met with Sheriff Johnson. 9 At this meeting, Sheriff Johnson terminated Plaintiff's employment.

Plaintiff filed this lawsuit on March 12, 2010, alleging that her termination violated her First Amendment rights of free speech and the free exercise of religion and constituted religious and gender discrimination and retaliation under Title VII of the Civil Rights Act of 1964. Defendants have filed three Motions for Summary Judgment, arguing they are entitled to judgment as a matter of law as to all of Plaintiff's claims.

**LEGAL STANDARD**

Summary judgment is warranted under Rule 56(a) of the Federal Rules of Civil Procedure when evidence reveals no genuine dispute regarding any material fact and that the moving party is entitled to judgment as a matter of law. The rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." . . .

**DISCUSSION AND ANALYSIS**

**A. Free Speech Under the First Amendment**

Plaintiff has conceded her First Amendment free speech claim in her brief in opposition to summary judgment. As such, the Court does not analyze the issue, and Defendants are entitled to summary judgment on this claim.

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**C. Gender Discrimination Under Title VII**

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***The Uniform Policy***

The majority of Plaintiff's claim appears to focus solely on the uniform policy itself. The policy requires both males and females to wear pants. It is important to note that Plaintiff's only argument is that the policy denies females the right to wear "traditional garb" in the form of a skirt. 27 Thus, the policy -- unlike most cases brought alleging discrimination based on uniform policies -- does *not* differentiate between males and females. The Court is unaware of any case where a policy that deprives a gender from wearing what he or she defines as "traditional" attire has been held per se discriminatory. 28 In fact, even uniform policies and/or grooming standards that vary between genders have been routinely upheld by courts. 29

27 Plaintiff analyzes **[\*51]** her claim only under McDonnell Douglas as a "traditional" gender discrimination claim. However, many of Plaintiff's arguments sound like arguments usually made either under a disparate impact theory or "sex stereotyping" under Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). As such, the Court takes all of these arguments into account and concludes that Plaintiff has failed to prove a claim of disparate treatment, disparate impact, or sex stereotyping.

28 If anything, requiring a female to wear what one could define as "traditional garb" could potentially be a violation of Title VII under Price Waterhouse. This is discussed in more detail *infra.*

29 This by no means is to say that such policies, including even-handed requirements like the one at issue here, are beyond the purview of Title VII. As one court has noted, "[i]t is not impossible to imagine a situation in which a frivolous appearance guideline so disparately impacts a protected class that a jury could infer from the existence of that situation alone that the employer adopted the guideline as a subterfuge for discrimination." Eatman v. United Parcel Service, 194 F. Supp. 2d 256, 264 (S.D.N.Y. 2002) **[\*52]** (granting summary judgment to employer and noting that plaintiff had "neither shown that the policy severely impacts African-Americans as a class, nor presented any evidence that the policy lacks a legitimate business purpose").

The state of the law governing sex-based "grooming standards" was aptly summarized by the Eighth Circuit in Knott v. Missouri Pac. Ry. Co., 527 F.2d 1249, 1252 (8th Cir.1975), where the court held that "minor differences in personal appearance regulations that reflect customary modes of grooming do not constitute sex discrimination within the meaning of § 2000e-2." Title VII "was never intended to interfere in the promulgation and enforcement of personal appearance regulations by private employers." Id. at 1251-52. The rationale for this conclusion is that if such policies are not designed as a pretext to exclude either sex from employment, slight differences in grooming standards have "only a negligible effect on employment opportunities." Id.

In a series of cases similar to Knott, other courts addressing this question have arrived at a similar result. See, e.g., Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084 (5th Cir. 1975) (concluding that a grooming policy **[\*53]** concerning hair length differences for males and females did not constitute sex discrimination and noting that such a policy relates "more closely to the employer's choice of how to run his business than to equality of employment opportunity"); Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1109-10 (9th Cir. 2006**)** (en banc) (holding that Harrah's grooming standards requiring women to wear makeup and styled hair and men to dress conservatively was not discriminatory because the policy did not impose unequal burdens on either sex); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 875 n.7 (9th Cir. 2001) (explaining that reasonable regulations concerning dress and grooming standards do not necessarily constitute actionable discrimination under Title VII); Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998) (grooming policy prohibiting men, but not women, from wearing long hair does not violate Title VII); Bellissimo v. Westinghouse Electric Corp., 764 F.2d 175 (3d Cir. 1985), *cert. denied*, 475 U.S. 1035, 106 S. Ct. 1244, 89 L. Ed. 2d 353 (1986) (dress codes permissible although specific requirements for males and females may differ); Barker v. Taft Broadcasting Co., 549 F.2d 400 (6th Cir. 1977) **[\*54]** (a different hair grooming standard for men than for women does not give rise to a Title VII claim); Fountain v. Safeway Stores, Inc., 555 F.2d 753, 755 (9th Cir. 1977) ("regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees is not discrimination within the meaning of Title VII"); Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349 (4th Cir. 1976) (sex-differentiated grooming regulation not used as pretext to exclude either sex from employment is not within Title VII's purview); Fagan v. National Cash Register Co., 481 F.2d 1115, 157 U.S. App. D.C. 15 (D.C. Cir. 1973) (distinction between sexes vis-à-vis grooming standards does not constitute Title VII violation); 30 Capaldo v. Pan American, 1987 U.S. Dist. LEXIS 14475, 1987 WL 9687, at \*2 (E.D.N.Y. Mar. 26, 1987) (holding that terminating a male employee for refusing to remove an earring does not state a claim for sex discrimination);

30 The Court in Fagan, like other courts considering this issue, took a realistic and commonsense approach. For example, the court stated:

Perhaps no facet of business life is more important than a company's place in public estimation. That the image created **[\*55]** by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance. Good grooming regulations reflect a company's policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility.

481 F.2d at 1125-25; see also Burdine, 450 U.S. at 259, 101 S. Ct. 1089 (noting that Title VII "was not intended to diminish traditional management prerogatives"); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979) ("Employment decisions . . . based on either dress codes or policies . . . are more closely related to the company's choice of how to run its business. . . .").

The "pants-only" dress code here applies to all employees equally; it does not single out males or females. Thus, it stands in stark contrast to cases where a violation of Title VII has been found due to a dress code policy distinguishing between male and female attire with respect to uniform regulations. See Carroll v. Talman Fed. Sav. And Loan Ass'n of Chicago, 604 F.2d 1028, 1031 (7th Cir. 1979). **[\*56]** In Carroll, a bank required its female tellers, officer and managerial employees to wear a uniform while male employees working in the same positions were required only to wear customary business attire. The employer expressly maintained that the purpose of the uniform requirement was to reduce fashion competition among women. Id. at 1031. Since men (apparently) do not engage in such competition, they do not need a uniform requirement. Id. The Seventh Circuit held that personal appearance regulations with differing requirements for men and women do not violate Title VII as long as there is "some justification in commonly accepted social norms and are reasonably related to the employer's business needs." Id. at 1032. However, an employer who imposes separate dress requirements for men and women performing the same jobs will violate Title VII when one sex can wear regular business attire and the other must wear a uniform. Id. Finding the uniform requirement demeaning to women, the Carroll court stated: "[w]hile there is nothing offensive about uniforms per se, when some employees are uniformed and others are not there is a natural tendency to assume that the uniformed women have lesser **[\*57]** professional status than their colleagues attired in normal business clothes." Id. at 1033. Here, unlike Carroll, the uniform policy is applied even-handily; thus, it is valid under Title VII unless Plaintiff can further present sufficient evidence from which a rational jury could infer intentional discrimination. See, e.g., Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224-27 (10th Cir. 2007) (noting that employers cannot shield discrimination behind a presumably valid dress code and/or grooming policy).

The same McDonnell Douglas analysis as discussed above is equally applicable to Plaintiff's claim based on gender discrimination in the uniform policy. Plaintiff cannot meet the fourth prong of a prima facie case. The uniform policy applies evenly to all detention officers, and Plaintiff's only allegation is that the uniform policy prohibited her from wearing traditional female apparel. Plaintiff does not allege that she was replaced by someone outside her protected class, and she cannot otherwise demonstrate that she was treated less favorably than male employees, 31 or any other employees, with regards to Defendants' decision to terminate Plaintiff's employment based on her refusal **[\*58]** to comply with the "pants-only" requirement.

31 The Court notes that it is not holding that women alleging sex discrimination are *always* compelled to prove that men were not subjected to the same challenged discriminatory conduct or to show that the discrimination affected anyone other than herself. In fact, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) illustrates how an employee may prove an adverse employment action because of sex without evidence that employees of the opposite sex were treated differently. Oncale was part of an eight man ship crew, and he could not show any female crew were treated differently since there were none. Id. at 77, 118 S. Ct. 998. Evidence that he had been sexually harassed was nevertheless sufficient to support his Title VII claim because the harassment was *because of his sex.* As the Court explained, "comparative evidence about how [an] alleged harasser treated members of both sexes" is only one "evidentiary route" to prove discrimination, but a harasser's "sex-specific and derogatory terms" can do the same. Id. at 80-81, 118 S. Ct. 998. Given this, the Court analyzes Plaintiff's gender discrimination **[\*59]** claim in further detail.

Yet, in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), the Supreme Court decided that sex stereotyping can violate Title VII when it influences employment decisions. In Price Waterhouse, a female senior manager was denied partnership, and partners involved in the decision making had referred to her as "'macho'" and in need of "'a course at charm school[.]'" 490 U.S. at 235, 109 S. Ct. 1775. She was advised that to become a partner she should "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" Id. The Court found that such stereotypical attitudes violate Title VII if they lead to an adverse employment decision. Id. at 251, 109 S. Ct. 1775; id. at 259, 109 S. Ct. 1775 (White, J., concurring); id. at 272-73, 109 S. Ct. 1775 (O'Connor, J., concurring). The Price Waterhouse plurality's understanding that an employer might escape liability by showing that it would have made the same decision even without a discriminatory motive is no longer permissible because Congress provided otherwise, see 42 U.S.C. § 2000e-2(m), but the Court's conclusion that Title **[\*60]** VII prohibits sex stereotyping endures. Other courts have upheld Title VII claims based on sex stereotyping subsequent to Price Waterhouse. See, e.g., Chadwick v. WellPoint, Inc., 561 F.3d 38 (1st Cir. 2009); Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004); Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001); Frank v. United Airlines, Inc., 216 F.3d 845, 855 (9th Cir.2000). And, even well before Price Waterhouse, courts had found sex specific impositions on women in customer service jobs illegal. Violations of Title VII occurred where a female lobby attendant was terminated for refusing to wear a sexually provocative uniform, see EEOC v. Sage Realty Corp., 507 F. Supp. 599, 607-608 (S.D.N.Y. 1981); where only women employees were compelled to wear uniforms, see Carroll v. Talman Fed. Sav. & Loan Ass'n of Chic., 604 F.2d 1028 (7th Cir. 1979); and where only female flight attendants were required to wear contact lenses instead of glasses, see Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763, 790 (D.D.C. 1973), *aff'd in part, vacated and remanded in part on other grounds*, 567 F.2d 429, 185 U.S. App. D.C. 322 (D.C. Cir. 1976).

As **[\*61]** the Sixth Circuit succinctly stated, "[a]fter Price Waterhouse, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." Smith, 378 F.3d at 574. Here, however, Plaintiff simply produces no evidence that would allow a factfinder to conclude that the uniform policy is impermissible gender discrimination or proscribed sex stereotyping. Plaintiff has provided no support for the proposition that Defendants' legitimate, nondiscriminatory reason for Plaintiff's termination (.i.e., Plaintiff's refusal to comply with the policy) is either pretext or that Plaintiff's gender was a motivating factor in the decision. Further, the "pants-only" policy applies uniformly to all employees. See Price Waterhouse, 490 U.S. at 240, 109 S. Ct. 1775 (noting that Title VII requires that "gender must be *irrelevant* to employment decisions") (emphasis added). Thus, Defendants have done the exact opposite of what has generally been considered sex stereotyping that rises to the level of a violation under Title VII. 32

32 In support of their summary judgment motion on **[\*62]** Plaintiff's gender discrimination claim, Defendants state as follows:

In any event, the whole "traditional attire" argument is dubious. While pants may not have been "traditional" female attire in the 1960s, and dresses may have been de rigueur for Harriet Nelson and June Cleaver, since the 1970s the wearing of pants by women has become increasingly commonplace, and in current fashion pants are just as much women's clothing as they are men's clothing. The court can take judicial notice that it is now routine rather than unusual for women to wear pants . . . Counsel for defendants, on a recent Thursday, conducted an email survey of the women working for the firm to see if they were wearing pants or skirts. Of the 22 women who responded, 17 (77%) were wearing pants.

See Defendants' Rebuttal Brief in Support of Motion for Summary Judgment, at 17 & n.7. While the Court is appreciative of the history concerning the wearing of pants by women, it declines to take judicial notice of such. Further, the Court highly doubts that Defendants' counsel's survey of the women working in his law firm would pass the gatekeeping hurdle prescribed under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) **[\*63]** and Federal Rule of Evidence 702.

However, as discussed *supra*, some of Plaintiff's arguments sound more like Plaintiff intended to proceed under a disparate impact theory of discrimination, as opposed to disparate treatment. Disparate impact claims are those claims which "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Raytheon v. Hernandez, 540 U.S. 44, 52-53, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003). Unlike a disparate treatment claim, a plaintiff bringing a disparate impact claim need not present evidence of discriminatory intent. Id. at 53, 124 S. Ct. 513. Instead, the plaintiff must present two kinds of evidence to establish a prima facie case. First, the plaintiff must point to the specific employment practice that allegedly has a disparate impact. Second, the plaintiff must demonstrate causation by offering statistical evidence sufficient to show that the challenged practice has resulted in prohibited discrimination. See Hallmark Developers v. Fulton Cnty., 466 F.3d 1276, 1286 (11th Cir. 2006). While "no single test controls **[\*64]** in measuring disparate impact," the plaintiff must produce some evidence about the population that a policy applies to, some numbers or proportional statistics, in order to survive a motion for summary judgment. Id. Even if Plaintiff had intended to proceed under this theory, she would have failed to met her burden of demonstrating that there is a genuine dispute as to any material fact, as Plaintiff presented no statistical evidence for the Court to even consider. Accordingly, Plaintiff has failed to carry her burden, and Defendants are entitled to summary judgment as to Plaintiff's claim of gender discrimination.

**D. Religious Discrimination Under Title VII**

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating on the basis of religion. See 42 U.S.C. § 2000e(j) (2000). To establish a prima facie case of religious discrimination, a plaintiff must show that: (1) she has a bona fide religious belief that conflicted with an employment requirement; (2) the employer was informed of that belief; and (3) she was discharged for failing to comply with the conflicting employment requirement. Daniels, 246 F.3d at 506; Bruff v. N. Miss. Health Svcs., Inc., 244 F.3d 495, 499 n.9 (5th Cir.), **[\*65]** *cert. denied*, 534 U.S. 952, 122 S. Ct. 348, 151 L. Ed. 2d 263 (2001). If a plaintiff can make out a prima facie case, the defendant must then show either: (1) that it offered the plaintiff a reasonable accommodation, or (2) that accommodating plaintiff would subject the defendant to undue hardship. Bruff, 244 F.3d at 500; see also 42 U.S.C. § 2000e(j) (2000) (providing a defense if an "employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business").

It is undisputed that Plaintiff can meet a prima facie case of religious discrimination: she holds a bona fide religious belief, her employer knew of this belief, and she was terminated for refusing to comply with the JDC uniform policy. Thus, the burden shifts to Defendants to come forward with evidence that it offered a reasonable accommodation, or that accommodating Plaintiff would cause undue hardship. In this instance, Defendants proceed under the theory that accommodating Plaintiff would cause undue hardship. An undue hardship exists when an employer incurs anything more than a *de minimus* **[\*66]** cost to accommodate an employee's beliefs. 33 See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977); see also Bruff, 244 F.3d at 500. Both economic and non-economic costs can pose an undue hardship upon employers . . . ." Webb v. City of Philadelphia, 562 F.3d 256, 260 (3d Cir. 2009) (citing Hardison, 432 U.S. at 84, 97 S. Ct. 2264). 34 Here, Plaintiff wishes to be able to wear a skirt (which is a tenet of her Pentecostal faith), as opposed to pants, while working as a juvenile detention officer. Defendants contend that accommodating Plaintiff's religious beliefs by granting her an exemption from the "no skirts" policy would create a risk to safety and security in the JDC.

33 Compare e.g., 42 U.S.C. § 12111(10)(A) ("[Under the ADA] the term 'undue hardship' means an action requiring significant difficulty or expense[.]"); with Hardison, 432 U.S. at 84, 97 S. Ct. 2264 (under Title VII anything more than *de minimis* expense is an undue hardship).

34 The Third Circuit, in Webb, stated that the Supreme Court's decision in Hardison "strongly suggests that the undue hardship test is not a difficult threshold to pass." 562 F.3d at 260. In Hardison, **[\*67]** the Supreme Court held that accommodating an employee's request not to work on his Sabbath would have been an undue hardship because the proposed accommodations would have (1) caused the employer's operation to suffer by removing an employee or supervisor from his position to work plaintiff's job; (2) violated a seniority system in the collective bargaining agreement; or (3) cost the employer $150 in premium pay to another employee until the plaintiff earned sufficient seniority to obtain a position that did not require Saturday work. 432 U.S. at 77-85, 97 S. Ct. 2264. These burdens were deemed to impose "more than a *de minimis* cost" and therefore were not required under Title VII. Id. at 84, 97 S. Ct. 2264.

In August 2010, the Third Circuit in EEOC v. The GEO Group, Inc., 616 F.3d 265 (3d Cir. 2010) held it would be an undue hardship for The GEO Group, Inc. ("GEO"), a private company that was contracted to run a prison, to allow its practicing Muslim employees to wear a khimar 35 as an exception to its non-headgear policy. The court reasoned that khimars, like hats, could have been used to smuggle contraband into and around the prison, conceal the identity of the wearer, and/or be **[\*68]** used against prison employees in an attack. Additionally, it was noted that accommodating the employees would have necessarily required additional time and resources of prison officials. Thus, the court concluded that the safety and security concerns created an undue hardship as a matter of law. Id. at 275-77. The court in GEO Group relied on the prior Third Circuit holding in Webb v. City of Philadelphia. There, the Third Circuit held that the city would suffer undue hardship under Title VII if forced to permit police officers to wear religious clothing or ornamentation with their uniforms. 562 F.3d at 260-62. The court noted that "safety is undoubtedly an interest of the greatest importance to the police department and that uniform requirements are crucial to the safety of officers . . . ." Id. at 262 (internal quotations and citation omitted).

35 The khimar is an "Islamic religious head scarf, designed to cover the hair, forehead, sides of the neck, shoulders, and chest." GEO Group, 616 F.3d at 267-68. While there are many different styles of khimar, the particularity of the khimars were not at issue in the case. Thus, the court adopted the definition from the complaint. Id. at 268 n.1.

"[S]afety **[\*69]** considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer's business. Title VII does not require that safety be subordinated to the religious beliefs of an employee." Draper v. U.S. Pipe & Foundry Co., 527 F.2d 515, 521 (6th Cir.1975); see also, e.g., EEOC v. Kelley Services, Inc., 598 F.3d 1022 (8th Cir. 2010); Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1384 (9th Cir. 1984); Kalsi v. New York City Transit Auth., 62 F.Supp.2d 745 (E.D.N.Y. 1998), *aff'd mem.*, 189 F.3d 461 (2d Cir. 1999). This line of cases makes clear that an employer can be subjected to an undue hardship if the accommodation would create any significant safety, or even legal, *risks.* For example, in Bhatia, the Ninth Circuit affirmed summary judgment for an employer that required machinists whose duties involved potential exposure to toxic gas to shave any facial hair that prevented them from achieving a gas-tight seal when wearing a respirator. 734 F.2d 1382. All machinists were required to comply with the policy even though machinists sometimes were assigned to jobs that did not require the use of a respirator. Id. at 1383. Because assignments **[\*70]** were unpredictable, the employer required all machinists to be able to use a respirator safely. Id. The plaintiff had worked as a machinist since before the policy against facial hair had taken effect. For religious reasons, the plaintiff did not shave. He was suspended without pay and then placed in a lower-paying job that did not expose him to gas.

The Ninth Circuit held that allowing the plaintiff to work as a machinist on assignments where he would be exposed to gas would be an undue hardship because the employer "would risk liability" under California occupational safety standards. 734 F.2d at 1384. In addition, retaining the plaintiff as machinist and assigning him only to assignments that did not involve exposure to toxic gas would impose two undue hardships on the employer. First, the employer would have to revamp its unpredictable system of work assignments. Second, the employer would have to require the plaintiff's co-workers to perform his share of dangerous work. Id. Affirming summary judgment for the employer, the court concluded that "Title VII does not require Chevron to go that far." Id. The Ninth Circuit did not require the employer to prove that the accommodation would **[\*71]** actually violate state laws or cause injury; the increased risks were sufficient.

Relying in part on Bhatia, another court conducted a similar analysis and reached a similar conclusion in a case involving an employer's hard hat policy. Kalsi, 62 F. Supp. 2d 745, *aff'd mem.*, 189 F.3d 461 (2d Cir. 1999) (affirming "for substantially the reasons stated by the district court"). In Kalsi, the plaintiff's religious beliefs required him to wear a turban at all times. He was hired as a subway car inspector. The New York Transit Authority required all inspectors to wear hard hats, and it fired the plaintiff because he would not wear one. The court granted summary judgment for the employer on undue hardship grounds. The plaintiff argued that he should be allowed to perform his job (with some modifications) without a hard hat, and even his occupational safety expert opined that his position should not have required a hard hat. Id. at 759. 36 The plaintiff proposed that he work only inside subway cars, where there is less risk of head injury, and that he take unpaid breaks if his assigned team was performing tasks for which the employer considered hard hats most necessary. Id. at 759. The plaintiff's **[\*72]** expert acknowledged that accommodating the plaintiff in this manner would increase his risk of head injury. He opined, however, that if plaintiff wore a turban, he would be unlikely to experience a "catastrophic" injury. Id. at 759-60. The expert also made several suggestions for how workplace hazards could be avoided so that hard hats would be unnecessary.

36 While Defendants in this case retained an expert and presented an expert report, the Plaintiff presented no such report or testimony.

Rejecting the plaintiff's arguments, the court reasoned: "Title VII does not require employers to absorb the cost of all less than catastrophic physical injuries to their employees in order to accommodate religious practices." Id. at 760. The risks inherent in the proposed

accommodation were not limited only to the increased risk of personal injury to plaintiff. They also included the risk of injury to plaintiff's co-workers who might be called on to rescue him or who might become hurt if he were incapacitated. Id. 37 The court rejected plaintiff's expert's suggestions about possible modifications to the work environment because those modifications would have involved more than a *de minimis* cost. Id.

37 Albeit **[\*73]** for different yet similar reasons, a concern about the safety and security of other workers in the JDC is present in this action as well.

Similarly, in EEOC v. Oak-Rite Mfg. Corp., 2001 U.S. Dist. LEXIS 15621, 2001 WL 1168156 (S.D. Ind. Aug. 27, 2001), the court was presented with a conflict between the religious beliefs of a job applicant similar to the Plaintiff's beliefs in this action and an employer's safety policies. For safety reasons, the defendant required employees to wear long pants in its metal-working factory. The EEOC sued the defendant on behalf of the job applicant whose religion required her to wear modest skirts and dresses, as opposed to pants. The EEOC claimed that the employer violated Title VII's proscription against religious discrimination because the employer failed to accommodate the job applicant by allowing her to wear a long skirt to work in the factory. The defendant employer moved for summary judgment, and the court granted the motion, finding as follows:

Oak-Rite's pants-only policy is a facially neutral and reasonable safety measure. There is no evidence of any religious hostility on the part of Oak- Rite. An employer's duty under Title VII to accommodate religious practices is limited **[\*74]** to workplace modifications that place no more than a de minimis burden on the employer. The accommodation that the EEOC suggests--"a reasonably close-fitting, denim or canvas dress/skirt that extends to within two or three inches above the ankle, when worn with leather above-the-ankle boots extending up under the dress/skirt"--would impose an undue hardship on Oak-Rite by requiring it to experiment with employee safety. The proposed accommodation raises its own problems in terms of trade-offs between entanglement of a long skirt and/or severe restrictions on mobility and flexibility. No evidence shows that the proposed solution has worked safely in any comparable manufacturing setting. The employer's limited duty of accommodation under Title VII does not require an employer to choose between potential Title VII liability on the one hand and experimenting with increased risk of workplace injuries on the other.

2001 U.S. Dist. LEXIS 15621, [WL] at \*1. Along the same lines, an earlier unsuccessful EEOC action to a pants-only policy came in EEOC v. Heil-Quaker Corp., 1990 U.S. Dist. LEXIS 9948, 1990 WL 58543 (M.D. Tenn. Jan. 31, 1990), where the court ruled for the employer after trial. There, the court held that "[t]he employer is not required **[\*75]** to pursue accommodations when the employee's belief is inherently inconsistent with the employer's reasonable practice." Id. The experts in that case testified that a pants-only policy is uniform and that skirts and dresses are inherently more hazardous than pants. Id. The court noted that increased safety hazards and a corresponding increase risk of liability "are all justification[s] recognized by the [c]ourt as being undue hardships." Id. 38

38 In many other challenges to pants-only policies, there has not been the existence of a safety-based undue hardship defense under Title VII. See Killebrew v. Local Union 1683, 651 F. Supp. 95 (W.D. Ky. 1986) (union was not liable for religious discrimination under Title VII for not modifying its bumping rules to permit the plaintiff to bid on office job, which she could have performed while wearing a skirt or dress); Reid v. Kraft General Foods, Inc., 1995 U.S. Dist. LEXIS 5595, 1995 WL 262531 (E.D. Pa. Apr. 27, 1995) (fact questions regarding reasons behind the timing of plaintiff's hire precluded summary judgment on Title VII reasonable accommodation issue where employer eventually hired plaintiff and allowed her to wear a skirt with her uniform; employer did not raise **[\*76]** undue hardship defense); Seabrook v. City of New York, 2001 U.S. Dist. LEXIS 268, 2001 WL 40767 (S.D.N.Y. Jan. 16, 2001) (granting Department of Corrections summary judgment on free exercise and Fourteenth Amendment challenges to pants-only policy where plaintiff corrections officers had designed a prototype skirt to be worn with prison riot gear; Title VII claim was not yet ripe); Kisco Co. v. Missouri Comm'n on Human Rights, 634 S.W.2d 497, 498-99 & n.2 (Mo. App. 1982) (employer's pants-only policy did not violate state anti-discrimination statute, but state law did not impose duty to accommodate).

Here, as discussed under the Court's analysis of Plaintiff's free exercise claim, Defendants submitted deposition testimony, as well as an expert report, of the legitimate safety concerns presented from wearing a skirt as a juvenile detention officer in the JDC. The safety and security concerns include the ability of an officer to perform certain defense-tactic maneuvers, such as the "hip drill retreat" and the "bridge and roll." Specifically, the ability to perform these maneuvers would be impaired because "of the likelihood that the assailant could pin the material of the skirt to the floor with his knees, preventing **[\*77]** the officer from moving her body in the way necessary to perform the maneuvers, or because it would hinder the officer's freedom to move her legs in the way necessary to perform the maneuver." Similarly, an expert report provided that a skirt would potentially interfere with an officer's ability to perform the "Hook and Drive Take Down," which is used "once the officer has back control of the attacker and needs to take them down to the ground because they are still not in compliance," as well as the "bicycle hook." The expert report goes on to detail several more maneuvers, and notes that the "issues of safety and security are not significantly lessened in a juvenile detention facility[, as] [j]uveniles are capable of injuring officers and other detainees and attempting to escape in the same manner as adults."

This report is supported by the deposition testimony of Tim Erickson, who is the school resource officer and part of the training staff at the Lee County Sheriff's Department. Moreover, Plaintiff testified as follows:

Q: But would you disagree with that, that at any time it's possible to get in a confrontation with an inmate that might be a life or death situation?

A: Yes, sir. **[\*78]** Could be.

Q: In fact, at the juvenile facility you were aware that a juvenile detainee actually shot and killed a juvenile corrections officer?

A: Yes, sir.

\*\*\*

Q: And you acknowledge there are cases where they get violent. Do you recall a situation where a juvenile assaulted Leticia Bean?

A: Yes, sir.

Q: And Leticia actually had to take this juvenile to the floor?

A: Yes, sir.

Further, Defendants presented several "jailer's statements" concerning incidents that had occurred between officers and juveniles that support Defendants' reliance on safety and security as legitimate concerns. In contrast, the only evidence presented by Plaintiff to counter Defendants' evidence concerning safety and security is her unsupported, subjective belief that she might be able to do some of the same maneuvers. For example, Plaintiff testified as follows:

Q: And you think that you're just as able to do that [referring to the bicycle maneuver] in a skirt that you wore as you would be in a pair of pants?

A: Yes, sir. I don't think that -- - I think in the same technique that I could drop and roll and do a bicycle kick, I could do another alternative just the same.

However, Defendants' expert asserted that, in contrast **[\*79]** to Plaintiff's deposition testimony, "there are no alternatives to the bicycle kick in the SSGT training." 39

39 Plaintiff further asserts that she should be allowed to wear a skirt, and safety and security concerns should not support a finding of undue hardship, because she would have been willing to sign a written statement that she would take full responsibility for herself in her skirt. However, this would require allowing the Defendants to put not only Plaintiff herself at risk (or any other employees who wished to deviate from the uniform policy), but also to put others at risk if Plaintiff, due to her skirt, could not subdue any particular juvenile detainee.

The Defendants have presented competent, summary judgment evidence that a skirt like Plaintiff's would indeed cause risks of respect to safety and security at the JDC. Furthermore, to carry a burden of showing undue hardship, Defendants do not even need to prove that a skirt has--for example, in the past--actually *caused* such safety and security problems. Instead, the Defendants must show safety and security *risks.* For example, in Favero v. Huntsville Ind. Sch. Dist., 939 F. Supp. 1281 (S.D. Tex. 1996), *aff'd mem.*, 110 F.3d 793 (5th Cir. 1997), **[\*80]** several school bus drivers claimed a school district failed to accommodate their religious holidays by allowing time off. The school district argued that accommodation would cause an undue hardship because it could not cover all the bus routes. The drivers argued that delays caused by "doubling up" on routes could not be an undue hardship because such delays occurred for other reasons. The district court rejected that argument and granted summary judgment for the school district:

Plaintiffs' argument that because there were no children stranded by a broken down bus, plaintiffs' absence could not have created a potential for delay in delivering the children, is also without merit. Plaintiffs' emphasis on reviewing the situation in hindsight would allow employers to deny requests only when they were certain in advance that the requested absence would cause an undue hardship. This is not what Title VII requires.

Id. at 1293. The Fifth Circuit affirmed. While the Court here is sympathetic to Plaintiff's plight, given the safety and security concerns presented in the record, the Court concludes that requiring Defendants to offer Plaintiff an exemption to the "no skirts" policy would impose **[\*81]** an undue hardship as a matter of law. 40

40 Plaintiff also relies heavily on the following deposition testimony from Sheriff Johnson to prove her religious discrimination claim:

Q: What did you do to -- what attempt did you make to accommodate Ms. Finnie's religious beliefs?

A: **As far as accommodation, I don't know that there was any.** Because that was not the purpose of our meeting. The purpose of our meeting that I met with her over was for her to remain in the same position that she was in but she was requesting that she wear the skirt in that same position.

Plaintiff appears to assert that because there was no reasonable accommodation, Defendants violated Title VII. However, Defendants never contend that they accommodated Plaintiff. Instead, Defendants proceed under the *alternative* theory that any such accommodation here would cause undue hardship. And, the Court notes that this comment about reasonable accommodation is in relation to Plaintiff's ability to wear a skirt in her position as a juvenile detention officer; it is not in relation to any accommodation related to transfers to another position. The Court addresses Plaintiff's arguments concerning transferring Plaintiff to another **[\*82]** position below.

Yet, even another concern is present in this action in addition the safety and security concerns already discussed. In Kelley v. Johnson, the Supreme Court characterized a police department's "[c]hoice of organization, dress, and equipment for law enforcement personnel . . . [as] a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power." 425 U.S. at 247, 96 S. Ct. 1440. Almost ten years later, in Goldman v. Weinberger, the Court stated that the "desirability of dress regulations in the military is decided by the appropriate military officials." 475 U.S. at 509, 106 S. Ct. 1310. The Court also found "the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission." Id. at 508, 106 S.Ct. 1310. 41 Relying on the principles from these two cases, the Third Circuit in Webb, facing an issue similar to the ones presented in the case *sub judice*, concluded that the city would suffer undue hardship under Title VII if it was forced to permit police officers **[\*83]** to wear religious clothing or ornamentation with their uniforms. 562 F.3d at 260-62. The Webb court relied, in part, on the Fifth Circuit's decision in Daniels v. City of Arlington, 246 F.3d 500, 506 (5th Cir. 2001). In Daniels, the Fifth Circuit found the city's no-pins uniform policy applicable to police officers was not only proper, but also that the city was unable to reasonably accommodate the officer's religious needs without undue hardship. The Fifth Circuit noted that "[a] police department cannot be forced to let individual officers add religious symbols to their official uniforms." Id.; see also, e.g., Rodriguez v. City of Chicago, 156 F.3d 771, 779 (7th Cir. 1998) (Posner, C.J., concurring) ("The importance of public confidence in the neutrality of its protectors is so great that a police department or a fire department . . . should be able to plead 'undue hardship'. . . ."); Paulos v. Breier, 507 F.2d 1383, 1386 (7th Cir.1974) (recognizing and protecting the interest of municipality in preserving nonpartisan police force and appearance thereof). While, here, the uniform policy concerns detention officers in the juvenile detention center, as opposed to the police force, **[\*84]** the rationale is at least still applicable, see Communications Workers of America v. Ector Community Hospital District, 467 F.3d 427, 439-40 (5th Cir. 2006) ("That uniforms may be more important in law enforcement than in other fields clearly does not mean that other employers have no interest in requiring them . . . There is no reason to believe that a uniform requirement will not have somewhat similar efficiency enhancing effects in the non-law enforcement context, as is clearly attested by the presence of uniforms in so many non-law enforcement occupations, e.g., postal employees, bus drivers, flight attendants, United Parcel Service personnel and a host of others."), and it certainly is supportive of the fact that allowing an exception to the "pants-only" policy would amount to undue hardship.

41 Both Kelley v. Johnson and Goldman v. Weinberger are discussed in more detail under the Court's analysis of Plaintiff's free exercise claim.

Plaintiff additionally contends that she should have been reasonably accommodated by being allowed to transfer to another position within the JDC; more specifically, a position that allowed her to wear a skirt. However, according to Defendants, there **[\*85]** were not any administrative, clerical, or other officer positions, in which Plaintiff could wear a skirt, available at the time of Plaintiff's termination. Defendants attached to their supplemental motion for summary judgment the declaration of Kamisha McKinnon, who is the administrative assistant to Sheriff Johnson. McKinnon asserts that she has access to and knowledge concerning the records of the sheriff's department and the administrative personnel of the department. McKinnon declares that according to the records and her personal knowledge of the investigation, "there were no vacancies in administrative/office/clerical positions in the sheriff's department from September 2008 through April 2009. The minimum educational qualification for those positions is a high-school diploma or GED certificate. Also, there was no vacancy in the teacher position at the JDC during that time period." Plaintiff, who lacked a GED at the time in which she worked for JDC, 42 was not qualified for the positions which would allow her to wear a skirt. Further, Defendants' testimony concerning the positions available and qualification standards remains uncontested. After Defendants filed two supplemental **[\*86]** motions for summary judgment, providing more evidentiary support for their original summary judgment motion, Plaintiff requested an extension of time to respond to Defendants' motions and the evidence presented therein [72], which the Court granted. However, Plaintiff entirely failed to respond to such supplemental motions. Thus, not only is there competent, uncontested, summary judgment evidence before the Court asserting that no were positions available, but such evidence also establishes qualification standards for such positions--standards that Plaintiff did not meet. In Brener v. Diagnostic Center Hospital, 671 F.2d 141, 146 (5th Cir. 1982), the Fifth Circuit held that hiring a substitute employee in order to permit the plaintiff to observe the Sabbath "plainly would involve a more than *de minimis* cost." Similarly, in Bruff v. North Mississippi Health Services, 244 F.3d 495 (5th Cir. 2001), the court found that an accommodation would result in undue hardship because it would require other employees to assume disproportionate workloads. The court further noted that an employer need not actually incur costs before claiming that an accommodation would result in costs that are more **[\*87]** than *de minimus.* Id. at 501; see also Weber v. Roadway Express, Inc., 199 F.3d 270, 274 (5th Cir. 2000) ("The mere possibility of an adverse impact on co-workers . . . is sufficient to constitute an undue hardship."); Eversley v. MBank Dallas, 843 F.2d 172, 176 (5th Cir. 1988) (determining it would be an undue hardship on an employer to require employees to switch shifts). Along the same lines, "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny [the rights] of some employees in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far." Hardison, 432 U.S. at 81, 97 S. Ct. 2264. In other words, an employer cannot give preference to an employee because of his or her religion any more than it can discriminate against that employee for the same reason. It is axiomatic that preferential treatment involves discriminating against one in favor of another which, in the context of religion, is exactly the conduct proscribed by Title VII. See Bruff, 244 F.3d at 503. Accordingly, Defendants' uncontroverted evidence suffices to show undue hardship.

42 It is **[\*88]** undisputed that Plaintiff did not have her high-school diploma or a GED at the time she worked for JDC. However, Plaintiff has received her GED as of recently.

While Plaintiff does not analyze her claim under the "traditional" McDonnell Douglas analytical framework for discrimination cases, the Court nonetheless notes that, even if Plaintiff had, there is no evidence in the record that Defendants' safety-driven dress policy is pretext (or a motivating factor) for discrimination against religious employees, or employees requiring religious accommodation. See EEOC v. Kelley Services, Inc., 598 F.3d 1022 (8th Cir. 2010) (finding no evidence of pretext in a case where the EEOC brought suit against a temporary employment agency alleging it discriminated against a female Muslim temporary worker by failing to refer her to a commercial printing company for employment because that company had a dress policy prohibiting headware and loose-fitting clothing and the worker had refused to remove her khimar for work). The policy here is a facially-neutral requirement, applying to each employee equally. Further, this case is distinguishable from cases such as the Third Circuit's opinion in Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999). **[\*89]** In that case, the Third Circuit focused on the lack of neutrality in applying a "no-beards" regulation. Specifically, as the court explained, "the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent." Id. at 365. Unlike Fraternal Order of Police, the policy at JDC contains no such exceptions, nor is there evidence that other officers are allowed to deviate from the policy. Yet, Plaintiff does assert that Sheriff Johnson allows detention officers to wear skirts while escorting prisoners to court. Thus, according to Plaintiff, this weakens Defendants' rationale for the "pants-only" uniform policy. However, Plaintiff's assertion is flawed and not supported by the record. Sheriff Johnson testified in his deposition -- which remains uncontroverted -- as follows:

Q: Do you allow female jailers to wear skirts when they go to court?

A: My policy is that they wear their uniform. Now, for some reason, a skirt or that type of attire to testify -

Q: Uh-huh

A: -- not to work. They cannot be at work. But if they are testifying in court, then -- and they are off duty then they could wear it.

Q: That would only be for a **[\*90]** -- if they're testifying. It wouldn't be to escort prisoners?

A: No, absolutely not. It would be strictly to be a witness to testify.

Plaintiff also assert that Sheriff Johnson "admitted that Finnie was fired because of her religion . . . ." Plaintiff bases this assertion on a transcript of the audio recording of the meeting prepared by counsel for the respective parties. Plaintiff's counsel asserts that the transcript states as follows:

Finnie: How have I failed to meet the policies?

Johnson: You are not following the policy on my dress code. It is your choice not to follow. So, I have tried to work with you every way I could, to give you an opportunity to follow that policy and come back to work and you . . . for whatever reason, have chose not to do that.

Finnie: **Whatever reason? Because it's my religion?**

Johnson: **And you have filed an EEOC grievance against us.** You've got it in the court process and we'll let it run its course.

Defendants, on the other hand, assert that Plaintiff's version of the transcribed termination meeting is inaccurate. 43 Specifically, Defendants assert that "[t]he transcript makes it appear that Ms. Finnie asked a question -- 'Because it's my religion?' (supposedly **[\*91]** inquiring if her religion was the reason for her termination) which was followed by Sheriff Johnson's statement . . . ." According to Defendants, Plaintiff leaves out certain pauses, words, and "fillers," and the transcript, in its correct form, "shows undisputably [sic] that Ms. Finnie was not asking a question, but rather, in response to Sheriff Johnson's statement that she had refused to follow the dress code 'for whatever reason,' was making a declarative statement that the reason she refused to follow the uniform policy was because of her religious beliefs." Defendants' transcript of the termination meeting is as follows:

Johnson: You are not following the policy on my dress code. And it's your choice that you chose not to follow it. So, I have tried to work with you every way I could, to give you an opportunity to follow that policy and come back to work and you, for whatever reason, have chose not to do that. **So . . .**

Finnie: For whatever reason? **Because, you know, uh, it's my religion, and um . . .**

Johnson: And you have filed an EEOC grievance against us. And you've got it in the court process and we'll let it run its court.

In either version of the transcript, Sheriff Johnson **[\*92]** never actually mentions Plaintiff's religion. 44 It is Plaintiff herself that refers to her religious beliefs. That is, Plaintiff is the declarant of the statement concerning her religion, not Sheriff Johnson, and there is no evidence anywhere in the record that he "admitted" her religion was *the* reason, or even *a* reason, she was being terminated. 45 Further, as noted above, Plaintiff never analyzes her claim under the McDonnell Douglas framework, nor does she ever assert -- much less prove -- that Defendants' decision to terminate Plaintiff was "pretext" for religious discrimination, or that religion was a "motivating factor" in the decision. Instead, Plaintiff focuses solely on Defendants' failure to reasonably accommodate Plaintiff. But, the Court has already held that such reasonable accommodation would cause Defendants an undue hardship as a matter of law. As such, for all of the reasons discussed above, Plaintiff's claim for religious discrimination under Title VII fails, and Defendants are entitled to summary judgment as to this claim.

43 The Court does not have the audio recording of the termination meeting. Instead, the Court has only been presented with the two competing versions **[\*93]** of the transcribed meeting. However, the disputed versions of the transcript do not affect the Court's decision on Plaintiff's religious discrimination claim.

44 Sheriff Johnson does, however, bring up Plaintiff's EEOC charge. This is discussed under Plaintiff's retaliation claim.

45 While Plaintiff does not specifically allege such, Plaintiff's language concerning the fact that Sheriff Johnson allegedly "admitted" that he fired Plaintiff based on her religion sounds like Plaintiff is asserting that such a statement is "direct evidence" of discrimination. "Direct evidence is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." Rachid v. Jack In The Box, Inc., 376 F.3d 305, 309 n.6 (5th Cir. 2004) (quoting Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893, 897 (5th Cir. 2000)). If an inference is required for evidence to be probative as to a defendant's discriminatory animus in taking the challenged employment action, the evidence is circumstantial, not direct. Sandstad, 309 F.3d at 897-98. Here, Sheriff Johnson made *no* statement concerning Plaintiff's religious beliefs and, moreover, even statements that are insufficiently direct, ambiguous, **[\*94]** and require inferences do not amount to direct evidence of discriminatory animus. See Sandstad, 309 F.3d at 897-98 (company plan to "identify . . . younger managers . . . for promotion to senior management . . . ultimately replacing senior management" was not direct evidence of age discrimination because it required the inference that senior managers were to be fired to make room for younger trainees, rather than being replaced as they retire, change jobs, or are terminated for performance reasons).

**E. Retaliation Under Title VII**

Plaintiff next alleges that her termination was retaliation for the filing of her March 2009 EEOC charge. Before the Court turns to the merits of Plaintiff's retaliation claim, it first addresses a concern raised by Defendants in their opposition to Plaintiff's motion to amend her complaint, yet not addressed in their summary judgment motions, concerning exhaustion of administrative remedies.

It is undisputed that Plaintiff did not file an EEOC charge as to her retaliation claim. Instead, Plaintiff's EEOC charge only alleged gender and religious discrimination. However, Plaintiff's termination -- and her evidence supporting her retaliation claim -- occurred *after* **[\*95]** her initial EEOC charge was filed. In Gupta v. East Texas State University, 654 F.2d 411, 414 (5th Cir. 1981), the plaintiff, Gupta, brought a Title VII suit alleging that his former employer discriminated against him on the basis of national origin and religion. Id. at 412. Gupta filed an EEOC charge complaining of the discrimination on July 9, 1975. Id. Later, in February of 1976, Gupta filed a second charge with the EEOC, alleging various acts of retaliation that resulted from his first charge. Id. at 413. After he filed this second charge, Gupta's employer notified him that his contract would not be renewed for the following year. Id. Gupta never filed a third charge with the EEOC complaining that his employer had discharged him in retaliation for his two charges with the EEOC. The court therefore questioned its jurisdiction over the retaliatory discharge issue since "the filing of an administrative complaint is a jurisdictional prerequisite to bringing suit under Title VII." Id.

The Gupta court, however, found that it did have jurisdiction to hear the retaliatory-discharge claim despite the absence of a third charge with the EEOC. Id. at 414. It reasoned that "[i]t is the nature **[\*96]** of retaliation claims that they arise after the filing of the EEOC charge." Id. Thus, "[r]equiring prior resort to the EEOC would mean that two charges would have to be filed in a retaliation case . . . [which] would serve no purpose except to create additional procedural technicalities when a single filing would comply with the intent of Title VII." Id. As a result, the court found that it could exercise ancillary jurisdiction over Gupta's retaliatory-discharge claim. Id. Gupta is directly on point in this action.

Some courts, however, have questioned whether Gupta's holding is still valid in light of the Supreme Court decision in National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002). In Morgan, the Supreme Court held that Title VII plaintiffs could not use a "continuing violation" theory to assert claims that were barred because they were based on employer acts outside the 300-day statutory window for filing an EEOC charge. Id. at 113-14, 122 S. Ct. 2061. After Morgan, "[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" Id. at 114., 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 **[\*97]** Although Morgan involved incidents that took place before the EEOC charge was filed, courts have extended it to exclude any acts that occurred after filing from piggybacking onto an earlier-filed charge. See, e.g., Martinez v. Potter, 347 F.3d 1208, 1210-11 (10th Cir. 2003); McKenzie v. St. Tammany Parish School Bd., 2006 U.S. Dist. LEXIS 53814, 2006 WL 2054391, at \*2, \*3 (E.D. La. Jul. 19, 2006); Prince v. Rice, 453 F. Supp. 2d 14, 23-24 (D.D.C. 2006); Romero-Ostolaza v. Ridge, 370 F. Supp. 2d 139, 148-50 (D.D.C. 2005). Some courts have even gone a step further, holding that administrative remedies must be separately exhausted for claims of retaliation based on an earlier-filed EEOC charge that is already properly before the court. See Prince, 453 F. Supp. 2d at 23-24; Romero-Ostolaza, 370 F. Supp. 2d at 148-50.

Nevertheless, courts in the Fifth Circuit have continued to apply Gupta after Morgan. See, e.g., Eberle v. Gonzales, 240 F. App'x 622, 2007 WL 1455928 (5th Cir. 2007) (discussing Gupta's rationale and holding); Miller v. Southwestern Bell Telephone Company, 51 F. App'x 928, (5th Cir. 2002) (holding that, under Gupta, the plaintiff need not file an additional charge with the EEOC for a retaliation **[\*98]** claim "growing out of" his initial charge so long as the retaliation occurs after the filing of the initial charge); Stevenson v. Verizon Wireless LLC, 2009 U.S. Dist. LEXIS 3363, 2009 WL 129466 (N.D. Tex. Jan. 16, 2009) (discussing Morgan, yet still applying Gupta); Cooper v. Wal-Mart Transportation, LLC, 662 F. Supp. 2d 757 (S.D. Tex. Sept. 24, 2009) (same); Lightfoot v. OBIM Fresh Cut Fruit Co., 2008 U.S. Dist. LEXIS 76951, 2008 WL 4449512, at \*3 (N.D. Tex. Oct. 2, 2008) (applying Gupta but distinguishing it on the facts); Ocampo v. Laboratory Corp. of America, 2005 U.S. Dist. LEXIS 35138, 2005 WL 2708790, at \*7 (W.D. Tex. Sept. 6, 2005) ("Assuming the claims based on the charge of age discrimination are properly before the Court, and given [Gupta], Ocampo was not required to file a second charge of discrimination."); Green v. Louisiana Casino Cruises, Inc., 319 F. Supp. 2d 707, 710-11 (M.D. La. 2004) (citing Gupta and two later Fifth Circuit cases for the proposition that "a plaintiff is not required to exhaust administrative remedies before seeking review of a retaliation claim that grows out of an earlier EEOC charge"); see also Houston v. Army Fleet Services, LLC, 509 F. Supp. 2d 1033 (M.D. Ala. 2007) (citing Gupta, which is binding in the Eleventh Circuit as **[\*99]** well); White v. Potter, 2007 U.S. Dist. LEXIS 31909, 2007 WL 1330378, at \*7 (N.D. Ga. Apr. 30, 2007) (finding Gupta's policy rationale persuasive, recognizing the D.C. District Court's post-Morgan opinions as rejecting Gupta's holding, but deciding not to follow the D.C. decisions "given that Gupta is binding precedent in [the Eleventh] Circuit").

While Morgan arguably calls Gupta's holding into question, the Supreme Court did not squarely address the issue presented in Gupta. Morgan merely reemphasized the importance of treating discrete acts separately for the purpose of determining when the time limits for filing a charge with the EEOC expire. Morgan further never addressed the policy considerations Gupta took into account in deciding that a plaintiff need not file a new charge with the EEOC when a new discrete act "grows out" of an act for which the plaintiff has already filed a charge with the EEOC. Gupta, 654 F.2d at 414. Thus, because Defendants' failed to reurge this issue in their summary judgment motion, and until the Supreme Court or Fifth Circuit reassess the holding in Gupta, 46 this Court is bound to follow its holding. Therefore, Plaintiff's retaliation claim falls within an exception to the exhaustion **[\*100]** requirement, allowing it to proceed. 47

46 In Sapp v. Potter, 413 F. App'x 750, 2011 WL 661544, at \*3 n.2 (5th Cir. 2011), the Fifth Circuit, after discussing Gupta, noted that "[s]ome circuits have [ ] held that the Supreme Court's Morgan decision abolished or narrowed the Gupta exception . . . We need not address the potential abolition of the Gupta exception because the facts of this case do not support the exception's application." In that case, the court found that Gupta did not apply to Plaintiff's retaliation *and discrimination* claims, noting that Gupta had been applied to retaliation claims alone.

47 However, the Court notes that Gupta and its rationale are not applicable when the alleged retaliation occurs *before* the filing of the EEOC charge. See Eberle v. Gonzales, 240 Fed. Appx. 622, 2007 WL 1455928 (5th Cir. 2007). Thus, Plaintiff's complaints of retaliation occurring before the EEOC charge are barred, as Plaintiff's EEOC charge did not include a retaliation claim and they do not fall within Gupta's exception.

The Court now turns its focus to the merits of Plaintiff's retaliation claim. The McDonnell Douglas test is applicable to Title VII unlawful retaliation **[\*101]** cases. Byers v. Dallas Morning News, Inc., 209 F.3d 419, 427 (5th Cir. 2000). A plaintiff establishes a prima facie case of retaliation under 42 U.S.C. § 2000e-3(a) by showing that: (1) she engaged in an activity protected by Title VII; (2) she was subjected to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action. See Stewart v. Mississippi Transp. Comm'n, 586 F.3d 321, 331 (5th Cir. 2009).

Once the plaintiff makes out a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the employment action. Aryain v. Wal-Mart Stores Tex. LP, 534 F.3d 473, 484 (5th Cir. 2008). To survive summary judgment, plaintiff must then offer evidence that (1) the defendant's reason is not true, but is instead a pretext for retaliation (pretext alternative), or (2) the defendant's reason, though true, is only one of the reasons for its conduct, and another motivating factor is retaliation for the plaintiff engaging in protected activity (mixed-motives alternative). See Rachid v. Jack in the Box, Inc, 376 F.3d 305, 312 (5th Cir. 2004); Smith v. Xerox Corp., 602 F.3d 320, 330-33 (5th Cir. 2010).

As **[\*102]** background, on March 18, 2009, Plaintiff met with her attorney, who drafted a letter to Sheriff Johnson concerning the "pants-only" uniform policy and Plaintiff's religious beliefs. Sheriff Johnson did not respond to Plaintiff's counsel's letter. On March 19, 2009, Plaintiff filed a charge with the EEOC, alleging gender and religious discrimination. On April 13, 2009, Plaintiff alleges that she met with Steve White, who told her to "just put your pants on and come back to work." Plaintiff informed White that she could not do so due to religious reasons. On April 14, 2009, Plaintiff met with Sheriff Johnson, and her employment was terminated. 48

48 As discussed *supra*, there is a dispute between the parties concerning the actual date of the termination meeting. According to Plaintiff, the termination occurred on April 14, 2009, which would be four weeks after the EEOC charge was filed and sent to Sheriff Johnson. Under Defendants' version of the facts, the time frame was approximately six weeks, as Defendants contend that the termination meeting occurred later in April 2009. This dispute in no way impacts the Court's decision. However, the Court notes that it is accepting Plaintiff's version **[\*103]** of the facts for purposes of this Memorandum Opinion alone.

It is undisputed that Plaintiff's filing of an EEOC charge constitutes protected activity under Title VII. The Court also concludes that, in viewing the evidence in the light most favorable to Plaintiff, Plaintiff's April 2009 termination satisfies the second prong of Plaintiff's prima facie retaliation claim. 49 Defendants, however, contend that that Plaintiff cannot meet the third prong of a prima facie case: a causal link between the filing of the EEOC charge and the termination. To establish a 'causal link' as required by the third prong of the prima facie case, a plaintiff does not have to prove that his protected activity was the sole factor motivating the employer's challenged actions. Gee v. Principi, 289 F.3d 342, 345 (5th Cir. 2002). Close timing between an employee's protected activity and an adverse action against the employee may provide the causal connection needed to make out a prima facie case of retaliation. McCoy v. City of Shreveport, 492 F.3d 551, 562 n.28 (5th Cir. 2007); Swanson v. Gen. Srvs. Admin., 110 F.3d 1180, 1188 (5th Cir. 1997). However, if the only evidence of a prima facie causal link is "mere **[\*104]** temporal proximity between an employer's knowledge of protected activity and an adverse employment action," then "the temporal proximity must be very close." Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-74, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (per curiam) (citations and internal quotation marks omitted) (citing with approval cases holding that three and four-month gaps between an employer's knowledge of a protected activity and an adverse employment action are *insufficient* and too long, standing alone, to establish a prima facie causal link). Even beyond temporal proximity alone,

The courts have [also] sketched an outline of indicia of causation in Title VII cases, because causation is difficult to prove. Employers rarely leave concrete evidence of their retaliatory purposes and motives. For example, in Jenkins, the court looked to three factors for guidance in determining causation. First, the court examined the employee's past disciplinary record. Second, the court investigated whether the employer followed its typical policy and procedures in terminating the employee. Third, it examined the temporal relationship between the employee's conduct and discharge. Jenkins, 646 F. Supp. at 1278. **[\*105]** This analysis is highly fact specific, as the Supreme Court recently noted. St. Mary's, 509 U.S. at [524], 509 U.S. 502, 113 S. Ct. [2742, 125 L. Ed. 2d 407] ("the question facing triers of fact in discrimination cases is both sensitive and difficult.") (quoting United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L. Ed. 2d 403 (1983)).

Nowlin v. Resolution Trust Corp., 33 F.3d 498, 507-09 (5th Cir. 1994). Here, because the Court finds the close timing alone (less than one month) minimally sufficient for purposes of the motion at bar to establish a prima facie case, the Court need not address the other factors discussed in Nowlin. 50

49 Defendants argue that the second prong of the prima facie case is not met because, while Plaintiff was not terminated until after she filed her EEOC charge, "the ultimatum that ultimately resulted in her termination -- that she must wear pants or lose her job -- was given on March 16, 2009, prior to the filing of the EEOC charge . . . ." While Plaintiff was indeed told by Steve White that she could not wear a skirt as a juvenile detention officer prior to the filing of her EEOC charge, she was not terminated until *after* the filing of the **[\*106]** charge. In fact, at one point, Plaintiff was told by Steve White that she would only be suspended for three days without pay if she wore the skirt. Steve White's action of merely informing Plaintiff that she could not wear a skirt does not constitute the adverse employment action at issue (nor would it likely constitute an adverse employment action in general). Instead, the adverse employment action at issue is the April 2009 termination, which clearly occurred after the EEOC charge. Further, Defendants also note in their brief that, "for purposes of this motion only, the defendants assume for the sake of argument that Ms. Finnie has established the first two prongs of the prima facie case."

50 Defendants assert that a causal link cannot exist, even given the close temporal proximity, because the Plaintiff's actions amounted to a "constructive resignation," which Defendants contend is when an employee tells an employer that he or she will not do work, yet he or she will not quit either. Defendants fail to adequately support, for purposes of summary judgment, their assertion that Plaintiff constructively resigned. While Plaintiff asserted that she could not abide by the "pants-only" policy, **[\*107]** Plaintiff testified that she took her vacation leave in hopes that she would be reasonably accommodated. Plaintiff never testified that she was resigning. In fact, Plaintiff did not resign; she was officially terminated. Defendants also, relying on a case from the Third Circuit where the court found an inference of retaliatory motive illogical where the articulated reason existed before the protected activity occurred, assert that retaliatory motive cannot be found here because Plaintiff was told she could not wear a skirt prior to her filing of the EEOC charge. See Cohen v. Austin, 901 F. Supp. 945, 951 (E.D. Pa. 1995), *aff'd*, 107 F.3d 6 (3d Cir. 1997). While the Court agrees that the reasoning in Cohen is rational, the Court finds it inapplicable here. The Court in Cohen found retaliatory motive "plainly illogical *in light of the record*" that existed in that case. Id. (emphasis added). As discussed *infra*, given the record that exists in this case, the finding of a causal nexus is not plainly illogical.

After concluding that, for purposes of summary judgment, Plaintiff has presented a prima facie case of retaliation, the burden shifts to Defendants to articulate a legitimate, non-retaliatory **[\*108]** reason for the employment action. Defendants' reason for Plaintiff's termination is that Plaintiff failed to comply with the JDC uniform policy. This articulated reason satisfies Defendants' burden of production. As such, in order to survive summary judgment, Plaintiff must offer evidence that (1) the defendant's reason is not true, but is instead a pretext for retaliation (pretext alternative), or (2) the defendant's reason, though true, is only one of the reasons for its conduct, and another motivating factor is retaliation for the plaintiff engaging in protected activity (mixed-motives alternative). According to the Fifth Circuit, "[a] plaintiff can only avoid summary judgment on 'but for' causation by demonstrating 'a conflict in substantial evidence on this ultimate issue.'" Nunley v. City of Waco, 440 Fed. Appx. 275, 2011 WL 3861678, at \*5 (5th Cir. 2011) (quoting Hernandez v. Yellow Transp., Inc., 641 F.3d 118, 129 (5th Cir. 2011)). Evidence is "substantial" if it is of a quality and weight such that "reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." Id.

In Nunley, the Fifth Circuit addressed retaliation post- the court's decision in **[\*109]** Smith v. Xerox Corp., 602 F.3d 320 (5th Cir. 2010), where the court held that the Price Waterhouse "mixed motive" framework applies to Title VII retaliation cases, and a plaintiff may show that a protected activity was a "motivating" or "substantial" factor. The Fifth Circuit in Smith also dispensed with the previous requirement that a plaintiff offer direct evidence of retaliation in order to proceed on the mixed-motive theory. The plaintiff in Nunley, relying on the Smith decision, argued that a Title VII retaliation claim need only offer evidence that retaliation was a factor, i.e., that the City had "mixed motives," and such evidence may be circumstantial. The Fifth Circuit, responding to such an argument, stated as follows:

But as we explained in Long v. Eastfield College, 88 F.3d 300 (5th Cir. 1996), there are different tests for causation within the McDonnell Douglas framework--the initial "causal-link" required for making out a prima facie case, and the "but for" causation required after the employer has offered a legitimate, non-discriminatory justification. Id. at 305 n.4 ("At first glance, the ultimate issue in an unlawful retaliation case--whether the defendant discriminated **[\*110]** against the plaintiff because the plaintiff engaged in conduct protected by Title VII--seems identical to the third element of the plaintiff's prima facie case--whether a causal link exists between the adverse employment action and the protected activity. However, the standards of proof applicable to these questions differ significantly. . . .The standard for establishing the 'causal link' element of the plaintiff's prima facie case is much less stringent."). Indeed, the Court's opinion in Xerox affirms that the Price Waterhouse mixed-motive approach as applied in the retaliation context preserves an employer's ability to escape liability by refuting but for causation. Xerox, 602 F.3d at 333 ("[T]he mixed-motives theory is probably best viewed as a defense for an employer. This 'defense' allows the employer--once the employee presents evidence that an illegitimate reason was a motivating factor, even if not the sole factor, for the challenged employment action--to show that it would have made the same decision even without consideration of the prohibited factor." (emphasis added) (footnote and internal quotation marks omitted)); see also Manaway v. Med. Ctr. of Southeast Tex., 430 Fed. Appx. 317 (5th Cir 2011) **[\*111]** ("The burden then shifts back to the employee to 'prove that the protected conduct was a 'but for' cause of the adverse employment decision.'" (quoting Hernandez, 641 F.3d at 129)). Thus, our decision in Xerox did not dispense with this final "but for" requirement for avoiding summary judgment.

Nunley, 440 Fed. Appx. 275, 2011 WL 3861678, at \*5. 51

51 In short, and according to Nunley, the only thing the mixed-motive analysis does is increase the bar for a defendant to reach before the ultimate burden of proving but-for causation reverts to the plaintiff.

In an attempt to show a retaliatory motive, Plaintiff here presented, among other things, the transcript of Plaintiff's termination meeting with Sheriff Johnson. As discussed above, there is a dispute concerning portions of the transcribed meeting. Plaintiff's counsel asserts that the transcript states as follows:

Finnie: How have I failed to meet the policies?

Johnson: You are not following the policy on my dress code. It is your choice not to follow. So, I have tried to work with you every way I could, to give you an opportunity to follow that policy and come back to work and you . . .for whatever reason, have chose not to do that.

Finnie: Whatever reason? **[\*112]** Because it's my religion?

Johnson: **And you have filed an EEOC grievance against us. You've got it in the court process and we'll let it run its course.**

Defendants, on the other hand, assert that Plaintiff's version of the transcribed termination meeting is inaccurate. 52 Defendants' transcript of the termination meeting is as follows:

Johnson: You are not following the policy on my dress code. And it's your choice that you chose not to follow it. So, I have tried to work with you every way I could, to give you an opportunity to follow that policy and come back to work and you, for whatever reason, have chose not to do that. So . . .

Finnie: For whatever reason? Because, you know, uh, it's my religion, and um . . .

Johnson: **And you have filed an EEOC grievance against us. And you've got it in the court process and we'll let it run its course.**

In both versions of the transcript, Sheriff Johnson discusses Plaintiff's EEOC charge during a discussion concerning Plaintiff's termination. Unlike Plaintiff's assertions under her religious discrimination claim, here, Sheriff Johnson is the declarant of the statement, and he alludes to the EEOC charge, without questioning from Plaintiff, *while explaining* **[\*113]** *to Plaintiff the reasoning behind her termination.* That is, Sheriff Johnson is the not only the speaker of the statement concerning Plaintiff's protected activity, but he is the one who actually brings it up while officially terminating Plaintiff's employment. Although this statement does not qualify as direct evidence, 53 as Plaintiff at times appears to suggest, viewing the evidence in the light most favorable to Plaintiff, it does qualify as proper circumstantial evidence of a retaliatory motive. 54 The statement was made by Sheriff Johnson (the decisionmaker), during the termination meeting, and it was clearly related to the protected activity engaged in by Plaintiff. While a very close call, the Court cannot, at the summary judgment stage, do as Defendants would suggest and weigh evidence and credibility to determine exactly what Sheriff Johnson meant by his comment; instead, what inferences should be drawn from the remark depend on determinations best left to the trier of fact. Accordingly, disputes of material facts exist, and summary judgment is denied as to Plaintiff's retaliation claim. 55

52 The Court notes that the disputed versions of the transcript do not affect the Court's **[\*114]** decision on Plaintiff's retaliation claim.

53 "Direct evidence is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." Rachid v. Jack In The Box, Inc., 376 F.3d 305, 309 n.6 (5th Cir. 2004) (quoting Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893, 897 (5th Cir. 2000)). If an inference is required for evidence to be probative as to a defendant's discriminatory animus in taking the challenged employment action, the evidence is circumstantial, not direct. Sandstad, 309 F.3d at 897-98. This statement is insufficiently direct and unambiguous to establish unlawful retaliation without inferences. See id. (company plan to "identify . . . younger managers . . . for promotion to senior management . . . ultimately replacing senior management" was not direct evidence of age discrimination because it required the inference that senior managers were to be fired to make room for younger trainees, rather than being replaced as they retire, change jobs, or are terminated for performance reasons).

54 In the context of unlawful discrimination, the Fifth Circuit has stated that, [c]omments are evidence of discrimination only if they are (1) related to the **[\*115]** protected class of persons of which the plaintiff is a member, (2) proximate in time to the complained-of adverse employment decision, (3) made by an individual with authority over the employment decision at issue, and (4) related to the employment decision at issue." Jackson v. Cal-Western Packaging Corp., 602 F.3d 374, 380 (5th Cir. 2010); Jenkins v. Methodist Hospitals of Dallas, Inc., 478 F.3d 255, 262-63 (5th Cir. 2007) (citing Patel v. Midland Mem'l Hosp. & Med. Ctr., 298 F.3d 333, 343-44 (5th Cir. 2002)). Comments which do not meet these criteria are considered "stray remarks" and, standing alone, are insufficient to defeat summary judgment. Jackson, 602 F.3d at 380.

55 While this action may proceed at trial as a "mixed-motives" case, the Court need not decide at this juncture whether this case is properly labeled a "pretext" case or a "mixed motives" case. See Smith, 602 F.3d at 333.

**CONCLUSION**

For the reasons stated above, Defendants' Motions for Summary Judgment are granted in part and denied in part. Defendants' motions are granted with respect to Plaintiff's First Amendment free speech and free exercise claims. The motions are further granted with respect to Plaintiff's Title **[\*116]** VII gender and religious discrimination claims. The motions are denied, however, as to Plaintiff's VII retaliation claim.

So ordered on this, the 17th day of January, 2012.

**/s/ Sharion Aycock**

**UNITED STATES DISTRICT JUDGE**