

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-03204-RBJ-NRN

LORI FRANK,

Plaintiff,

v.

CITY OF FORT COLLINS, a municipality; and
JEROME SCHIAGER, former Deputy Chief of Police, in his individual capacity,

Defendants.

**DEFENDANT CITY OF FORT COLLINS' NOTICE OF INTENT TO FILE A
SUMMARY JUDGMENT MOTION**

Defendant City of Fort Collins, by and through its attorneys Cathy Havener Greer, and Kathryn A. Starnella, of Wells, Anderson & Race, LLC and Jenny Lopez Filkins, Senior Assistant Attorney, City of Fort Collins, respectfully submits the following Notice of Intent to File a Summary Judgment Motion, pursuant to Hon. R. Brooke Jackson's Practice Standards.

These claims remain against the City: (Claims 1 and 2) gender discrimination in violation of Title VII and the Colorado Anti-Discrimination Act (CADA); (Claims 3 and 4) retaliation in violation of Title VII and CADA; and (Claim 7) violation of the Equal Pay Act. *See* Complaint, Doc. # 2 at 30-33, 35; Order on Motion to Dismiss, Doc. # 40. The City intends to file a summary judgment motion on all these claims. An analysis of the basis for the City's intended summary judgment motion is set forth in the attached Table.

Dated this 10th day of January 2020.

Respectfully submitted,

S/Kathryn A. Starnella

Cathy Havener Greer

Kathryn A. Starnella

Wells, Anderson & Race, LLC

1700 Broadway, Suite 1020

Denver, CO 80290

Telephone: (303) 830-1212

Email: cgreer@warllc.com; kstarnella@warllc.com

Attorneys for Defendants City of Fort Collins

S/ Jenny Lopez Filkins

Jenny Lopez Filkins

Senior Assistant City Attorney

City of Fort Collins

300 LaPorte Avenue

Fort Collins, CO 80521

Telephone: (970) 221-6520

Email: jlopezfilkins@fcgov.com

Attorney for Defendant City of Fort Collins

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 10, 2020, a true and correct copy of the above and foregoing **DEFENDANT CITY OF FORT COLLINS' NOTICE OF INTENT TO FILE A SUMMARY JUDGMENT MOTION** was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following email addresses:

Jennifer Robinson, Esq.
Robinson & Associates Law Offices, LLC
7900 E. Union Avenue, Suite 1100
Denver, CO 80237
Email: jrobinson@raemployment.com
Attorneys for Plaintiff

Robert M. Liechty, Esq.
Robert M. Liechty PC
1800 Gaylord St
Denver, CO 80206
Email: rliechty@crossliechty.com
Attorney for Plaintiff

David R. DeMuro, Esq.
Vaughan & DeMuro
720 South Colorado Boulevard
Penthouse, North Tower
Denver, CO 80246
Email: ddemuro@vaughandemuro.com
Attorneys for Defendant Schiager

Sara L. Cook, Esq.
Vaughan & DeMuro
111 South Tejon, Suite 545
Colorado Springs, CO 80903
T: 719-578-5500
Email: scook@vaughandemuro.com
Attorneys for Defendant Schiager

S/ Kathleen Porter
Kathleen Porter
Email:kporter@warllc.com

Table A: Analysis of Defendants' Intent to File a Summary Judgment Motion

Claim	Elements	Plaintiff's Allegations	The Evidence
<p>Title VII and CADA Gender Discrimination (Claims 1 and 2)</p>	<p>Three-step burden-shifting framework. <i>McDonnell Douglas Corp. v. Green</i>, 411 U.S. 792, 802-04 (1973); <i>Colo. Civil Rights Comm'n v. Big O Tires</i>, 940 P.2d 397, 399-400 (Colo. 1997) (applying <i>McDonnell Douglas</i> framework to CADA claim)</p> <p>Step 1: Ms. Frank must establish <i>prima facie</i> case of gender discrimination, by a preponderance of evidence that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) her performance was satisfactory; and (4) she was treated less favorably than her male counterparts. <i>Cole v. Ruidoso Mun. Schools</i>, 43 F.3d 1373, 1379 (10th Cir. 1994).</p> <p>Step 2: The City must articulate a legitimate, nondiscriminatory reason for its actions. <i>McDonnell Douglas</i>, 411 U.S. at 802.</p>	<ul style="list-style-type: none"> • She competently performed her crime analyst job and was qualified. • Fort Collins Police services engaged in the following conduct <i>because</i> of her gender: (1) paid her less than her male co-worker who performed substantially similar work; (2) disciplined her by imposing a performance improvement plan; (3) denied her a raise; (4) categorized her job as “administrative” rather than “professional, a higher pay category; and (5) it denied her job reclassification request. <p><i>See</i> Complaint, Doc. # 2, at ¶¶ 227-235.</p>	<p>Fort Collins Police Services’ (FCPS’s) legitimate, nondiscriminatory reasons for actions:</p> <p><i>Re Ms. Frank’s job performance:</i></p> <ul style="list-style-type: none"> • FCPS relies on Ms. Frank to generate accurate data and to provide data analysis regarding trends and forecasts. See Crime Analyst Job Description. FCPS uses the data to inform the public, its officers, and City management about crime trends and FCPS’s crime-fighting efficacy and to allocate resources. • Ms. Frank refuses to check her work product to ensure accuracy. See G. Yeager Depo; L. Frank Depo. • Ms. Frank’s errors have repeatedly caused FCPS to misinform the public and City management about crime and statistics. See id.; Frank Depo. Ex. 37.

Claim	Elements	Plaintiff's Allegations	The Evidence
	<p>Step 3: Ms. Frank must show that the City's explanation is pretextual, <i>i.e.</i>, so weak, implausible, inconsistent, incoherent, or contradictory. <i>Id.</i> at 411 U.S. at 804-05; <i>Jones v. Okla. City Pub. Sch.</i>, 617 F.3d 1273, 1280 (10th Cir. 2010).</p>		<ul style="list-style-type: none"> • Issues with Ms. Frank's work product have been documented by male and female supervisors since at least 2011. See L. Frank Depo.; L. Frank Depo Exs. 16-18, 22; K. Volesky Affidavit. <p><i>Re Ms. Frank's pay in relation to her male co-worker, Erik Martin:</i></p> <ul style="list-style-type: none"> • Ms. Frank's Crime Analyst job and Mr. Martin's Financial Analyst II job are dissimilar. See Crime Analyst Job Description and Financial Analyst II Job Description. • Ms. Frank's duties include: research and analyze information on crime-related topics; determine criminal activity patterns and crime trends; extract and analyze data to assist with department budgeting; analyze and interpret information and prepare conclusions and forecasts. See Crime Analyst Job Description.

Claim	Elements	Plaintiff's Allegations	The Evidence
			<ul style="list-style-type: none"> <li data-bbox="1493 240 1894 1036">• Mr. Martin's duties include: prepare financial budget for agency vs. actual variance analysis and narrative assessment reports; lead budget development and forecast projections with management team in coordination with Finance service area personnel; analyze/interpret and communicate complex data using standard accounting and finance concept knowledge; train staff on budgeting and financial systems; serve as primary department contact for auditors. See Financial Analyst II Job Description. <li data-bbox="1493 1045 1894 1295">• Mr. Martin's job includes supervisory responsibilities; Ms. Frank's do not. See Crime Analyst Job Description and Financial Analyst II Job Description. <li data-bbox="1493 1305 1894 1409">• Mr. Martin's job requires a Bachelor's degree in Accounting, Finance or

Claim	Elements	Plaintiff's Allegations	The Evidence
			<p>Business; Ms. Frank's does not. <i>See id.</i></p> <ul style="list-style-type: none"> • Mr. Martin's position is exempt under the Fair Labor Standards Act; Ms. Frank's is non-exempt. See Crime Analyst Job Description and Financial Analyst II Job Description. <p><i>Placement on Performance Improvement Plan (PIP)</i></p> <ul style="list-style-type: none"> • Jerry Schiager placed Ms. Frank on a PIP during Q3 of 2016 after he observed her work product for several months and received feedback from others. See J. Schiager Depo. • Mr. Schiager consulted with the City's human resources department and then-Chief of Police John Hutto. See J. Schiager Depo. • Mr. Schiager sought to address the accuracy and integrity of Ms. Frank's work product between Q1-

Claim	Elements	Plaintiff's Allegations	The Evidence
			<p>Q3 of 2016. <i>See J. Schiager Depo. Ex. 88.</i></p> <ul style="list-style-type: none"> • Examples of Ms. Frank's inaccuracies: (1) Q1 2016, she provided data to the ACLU, which contained duplicate entries and incorrect data; (2) October 2016, she issued quarterly "Part 1 crime statistics" for the last two years with data that was off by a factor of more than two. <i>Id.</i> <p><i>Failure to receive a raise</i></p> <ul style="list-style-type: none"> • Ms. Frank did not receive a raise while she was on a PIP. <i>See G. Yeager Depo.</i> • Per FCPS policy, employees are not eligible for raises while on a PIP. <i>Id.</i> • After Ms. Frank was removed from the PIP, she retroactively received the raise. <i>See Personnel Action Form 7/31/17 (Eff. Date); J. Heckman-L. Williams, et al. email chain (dated 9/1/17); J. Miller-J. Kinsman email</i>

Claim	Elements	Plaintiff's Allegations	The Evidence
			<p>(dated 1/26/18); 8/18/17 Memo re PIP's ending.</p> <p><i>Re categorization of job as "administrative"</i></p> <ul style="list-style-type: none"> • Ms. Frank's job was categorized as administrative following a City-wide effort Human Resources undertook with an outside consultant to review and compare job descriptions and standardize job categorizations across the City. See T. Roche Depo.; G. Yeager Depo. • The City used data from the consultant on pay levels in the public sector from 12 peer cities. See T. Roche Depo. • With the outside consultant's input, the City determined that FCPS's Crime Analyst and investigative aide positions should be categorized as administrative. See G. Yeager Depo. • The administrative categorization comports

Claim	Elements	Plaintiff's Allegations	The Evidence
			<p>with how other non-City of Fort Collins agencies categorize the position. See T. Roche Depo.</p> <p><i>Re denial of Ms. Frank's job reclassification request:</i></p> <ul style="list-style-type: none"> Deputy Chief Yeager met with FCPS's executive staff during the last three administrations; executive staff determine the agency does not have a business need for the reclassification. See G. Yeager Depo.
Title VII and CADA Retaliation (Claims 3 and 4)	<p>(1) Ms. Frank engaged in protected opposition to discrimination;</p> <p>(2) She suffered an adverse employment action; and</p> <p>(3) A causal connection exists between her protected activity and the adverse action.</p> <p><i>Hennagir v. Utah Dep't of Corr.</i>, 587 F.3d 1255, 1265 (10th Cir. 2009); <i>see also Johnson v. Weld County</i>, 594 F.3d 1202, 1219 n.11 (10th Cir. 2010) (noting the same legal standards apply to CADA</p>	<ul style="list-style-type: none"> Alleged protected activity: (a) complained to Chief Hutto about Mr. Schiager's cool and distant attitude towards her; (b) met with Human Resources to request job reclassification; (c) complained about Mr. Schiager's decision to place her on a PIP and his "Needs Improvement" rating of her work; (d) complained of being excluded from a January 26, 2017, staff meeting Mr. Schiager held with his 	<p>Assuming <i>arguendo</i> that the listed actions are adverse employment actions, there is no evidence that FCPS took these actions because Ms. Frank engaged in protected activity.</p> <p>FCPS acted for legitimate non-retaliatory and non-discriminatory reasons:</p> <ul style="list-style-type: none"> Ms. Frank received negative evaluations because of her poor performance.

Claim	Elements	Plaintiff's Allegations	The Evidence
	and Title VII retaliation claims).	<p>direct reports; (e) complained about Financial Analyst Erik Martin's assignment as head of a workload and staffing analysis; (f) filed a charge with the CCRD and EEOC on December 13, 2017; and (g) amended her statement of discrimination. <i>See</i> Complaint, Doc. # 2 at ¶¶ 75-76, 83, 84, 87, 110, 123, 133, 148, 161, 182, 225, 242.</p> <ul style="list-style-type: none"> Alleged adverse actions: (a) negative performance evaluations; (b) placement on a PIP; (c) administrative classification of her job; (d) denial of a raise while she was on a PIP. <i>See id.</i> at ¶ 243. 	<ul style="list-style-type: none"> Mr. Schiager imposed the PIP because Ms. Frank's performance continued to decline. The City relied on consultant-gathered data to classify Plaintiff's job as administrative and the classification matches peer institutions; and City policy does not permit employees on PIPs to receive raises, but Ms. Frank received a retroactive raise post-PIP. <p><i>See cited evidence for Title VII and CADA gender discrimination claims (Claims 1 and 2).</i></p>
Equal Pay Act, 29 U.S.C. § 206(d)(1) (Claim 7)	(1) Ms. Frank was performing work that was substantially equal to that of the male employees considering the skills, duties, supervision, efforts and responsibilities of the job; (2) the conditions where the work was performed were basically the same; and	<ul style="list-style-type: none"> Erik Martin and Ms. Frank were equals on the organizational chart. Complaint, Doc. # 2 at ¶ 90. Mr. Martin and Ms. Frank performed substantially the same type of analytical work. <i>Id.</i> at ¶ 91. 	<ul style="list-style-type: none"> Mr. Martin's Financial Analyst II and Ms. Frank's Crime Analyst positions are substantially <i>unequal</i>. They have vastly different responsibilities and Mr. Martin's position includes supervisory

Claim	Elements	Plaintiff's Allegations	The Evidence
	(3) the male employee was paid more under such circumstances. <i>Sprague v. Thorm AmErikas, Inc.</i> , 129 F.3d 1355, 1364 (10th Cir. 1997).	<ul style="list-style-type: none"> Mr. Martin is paid more than Ms. Frank. <i>Id.</i> at ¶¶ 94, 95. 	<p>responsibilities, while Plaintiff Frank's does not.</p> <ul style="list-style-type: none"> The Financial Analyst II position requires specific education and experience. <p>See cited evidence for Title VII and CADA gender discrimination claims (Claims 1 and 2).</p>