

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.

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**DEFENDANT CITY OF FORT COLLINS' MOTION FOR SUMMARY JUDGMENT**

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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 Fed. R. Civ. P. 56 Motion for Summary Judgment.

**INTRODUCTION**

This case concerns the accuracy and integrity of crime data. Data that is inaccurate and incorrect is worthless. Without data accuracy and integrity, the public loses confidence and trust in its police department. The police department loses its ability to fight crime and get ahead of crime trends. Public trust in the accuracy of government data is central to a democratic and civilized society. Through coaching and constructive criticism, the City of Fort Collins sought to ameliorate the chronic problems with Crime Analyst Lori Frank's data analysis. Instead of heeding

that guidance, Ms. Frank rejected all constructive criticism about her performance and brought suit.

Instead, Ms. Frank attributes the constructive criticism to gender discrimination and retaliation. *See* Complaint, Doc. # 2, at ¶¶ 70-74, 235, 242-43. She theorizes that a culture of gender discrimination and pay inequity pervades the City's Police Services. *Id.* at ¶¶ 1, 5, 17, 18, 180. The evidence, however, does not support her theories and speculations.

These claims have not been dismissed and 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.

Summary judgment in the City's favor is warranted because the evidence fails to support Ms. Frank's claims and no reasonable juror could find in Ms. Frank's favor.

## MOVANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS

### *Ms. Frank's Job Performance*

1. Fort Collins Police Services (FCPS) relies on Ms. Frank to generate accurate data and to provide data analysis regarding trends and forecasts. *See* **Ex. A, Crime Analyst Job Description, FORT COLLINS 000276-277.**

2. FCPS uses the data to inform the public, its officers, and City management about crime trends and FCPS's crime-fighting efficacy and to plan and to allocate resources. *See, e.g.,* **Ex. B, G. Yeager Depo. at 100:4-11, 101:20-24, 107:8-19, 108:18-109:8, 112:13-14; Ex. C, T. Jones Depo. at 92:23-93:5.**

3. Ms. Frank does not check her work product to ensure accuracy. *See Ex. B, G. Yeager Depo. at 37:13-24; Ex. D, J. Schiager Depo. at 94:5-11, 96:2-97:14; Ex. E, L. Frank Depo. at 203:12-204:4, 205:6-16, 205:21-25,*

4. Ms. Frank's errors have repeatedly caused FCPS to misinform the public and City management and policy makers about crime and statistics. *See id.; Ex. F, Schiager-Frank Memo (dated Nov. 16, 2016), FORT COLLINS-JONES 000251-254.*

5. Issues with Ms. Frank's work product have been documented by supervisors both male and female since at least 2011. *See Ex. G, 2011 Review, FORT COLLINS-JONES 000202-210 (by C. Christensen); Ex. H, 2012 Review, FORT COLLINS-JONES 000124-129 (by C. Christensen); Ex. I, 2013 Review, FORT COLLINS-JONES 000949-959 (by J. Szakmeister); Ex. J, 2014 Review, FORT COLLINS-JONES 000211-218 (by C. Christensen); Ex. K, Q3 2019 Review (by K. Volesky), FORT COLLINS 006171-6181 at 6176-6177.*

**Re: Ms. Frank's Pay in Relation to Her Male Co-Worker, Erik Martin**

6. Ms. Frank's Crime Analyst job and Mr. Martin's Financial Analyst II job are dissimilar. *See Exs. A & L, Crime Analyst Job Description, FORT COLLINS 000276-277, and Financial Analyst II Job Description, FORT COLLINS-JONES 000096-98.*

7. Ms. Frank's duties include: research and analysis of 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 Ex. A, Crime Analyst Job Description, FORT COLLINS 000276-277.*

8. Mr. Martin's duties include: prepare financial budget for agency versus actual variance analysis and narrative assessment reports; lead budget development and forecast projections with management team in coordination with Finance service area personnel; analyze and 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 Ex. L, Financial Analyst II Job Description, FORT COLLINS-JONES 000096-98.**

9. As FCPS's Financial Analyst, Mr. Martin is responsible for a budget of approximately \$40,000,000. **See Ex. M, General Fund Expense Detail, from 2019-2020 Adopted Biennial Budget at 493, available at: <https://www.fcgov.com/citymanager/files/201920-biennial-budget.pdf?1551998128> (last accessed on Jan. 28, 2020).**

10. Mr. Martin's job includes supervisory responsibilities; Ms. Frank's does not. **See Exs. A & L, Crime Analyst Job Description, FORT COLLINS 000276-277, and Financial Analyst II Job Description, FORT COLLINS-JONES 000096-98.**

11. Mr. Martin's job requires a Bachelor's degree in Accounting, Finance, or Business; Ms. Frank's job does not. **See id.**

12. Mr. Martin's position is exempt under the Fair Labor Standards Act; Ms. Frank's position is non-exempt. **See Exs. A & L, Crime Analyst Job Description, FORT COLLINS 000276-277, and Financial Analyst II Job Description, FORT COLLINS-JONES 000096-98.**

13. In March 2018, Ms. Frank earned an annual salary of \$70,992.14, while the Financial Analyst II position earned \$72,493.13. **See Ex. N, JA Master Mapping File (dated 3/11/18), FORT COLLINS 004673 (modified).**

**Placement on Performance Improvement Plan (PIP)**

14. Soon after Jerry Schiager became Ms. Frank's supervisor in November 2015, he memorialized his performance goals and expectations of her and presented those expectations to her in a meeting with then-Chief John Hutto in January 2016. **Ex. O, Schiager-Frank Memo re: Goals and Expectations for 2016, FORT COLLINS-JONES 000255; Ex. D, J. Schiager Depo. 72:13-18.**

15. Mr. Schiager placed Ms. Frank on a PIP in November 2016 after he observed her work product for several months and received feedback from others. **See Ex. D, J. Schiager Depo. 118:19-21; Ex. P, Q1 2016 Review (by J. Schiager), FORT COLLINS-JONES 000131-134; Ex. Q, Q2 2016 Review (by J. Schiager), FORT COLLINS-JONES 000173-175 at 173; Ex. R, Q4 2016 Review (by J. Schiager), FORT COLLINS-JONES 000135-137; Ex. S, Performance Improvement Plan (dated Nov. 16, 2016), FORT COLLINS-JONES 000249-250.**

16. Mr. Schiager placed Ms. Frank on a PIP after he had several discussions with Ms. Frank about the importance of data accuracy. **See Ex. D, J. Schiager Depo. at 77:13-25.**

17. Before he placed Ms. Frank on a PIP, Mr. Schiager consulted with the City's human resources department and then-Chief of Police John Hutto. **See Ex. D, J. Schiager Depo. at 117:14-118:21, 120:12-15.**

18. Mr. Schiager placed Ms. Frank on a PIP because he sought to address the accuracy and integrity of her work product that he observed during the first through third quarters of 2016. ***See id.*; Ex. F, Schiager-Frank Memo (dated Nov. 16, 2016), FORT COLLINS-JONES 000251-000254.**

19. Examples of Ms. Frank's inaccuracies and/or lack of analysis during 2016 include: (1) during the first quarter of 2016, she provided the American Civil Liberties Union with data that contained inaccuracies and duplicate entries; (2) in August 2016, she produced an erroneous report showing a significant increase in daytime disturbance calls in the downtown area from 14 in 2013 to 111 in 2014; (3) in September 2016, she sent the *Coloradoan* an erroneous report that showed 140 bicycle tickets were issued in 2015 but only 10 were issued to-date in 2016; and (4) in October 2016, she issued a quarterly "Part 1 crime statistics" for 2014-2015, but the data was off by a factor of more than two. ***Ex. F, Schiager-Frank Memo (dated Nov. 16, 2016), FORT COLLINS-JONES 000251-254.***

***Failure to Receive a Raise***

20. Ms. Frank did not receive a raise while she was on a PIP. ***See Ex. B, G. Yeager Depo. at 35:17-22; Ex. E, L. Frank Depo. at 255:16-21, 294:15-20.***

21. Per City of Fort Collins compensation policy, employees are not eligible for raises while on a PIP. ***Ex. V, City Policy, FORT COLLINS 005812-5819 at 5817; See Ex. U, City of Fort Collins 2017 Compensation Discussion, FORT COLLINS 005820-5835 at 5832; Ex. B, G. Yeager Depo. at 35:17-22.***

22. At the beginning of 2017, City employees received a raise based on performance and internal equity. *See Ex. U, City of Fort Collins 2017 Compensation Discussion, FORT COLLINS 005820-5835 at 5831.*

23. Ms. Frank was one of four employees who did not receive that pay raise at the beginning of the year because they were on PIPs. *See Ex. V, “Staff No Salary Increase List,” FORT COLLINS-JONES 000559-REV.*

24. After Ms. Frank was removed from the PIP, she received the raise, retroactive to July 31, 2017. *See Ex. W, Personnel Action Form (effective date of 7/31/17), FORT COLLINS-JONES 000223; Ex. X, J. Heckman-L. Williams, et al. email chain (dated 9/1/17), FORT COLLINS-JONES 000224-225; Ex. Y, J. Miller-J. Kinsman email (dated 1/26/18), FORT COLLINS 005810-5811.*

**Re: Categorization of Job as “Administrative”**

25. 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 Ex. Z, T. Roche Depo. 59:12-22, 69:3-11, 77:2-78:8; Ex. B, G. Yeager Depo. at 31:11-20.*

26. Prior to the City-wide effort to standardize job categorizations, Ms. Frank’s crime analyst position was categorized as non-exempt.

27. The City used data from the retained outside consultant on pay levels in the public sector from several peer cities. *See Ex. Z, T. Roche Depo. at 43:7-13, 66:20-24, 67:9-68:23, 99:6-24.*

28. With the retained outside consultant's input, the City determined that FCPS's Crime Analyst and investigative aide positions should be categorized as administrative. *See Ex. Z, T. Roche Depo. at 70:11-73:7, 92:19-94:4; Ex. B, G. Yeager Depo. at 82:3-6.*

29. The administrative categorization for the Crime Analyst position comports with how other non-City of Fort Collins agencies categorize the position. *See Ex. Z, T. Roche Depo. at 99:6-24.*

**Re: Denial of Ms. Frank's Job Reclassification Request**

30. Ms. Frank sought to have her job reclassified as exempt and retitled as a "senior management analyst," with no supervisory responsibilities. *Ex. E, L. Frank Depo. at 42:16-25, 105:4-17, 193:14-18, 194:1-7.*

31. Deputy Chief Yeager communicated with current and former members of FCPS's executive staff about Ms. Frank's reclassification request and it was determined that FCPS does not have a business need for the reclassification. *See Ex. B, G. Yeager Depo. at 89:23-91:19.*

**STANDARD OF REVIEW**

Summary judgment shall be granted if "the pleadings, the discovery and disclosure of materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The mere existence of a scintilla of evidence" in support of the nonmoving party's position is insufficient to

overcome a summary judgment motion; “there must be evidence on which the jury could reasonably find for the [nonmoving party].” *Id.* at 252.

## ARGUMENT

### **I. No evidence demonstrates that the City discriminated against Ms. Frank because of her gender in violation of the Title VII and CADA (Claims 1 and 2).**

To prevail on her gender discrimination claims under Title VII and CADA, Ms. Frank must first establish a *prima facie* 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. *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1379 (10th Cir. 1994); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Colo. Civil Rights Comm’n v. Big O Tires*, 940 P.2d 397, 399-400 (Colo. 1997) (applying *McDonnell Douglas* framework to CADA claim).

If Ms. Frank establishes a *prima facie* case, then the City must articulate a legitimate, nondiscriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802.

Once the City articulates a legitimate, nondiscriminatory reason for its actions, then Ms. Frank must show that the City’s explanation is pretextual, *i.e.*, so weak, implausible, inconsistent, incoherent, or contradictory. *McDonnell Douglas*, 411 U.S. at 804-05; *Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1280 (10th Cir. 2010).

Ms. Frank cannot establish a *prima facie* case for at least three reasons: (1) her job performance on accuracy and analysis was not satisfactory; (2) the City had legitimate, non-pretextual reasons for its actions; and (3) she was not treated less favorably than a male counterpart.

Ms. Frank complains that the City engaged in the following “adverse actions” *because of* her gender: (1) paid her less than her male co-worker who allegedly 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) denied her job reclassification request.<sup>1</sup> *See* Complaint, Doc. #2, at ¶¶ 227-235. The City did no such thing.

First, no reasonable juror could find that Ms. Frank was paid less than a male co-worker who performed substantially similar work. Ms. Frank identifies Erik Martin as the male co-worker who performed substantially similar work. *See* Complaint, Doc. # 2, at ¶ 90. Mr. Martin’s duties as a Financial Analyst II, however, are substantially *dissimilar* from Ms. Frank’s duties as a Crime Analyst. ***See Facts at ¶ 6.*** Ms. Frank’s job entails the research and analysis of information on crime-related topics and identification of criminal activity patterns and crime trends. ***See Facts at ¶ 7.*** Her job does not include supervisory responsibilities and is non-exempt under the Fair Labor Standards Act. ***See Facts at ¶¶ 10, 12.***

In contrast, Mr. Martin’s job entails the preparation of a financial budget, analysis of actual budget variances, forecast future budget needs with management, analysis and interpretation and communication of complex data using standard accounting and finance concept knowledge, training FCPS staff on budgeting and financial systems, and serving as a primary department contact for auditors. ***See Facts at ¶ 8.*** His job includes supervisory responsibilities; requires a

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<sup>1</sup> For purposes of this motion only, the City assumes *arguendo* that these complained-of actions qualify as adverse actions.

Bachelor's degree in Accounting, Finance, or Business; and is exempt under the Fair Labor Standards Act. *See Facts at ¶¶ 10-12.*

Simply put, Ms. Frank and Mr. Martin do not perform substantially similar work and their jobs are categorically different. Their official job descriptions demonstrate material differences in their duties and responsibilities. Those differences further demonstrate that Mr. Martin is an inappropriate comparator and the evidence about his Financial Analyst II position is not relevant to Ms. Frank's job classification or pay. Ms. Frank's failure to identify a male counterpart who was treated more favorably is fatal to her Title VII and CADA gender discrimination claims.

Second, no reasonable juror could conclude that FCPS placed Ms. Frank on a PIP because of her gender. Ms. Frank's data retrieval and analysis were unsatisfactory. **Facts, at ¶¶ 3-5, 15-16, 18-19.** FCPS relies on Ms. Frank, as a Crime Analyst, to generate accurate data and to provide data analysis regarding crime trends and forecasts. **Facts, at ¶ 1.** FCPS highly values data accuracy because it uses that data to inform the public, its officers, and City management about crime trends and FCPS's crime-fighting efficacy and to allocate financial and personnel resources. **Facts, at ¶ 2.** Nevertheless, Ms. Frank refuses to ensure the accuracy of her work product and she has furnished error-laden reports that were released to the public and City management with misleading information about crime and statistics. **Facts, at ¶¶ 4-5.**

Action was taken in 2016 to address Ms. Frank's work product. Mr. Schiager became Ms. Frank's supervisor in November 2015. **Facts, at ¶ 14.** Two months later, in January 2016, he set goals and expectations for Ms. Frank, memorialized those expectations in a memo, and presented those expectations to Ms. Frank during a meeting with then-Chief John Hutto. **Facts, at ¶ 14.** The

first two goals Mr. Schiager set for Ms. Frank concerned accuracy and analysis. **Ex. O, Schiager-Frank Memo re: Goals and Expectations for 2016, FORT COLLINS-JONES 000255.**

In Ms. Frank's Q1 2016 performance evaluation, Mr. Schiager identified various examples of Ms. Frank's questionable and inaccurate work product, including dissemination of incorrect data to the American Civil Liberties Union and poor analysis of the reason for a decrease in Citizen Survey results. *See Facts, at ¶ 15; Ex. P, FORT COLLINS-JONES 000131-134 at 132.* Though he rated Ms. Frank "On Track" under the "Results" category, he informed her of his expectation that her accuracy and analysis improve throughout 2016. *See Ex. P, FORT COLLINS-JONES 000131-134 at 132.*

Ms. Frank's accuracy and analysis did not improve; rather, it declined during the third and fourth quarter of 2016. Examples of Ms. Frank's inaccurate work product and lack of analysis include: (1) in August 2016, she produced an erroneous report showing a significant increase in daytime disturbance calls in the downtown area from 14 in 2013 to 111 in 2014; and (2) in September 2016, she sent the *Coloradoan* an erroneous report that showed 140 bicycle tickets were issued in 2015 but only 10 were issued to-date in 2016; and (3) in October 2016, she issued a quarterly "Part 1 crime statistics" for 2014-2015, but the data was off by a factor of more than two. **Facts, at ¶ 19; Ex. F, Schiager-Frank Memo (dated Nov. 16, 2016), FRANK 0323-0326.**

These errors undermined FCPS's confidence in the reliability and accuracy of Ms. Frank's work. Accordingly, on November 16, 2016, Mr. Schiager, placed her on a performance improvement plan, after consultation with the City's human resources department. **Facts, ¶¶ 15-17.** At that point, Mr. Schiager had supervised Ms. Frank for about nine months and had become familiar with her work product. Mr. Schiager sought to address the accuracy and integrity of Ms.

Frank's work product after he gave Ms. Frank a "Needs Improvement" rating under the "Results" category in her Q4 2016 evaluation. **Facts, at ¶ 15; Q4 2016 Review (by J. Schiager), FORT COLLINS-JONES 000135-000137; Ex. S, Performance Improvement Plan (dated Nov. 16, 2016), FORT COLLINS-JONES 000249-250.**

No evidence supports Ms. Frank's claim that FCPS placed her on a PIP because of her gender; rather, the evidence demonstrates that Ms. Frank was placed on a PIP to address the quality of her work product. Therefore, no reasonable juror could find in Ms. Frank's favor on her Title VII and CADA gender discrimination claims based on the PIP.

Third, no reasonable juror could find that FCPS denied Ms. Frank a pay raise because of her gender. At the beginning of 2017, City employees received a raise based on performance and internal equity. **Facts, at ¶ 22.** Ms. Frank was one of four employees who did not receive that pay raise at the beginning of the year. **Facts, at ¶ 23.** Ms. Frank did not receive a pay raise at that time because she was on a PIP, and City policy does not permit employees on PIPs to receive a raise. **Facts, at ¶¶ 21-23.** Once the PIP was lifted, Ms. Frank received that pay raise. **Facts, at ¶ 24.**

Fourth, no reasonable juror could find that FCPS used Ms. Frank's gender to categorize the Crime Analyst position as "administrative" instead of "professional," a higher paying category. The categorization of the crime analyst job was part of Human Resources' City-wide effort—with a retained outside consultant—to review and compare job descriptions and standardize job categorizations *across* the City. **Facts, at ¶ 25.** Simply put, the decision about how to categorize the crime analyst position was not viewed in isolation or based on the individual incumbents in the position. **Facts, at ¶ 29.** To make its categorization decisions, the City relied on data from the

outside consultant. **Facts, at ¶ 28.** The City also relied on consultant-provided data on pay levels in the public sector from several peer cities. **Facts, at ¶ 27.** Ultimately, the City placed the Crime Analyst and related investigative aide positions under the administrative category. **Facts, at ¶ 28.** Other non-City of Fort Collins agencies categorize the Crime Analyst position in a similar way. **Facts, at ¶ 29.**

Finally, no reasonable juror could find that FCPS denied Ms. Frank's job reclassification request because of her gender. Ms. Frank sought to have her job reclassified as exempt and retitled as a "senior management analyst," with no supervisory responsibilities. **Facts, at ¶ 30.** Deputy Chief Yeager communicated with current and former members of FCPS's executive staff and it was determined that FCPS does not have a business need for the reclassification. **Facts, at ¶ 31.**

In sum, the evidence demonstrates that (1) Ms. Frank's job performance on accuracy and analysis was not satisfactory; (2) the City had legitimate, non-pretextual reasons for its actions; and (3) Ms. Frank was not treated less favorably than a male counterpart. Because no reasonable juror could find that FCPS discriminated against Ms. Frank because of her gender, summary judgment in the City's favor on Ms. Frank's Title VII and CADA gender discrimination claims (Claims 1 and 2) is warranted.

**II. No evidence demonstrates that the City retaliated against Ms. Frank in violation of the Title VII and CADA (Claims 3 and 4).**

To establish a *prima facie* case of retaliation claim under Title VII and CADA, Ms. Frank must prove that: (1) she engaged in protected opposition to discrimination; (2) she suffered an adverse employment action; and (3) a causal connection exists between her protected activity and the adverse action. *Hennagir v. Utah Dep't of Corr.*, 587 F.3d 1255, 1265 (10th Cir. 2009); *see also Johnson v. Weld County*, 594 F.3d 1202, 1219 n.11 (10th Cir. 2010) (noting the same legal

standards apply to CADA and Title VII retaliation claims). Ms. Frank must “show that a reasonable employee would have found the challenged [employer] action materially adverse,” *i.e.*, that the action “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (internal quotations and citation omitted); *Lincoln v. Maketa*, 880 F.3d 533, 540 (10th Cir. 2018).

If Ms. Frank establishes a *prima facie* case, the City bears the burden of “coming forth with a legitimate, nondiscriminatory reason for adverse action.” *Hennagir*, 587 F.3d at 1265. The burden then shifts back to Ms. Frank to show that the City’s reasons are “pretext for the real, discriminatory reason for the adverse action.” *Id.*

Ms. Frank claims that she engaged in the following forms of protected activity: (1) she complained to Chief Hutto about Mr. Schiager’s cool and distant attitude towards her; (2) she met with Human Resources to request job reclassification; (3) she complained about Mr. Schiager’s decision to place her on a PIP and his “Needs Improvement” rating of her work; (4) she complained of being excluded from a January 26, 2017, staff meeting Mr. Schiager held with his direct reports; (5) she complained about Financial Analyst Erik Martin’s assignment as head of a workload and staffing analysis; (6) she filed a charge with the Colorado Civil Rights Division and the Equal Employment Opportunity Commission; and (7) she amended her statement of discrimination. *See* Complaint, Doc. # 2, at ¶¶ 75-76, 83, 84, 87, 110, 123, 133, 148, 161, 182, 225, 242.

The City disputes that the administrative categorization of Ms. Frank’s job and the denial of her job reclassification request constitute adverse employment actions.<sup>2</sup> Negative material

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<sup>2</sup> Again, the alleged adverse actions are: (1) placement on a performance improvement plan; (2) denial of a raise while on a PIP; (3) “administrative” categorization of the Crime Analyst job; and (4) denial of her job reclassification request. *See* Complaint, Doc. # 2, at ¶¶ 227-235.

*changes or alterations* to one's job or work environment typically constitute adverse actions. *See Burlington*, 548 U.S. at 70-71 (affirming jury's finding that job reassignment to less desirable position and 37-day suspension without pay were materially adverse actions). FCPS's denial of her job reclassification request did not change or alter her job or work environment; rather, Ms. Frank's job remained the same.

Assuming *arguendo* that the City, through FCPS, subjected Ms. Frank to adverse employment actions by placing Ms. Frank on a PIP and denying her a raise while on the PIP, there is no evidence that the City took these actions *because* Ms. Frank engaged in protected activity. As discussed above in Section I, FCPS acted for legitimate, non-retaliatory and non-discriminatory reasons. In her Q4 2016 evaluation, Ms. Frank received a negative performance rating in the area of "results" because of her poor analysis and accuracy. **Facts, at ¶ 15; Q4 2016 Review (by J. Schiager), FORT COLLINS-JONES 000135-000137; Ex. S, Performance Improvement Plan (dated Nov. 16, 2016), FORT COLLINS-JONES 000249-250.** She was placed on a PIP in November 2016 because her then-supervisor noticed that her analysis and accuracy continued to decline despite repeat counseling and coaching. **Facts, at ¶¶ 15-16.** She did not receive a raise at the beginning of 2017 because, per City policy, she was ineligible to receive a raise while on a PIP. **Facts, at ¶¶ 20-22.** Three other employees also did not receive raises because they were on a PIP, too. **Facts, at ¶ 23.** Once the PIP was lifted, however, Ms. Frank received the raise retroactive to July 31, 2017. **Facts, at ¶ 24.** The City categorized Ms. Frank's Crime Analyst job as "administrative," in consultation with a retained outside consultant, in a City-wide project to standardize job categorizations across the City. **Facts, at ¶ 25.** Finally, Ms. Frank's job

reclassification request was denied because of a lack of a business need for the change. **Facts, at ¶ 31.**

For these reasons, no reasonable juror could find a causal connection between Ms. Frank's supposed protected activity and any alleged adverse employment action. Accordingly, summary judgment in the City's favor on Ms. Frank's Title VII and CADA retaliation claims (Claims 3 and 4) is warranted.

**III. No evidence demonstrates that the City violated the Equal Pay Act, 29 U.S.C. § 206(d)(1) (Claim 7).**

To prevail on her Equal Pay Act claim, Ms. Frank must prove that: (1) she was performing work that was substantially equal to that of her male counterpart considering the skills, duties, supervision, efforts, and responsibilities of the job; (2) the conditions where the work was performed were basically the same; and (3) the male counterpart was paid more under such circumstances. *Sprague v. Thorm AmErikas, Inc.*, 129 F.3d 1355, 1364 (10th Cir. 2997).

Ms. Frank claims that she and Erik Martin were equals on FCPS's organizational chart, they performed substantially the same type of analytical work, and Mr. Martin is paid more than Ms. Frank. Complaint, Doc. # 2, at ¶¶ 90, 91, 94, 95.

Based on the evidence, no reasonable juror could find in Ms. Frank's favor, however. Ms. Frank's Crime Analyst job and Mr. Martin's Financial Analyst II job are dissimilar. **Facts, at ¶ 6.** Ms. Frank's duties entail the retrieval and analysis of crime data, identification of criminal activity patterns and trends, and drawing conclusions from and making forecasts on criminal trends. **Facts, at ¶ 7.** Her job does not include supervisory responsibilities. **Facts, at ¶ 10.** In contrast, Mr. Martin's duties require knowledge of standard accounting and finance concepts and entail financial budget preparation, analysis of budget variances, budget development and creation

of financial projections with the management team and Finance service area personnel, staff training on budget and financial systems, and response to inquiries from financial auditors. **Facts, at ¶ 8.** His job includes supervisory responsibilities and requires a Bachelor's degree in Accounting, Finance, or Business. **Facts, at ¶¶ 10, 11.** Ms. Frank's job does not require an accounting or finance degree. **Facts, at ¶ 11.** Additionally, Mr. Martin's job is exempt under the Fair Labor Standards Act; Ms. Frank's position is non-exempt. **Facts, at ¶ 12.**

For these reasons, summary judgment in the City's favor on Ms. Frank's Equal Pay Act claim (Claim 7) is warranted.

### **CONCLUSION**

Summary judgment in the City of Fort Collins' favor is warranted. The City must be able to ensure the accuracy and integrity of the data it generates and reports to the public. No reasonable juror could find in Plaintiff Lori Frank's favor on her claims against the City. The City has legitimate, non-discriminatory and non-retaliatory reasons for its actions, namely: (a) providing Ms. Frank negative ratings and constructive criticism on her accuracy and analysis; (b) placing her on a performance improvement plan when her performance further declined; (c) denying her a pay raise while she was on the performance improvement plan; (d) categorizing her job as "administrative," rather than "professional"; and (e) denying her job reclassification requests. Additionally, no evidence exists that the City has treated her less favorably than a male counterpart and paid her less than a male who performed substantially equal work.

Dated this 30th day of January, 2020.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 30, 2020, a true and correct copy of the above and foregoing **DEFENDANT CITY OF FORT COLLINS' MOTION FOR SUMMARY JUDGMENT** 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:

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