

No. 67215-1-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

STEVEN LODIS and DEBORAH LODIS, a marital community,

Plaintiffs/Appellants/Cross-Respondents,

v.

CORBIS HOLDINGS, INC., CORBIS CORPORATION, and GARY
SHENK,

Defendants/Respondents/Cross-Appellants,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Michael Hayden and Hon. Bruce Heller)

Case No. 08-2-20301-8 SEA

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. INTRODUCTION

Reading the first third of Corbis' responsive brief, one can barely tell that this case involves age discrimination and retaliation under the Washington Law Against Discrimination ("WLAD"), RCW 49.60. Instead, at trial and now on appeal, Corbis repeatedly tries to shift the focus away from Gary Shenk's age discriminatory comments and actions, and Lodis' opposition to Shenk's age discrimination, and turn the case into an attack of Lodis' work performance. Corbis' Restatement of the Case makes no attempt to challenge Lodis' facts related to age discrimination and only mentions age in reference to Lodis' age and the average age of Shenk's Executive Team.

It is undisputed that Lodis was promoted to Senior Vice President on December 20, 2007. Resp. Br. at 7. Around this same time, Shenk made comments to Lodis about wanting to replace Mark Sherman with a "young Hollywood type." App. Br. at 7, 11. Shenk's statements related to Sherman came after Shenk had already made numerous comments about the age of other employees to Lodis. App. Br. 5-11. Lodis had repeatedly admonished Shenk regarding Shenk's age discrimination and, when Shenk persisted, Lodis went to Corporate Counsel Jim Mitchell to report his concerns. App. Br. at 9-12. Within three months of Lodis' promotion and report to Mitchell, Shenk had contacted Dawn MacNab to conduct the "360" evaluations, used

the results to place Lodis on a Performance Improvement Plan, instructed Lodis to talk to his peers and direct reports about what each said in the 360, which was supposed to be anonymous and confidential, and then terminated Lodis for cause, allegedly for misrepresenting his discussions with his peers.

This Court should find that the trial court erred in dismissing Lodis' retaliation claim at summary judgment, having determined that he needed to "step outside" his official job duties and take a position adverse to Corbis in order to receive protection under the WLAD. A plain, dictionary definition of the term "oppose" is consistent with WLAD and Title VII case law. The trial court also erred when it found that the mere assertion of a claim for emotional distress damages serves as a waiver of the physician-patient and psychologist-patient privileges, thus adopting the broad view of waiver in federal court litigation. Lastly, the trial court committed a number of evidentiary and legal errors, which prejudiced Lodis' ability to present his case at both trials.

In the cross-appeal seeking entry of a judgment as a matter of law regarding the \$35,000 bonus payment, Respondents argue, "If Lodis unfairly gained an advantage during his employment, he is obligated to return to Corbis any sums unfairly obtained until after termination of his employment." Resp. Br. at 48. This argument is not really a breach of fiduciary duty argument. It is an unjust enrichment argument, and the jury

during the first trial found in favor of Lodis on the unjust enrichment counterclaims regarding bonus and vacation time recording. CP 9016. There, the jury rejected the third element of unjust enrichment: that Lodis retained the combined payment of \$36,050 under circumstances that would make it inequitable for him to retain the money. CP 9003. Perhaps this was because Lodis tried to pay the bonus back after learning of the double payment during the litigation, but Corbis refused the payment so it could maintain its counterclaim. Thus, Respondents' counterclaim appeal on breach of fiduciary duty must be rejected on the same facts.

II. REBUTTAL TO RESTATEMENT OF THE CASE

Corbis' Restatement of the Case contains numerous factual inaccuracies and incomplete truths, several of which bear clarification.

A. Lodis Lived in Scottsdale and Seattle, Other Corbis Executives Had Dual Residences, and No One Complained to Lodis About Being Unavailable

While he was employed by Corbis, Lodis had dual residences with a home in Arizona and a condominium in Seattle. CP 2412, CP 4196. During hiring discussions, COO/CFO Sue McDonald told Lodis he could work from home in Arizona when practical and explained that she also had dual residences in Seattle and San Francisco. CP 1576, CP 4196, RP Vol. IV at 644. Working from home was very common at Corbis, and Lodis worked from home both while in Arizona and in Seattle. First Trial

Ex. 31, CP 3392, CP 4196. No one complained to Lodis about him being unavailable. RP 3/15/10 AM at 92-93. In the responsive brief, Corbis states that the complaints about Lodis' unavailability continued throughout his employment at Corbis, but cites only to testimony from Krista Hale, a known detractor. Resp. Br. at 5. Lodis was promoted to Senior Vice President by CEO Shenk in December 2007. Resp. Br. at 7. The complaints about Lodis' unavailability did not arise until after this litigation commenced.

B. Corbis Mischaracterizes the HR Consultant's Findings

Corbis mischaracterizes the findings of the consultant it hired to evaluate the Human Resources department in 2006, stating that the consultant, Susan Coskey, "questioned whether Lodis had the skills to effectively lead the department." Resp. Br. at 5-6. Corbis hired Coskey to evaluate *whether* Lodis had the skills to effectively lead the department. First Trial Ex. 18 at 1. Her findings were inconclusive because she felt that in order for Lodis to be effectively evaluated, the reporting structure of HR needed to be changed so that instead of reporting through McDonald in the finance department, Lodis would report directly to the CEO. *Id.* at 6. Coskey noted that "[b]y all accounts, the HR function by the time Steve Lodis took the position of VP was in somewhat of a state of disarray" and found that, given the state of HR when Lodis started, the amount of work

accomplished “was substantial and an important step in setting the foundation necessary to make HR an effective business let alone strategic partner.” Id. at 2, 3.

C. Lodis Did Not Retaliate Against Krista Hale in 2006

After Krista Hale accused Lodis of inappropriate conduct in 2006, Lodis requested an investigation to clear his name. CP 3389, CP 7288-89, CP 2003. At the time, CEO Davis told Lodis, in a meeting with Shenk and Coskey, to terminate Hale. CP 3389, CP 7275-77. An investigation was conducted and the findings were that Lodis had not violated Corbis’ anti-harassment policy, but a warning letter was placed in his personnel file. First Trial Ex. 306. Hale was eventually laid off by Lodis in a major reduction-in-force (“RIF”) of the HR department and in accordance with a plan recommended by legal counsel. CP 3389, CP 7276, CP 7294, RP 3/11/10 at 19. Lodis did not retaliate against Hale and in fact had CEO Davis and Corbis Counsel Mitchell’s support in determining that Hale should be let go in the RIF. Id.

D. Shenk Used MacNab and the 360 Process to Create a Pretext for Lodis’ Retaliatory Termination in 2008

Corbis quotes consultant Dawn MacNab as stating that Lodis’ 360 evaluation results were “off the charts negative” and that she recommended he be put on probation. Resp. Br. at 8. MacNab never

testified to that effect. Shenk could not remember whether he or MacNab made the “off the charts negative” comment and stated that it could have been him. RP 3/17/10 PM at 69-72. MacNab testified that she told Shenk that 360 evaluations were not normally used to create performance improvement plans. CP 3620.

MacNab testified that a 360 is supposed to create “a comfortable environment, one where people are free” to honestly respond to questions and one where the interviewee feels safe. RP 2/25/10 at 13, CP 3617-18. Feedback is supposed to be anonymous and Shenk told his executive team members that the feedback would be “completely anonymous.” CP 3749, RP 2/25/10 at 22-23, First Trial Exs. 387 and 388. Then, as part of his Performance Improvement Plan (“PIP”), Shenk told Lodis to talk to Lodis’ peers and direct reports about what each of them said about him during the 360. CP 2444, 2449-50. When Lodis met with one of his direct reports, Kirsten Lawlor, to discuss his alleged deficiencies, as Shenk had instructed him to do, Lawlor became upset and claimed she felt retaliated against. First Trial Ex. 99 and 329. Shenk cited Lawlor’s email claiming retaliation as one of the reasons he terminated Lodis. Resp. Br. at 10.

Respondents also mischaracterize the opposition activities of Lodis, seeking to recast his actions as merely “warning the company’s CEO and other managers to comply with employment laws.” Resp. Br. at

22. He did much more. On at least five occasions, he confronted CEO Shenk to admonish him about specific offensive age-related comments made by Shenk. App. Br. at 9-11. Lodis characterized Shenk's comments as follows: "It was illegal, and it was just bad. . . ." CP 2570. Although the timing of specific events is somewhat unclear, in the light most favorable to Lodis, after Shenk made comments of wanting to hire a "young Hollywood type" to replace an older worker, Lodis reported Shenk's numerous age-related comments to Corbis General Counsel Jim Mitchell. Unfortunately, Mitchell was also prone to making inappropriate age-related comments, having referred to Director Sutherland as "old man" and having characterized Lodis as follows: "Steve [is an] old world HR guy, Corbis is [a] New Age company." CP3350, CP 3608-11, CP 3618-19.

Lodis met with Mitchell in the Seattle office for about ten minutes, and before that meeting, Lodis "had never shared with others [his] conversations with Shenk about his age-related comments until [Shenk's] statements about Sherman." CP 3374. Lodis "expressed [his] concerns about Gary's trying to get Mark Sherman" and his "terminating everyone." CP 3640, 3374.

Within what was likely only a few days after Lodis confided in Mitchell, Shenk implemented a rigged 360 evaluation and used the false

360 results to place Lodis on a PIP and to terminate him weeks later. First Trial Exs. 387 and 388, App. Br. at 11-12.

E. Corbis Intentionally Kept The Veer Acquisition Private and then Blamed Lodis for Not Being More Involved

Corbis claims that Lodis mismanaged “the HR aspects of Corbis’ acquisition of Veer” and this was one element of Lodis’ PIP. Resp. Br. at 8, CP 2448, CP 3380-83. Lodis played no role in the Veer acquisition and was kept out of the loop by Shenk and Mitchell. RP 3/15/10 at 91-92, CP 3380-83. Lodis became aware of a promise that HR would provide salary and benefit information to Veer employees, but was not aware of the promise until it apparently had become past due. RP 3/15/10 at 91-92, First Trial Ex. 384, CP 3380-83. Lodis worked to complete the project on time. RP 3/15/10 at 92.

III. ARGUMENT

A. Respondents Ignore the Holding and Reasoning of Martini v. Boeing, Which Rejects the Need to Resort to Federal Authority to Understand the Meaning of the WLAD

Respondents cannot distinguish Martini v. Boeing Co., 137 Wn.2d 357, 971 P.2d 45 (1999), so they ignore it, but ask the Court to use the same reasoning as was proposed there by Boeing. In Martini, Boeing argued that Mr. Martini could not obtain wage loss damages for the discriminatory conduct of Boeing managers because he resigned from the company (he was

not terminated), and did not claim or prove that he was constructively discharged. Id. at 359. Boeing relied on a line of federal authority, which had adopted that position in Title VII litigation. Id. at 363. The Supreme Court rejected that analysis and directed that one need only read the statute:

This plain statutory language makes it clear that a person who suffers from *any* violation of the statute shall have a claim for damages. A person who was discriminated against by an employer in violation of RCW 49.60.180(3) would therefore have a claim for damages under RCW 49.60.030(2). This claim could be asserted regardless of whether or not the employee had been discharged or constructively discharged in violation of RCW 49.60.180(2). The statute clearly does *not* require that a discharge violating RCW 49.60.180(2) must occur as a condition precedent to a claim for damages under RCW 49.60.030(2). To the contrary, the statutory language unambiguously states that *any* violation of the statute will form a basis for a claim for damages.

Id. at 367. In this case too, one need only read the statute.

RCW 49.60.210(1) provides:

It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

Thus, the statute applies to any person without restriction. There is no language to carve out an exception for Human Resource managers who are admonishing their CEOs that their age-related comments are inappropriate, or reporting those inappropriate comments to the General

Counsel of the company.¹ As with Boeing's argument, Respondents' argument here must be rejected. There is no need to rely on conflicting lines of federal authority, or in state cases interpreting federal FLSA decisions.

The only authority cited by Corbis to support its contention that employees must "step outside" their normal job duties in order to receive protection under the WLAD retaliation provision are lower court interpretations of the FLSA anti-retaliation provision, 29 U.S.C. § 215(a)(3), and pre-Crawford v. Metro. Gov't of Nashville & Davidson County, 555 U.S. 271, 129 S.Ct. 846 (2009), Title VII cases. Resp. Br. at 21-26. The FLSA language and purpose is quite different from the WLAD (App. Br. at 22-23) and the "step outside" threshold requirement has been rejected in Title VII cases. In Crawford, the United States Supreme Court applied a broad, dictionary definition of the term "oppose" in the "opposition clause" of 42 U.S.C. § 2000e-3(a). Id. at 850, App. Br. at 24-25.

As in Martini, this Court should reject Respondents' proposal to add the additional threshold requirements for proving retaliation under RCW 49.60.210, that the employee must "step outside" his or her normal

¹ Interestingly, the Respondents accept that anyone other than Lodis who engaged in the same conduct would be considered to have engaged in protected activity under RCW 49.60.210.

job duties and take a position adverse to the company, in order to receive protection.² Although the Court need not analyze the federal cases to reach a decision in this matter, it is worth noting that the cases relied upon by the Respondents are often misconstrued in the responsive brief as described below.

Corbis is correct to note that the WLAD “closely parallels” Title VII and therefore Washington courts “look to interpretations of federal law when construing RCW 49.60,” though federal law is not binding. Graves v. Dept. of Game, 76 Wn. App. 705, 712, 887 P.2d 424 (1994), Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988) (federal discrimination law is a source of guidance, but not binding on the WLAD), Resp. Br. at 20-21.³ The language of the retaliation provisions are similar; both contain an “opposition clause” and a “participation clause.” App. Br. at 22, 24-25.

All but one of the Title VII cases cited by Corbis are lower court opinions decided before the Supreme Court’s interpretation of the “opposition clause” in Crawford v. Metro. Gov’t of Nashville & Davidson

² Even if one were to accept Respondents’ argument, it is difficult to see how reporting Shenk’s improper age-related comments to the General Counsel would not fit its own proposed test since that act is putting the CEO on report. See Section III, B.

³ But see Martini v. Boeing Co., 137 Wn.2d 357, 372-77, 971 P.2d 45 (1999) (noting that the remedy provisions of the WLAD are “radically different” from those in Title VII and therefore “inapplicable” to the WLAD).

County, 555 U.S. 271, 129 S.Ct. 846 (2009). Although Crawford did not concern an employee who was allegedly speaking out pursuant to her normal job duties, the Supreme Court defined the term “oppose” according to the ordinary dictionary definition. Id. at 850. It would make little sense to define the term “oppose” one way for certain employees (those not arguably acting pursuant to their job duties) and differently for another class of employees, requiring more than a dictionary definition of “oppose” in order to receive protection under the same statute. In Crawford, the Supreme Court noted that ““When an employee communicates to her employer a belief that the employer has engaged in ... a form of employment discrimination, that communication’ virtually always ‘constitutes the employee’s opposition to the activity.’” Id. at 851 (citing 2 EEOC Compliance Manual §§ 8-II-B(1), (2), p. 614:0003 (Mar.2003)).

EEOC v. HBE Corp., 135 F.3d 543, 554 (8th Cir. 1998), cited by Corbis, was decided before Crawford defined “oppose” in Title VII, but even in that case, citing the FLSA case McKenzie v. Renberg’s, Inc., 94 F.3d 1478 (10th Cir. 1996), the court took a loose interpretation of the “step outside” requirement by stating that it “is satisfied by a showing that the employee took some action against a discriminatory policy.” In Correa v. Mana Products, Inc., 550 F. Supp. 2d 319, 327-28 (E.D.N.Y. 2008), another

pre-Crawford Title VII case cited by Corbis, the court took a broad interpretation of the “opposition clause,” and the “scope of her employment” language cited by Corbis was in reference to the “participation clause” of Title VII, which is not at issue in the instant case. The court noted that opposition “can include informal protests of discriminatory employment practices, including making complaints to management,” among others. Id. at 327.

Corbis cites Vidal v. Ramallo Bros. Printing, Inc., 380 F. Supp. 2d 60, 62 (D.P.R. 2005), a pre-Crawford Puerto Rican district court case, for additional support for the “step outside” requirement, but in a post-Crawford appellate court case from the same jurisdiction, Collazo v. Bristol-Myers Squibb Mfg., 617 F.3d 39, 42, 46-48 (1st Cir. 2010), the First Circuit applied the standard set out in Crawford for determining “the scope of conduct protected by the opposition clause of Title VII’s antiretaliation provision” – the ordinary dictionary definition of “oppose.” Both Vidal and Collazo, like Lodis, involved plaintiffs who alleged retaliation for opposing the discrimination of another employee. The “step outside” FLSA requirement was never adopted on a broad scale in Title VII litigation and now that the Supreme Court has recognized a plain meaning, dictionary definition of the term “oppose,” that is the standard that must be applied by the lower courts.

The only Title VII case the responsive brief identifies that was published after Crawford is Atkinson v. Lafayette College, 653 F. Supp. 2d 581 (E.D. Pa. 2009).⁴ Atkinson adopted the “step outside” requirement found in FLSA case law and also noted the general proposition’s connections to the First Amendment Supreme Court case Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951 (2006).⁵

Other courts have refused to expand the “step outside” language to Title VII/Title IX cases. In Bolla v. Univ. of Haw., 2010 U.S. Dist. LEXIS

⁴ Atkinson is a Title IX case; however, “most courts look to Title VII when reviewing claims under Title IX.” Bolla v. Univ. of Haw., 2010 U.S. Dist. LEXIS 134143 *24 (D. Haw. Dec., 16, 2010).

⁵ The Atkinson court stated:

Nonetheless, Plaintiff’s Title IX activities fail to fall within the realm of “protected conduct” because she never engaged in activity that was either adverse to the College or outside the scope of her position as Athletic Director. The United States Supreme Court, in Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), enunciated the general proposition that, in order to state a retaliation claim, complaints made within the scope of an employee’s job cannot constitute protected conduct. *Id.* at 421-24. While limited by its facts to the context of a public employee’s rights under the *First Amendment*, Garcetti’s broader holding has since been expanded to stand for the more general proposition that “[i]n cases where it is a third party who is attempting to help the alleged victim of discrimination assert her rights, ‘protected activity’ is limited to activity that is adverse to the company, or outside the employee’s normal employment role; this would include the filing of a complaint, but not reporting suspected discrimination to a supervisor.” Vidal v. Ramallo Bros. Printing, Inc., 380 F. Supp. 2d 60, 62 (D.P.R. 2005) (citing Claudio-Gotay, 375 F.3d at 102 (1st Cir. 2004) (Fair Labor Standards Act (“FLSA”) retaliation); McKenzie v. Renberg’s, Inc., 94 F.3d 1478, 1486 (10th Cir. 1996) (FLSA retaliation); EEOC v. HBE Corp., 135 F.3d 543, 554 (8th Cir. 1998) (Title VII retaliation)).

Atkinson, 653 F. Supp. 2d at 596-97.

134143 (D. Haw. Dec., 16, 2010), the court considered and rejected Atkinson v. Lafayette College, 653 F. Supp. 2d 581 (E.D. Pa. 2009), finding that “teachers and coaches were often in the best position to advocate for gender equity for students because they could detect discrimination and bring it to the attention of administrators.” Bolla, 2010 U.S. Dist. LEXIS 134143, *29-31 (relying on and citing Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005)). See also Vaughn v. City of New York, 2010 U.S. Dist. LEXIS 50791, *43, n.12 (E.D.N.Y. May 24, 2010) (refusing to extend Garcetti’s official job duties requirement to Title VII claims).

Rangel v. Omni Hotel Mgmt. Corp., 2010 U.S. Dist. LEXIS 105400, *2 (W.D. Tex. Oct. 4, 2010) is a recent Title VII case involving a plaintiff human resources manager, Rangel, who brought suit against her former employer, Omni, alleging “retaliation for counseling her male supervisor about inappropriate behavior toward a young female employee.” The court rejected the FLSA standard articulated in Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617 (5th Cir. 2008) and McKenzie v. Renberg’s, Inc., 94 F.3d 1478 (10th Cir. Okla. 1996). Rangel, 2010 U.S. Dist. LEXIS 105400 at *15-17. In reference to Hagan, the court stated:

The Fifth Circuit has not applied the rule to employment discrimination claims under Title VII. While adopting the reasoning in a Title VII case may benefit employers like

Omni, extending the rule would strip Title VII protection from “whole groups of employees-- management employees, human resources employees, and legal employees, to name a few”--employees who are in the best positions to advise employers about compliance. Because no authority extends the *Hagan* rule to Title VII, Omni is not entitled to summary judgment on the retaliation claim on the basis of *Hagan*.

Rangel, 2010 U.S. Dist. LEXIS 105400 at *16-17.

The FLSA requirement that the employee “step outside” his or her role and take a position adverse to the company should not be read into the “oppose” language of the WLAD retaliation provision, RCW 49.60.210. The standard was never adopted on a large scale in Title VII cases and since the Supreme Court’s defining of “oppose” as the dictionary definition of the word in Crawford v. Metro. Gov’t of Nashville & Davidson County, 555 U.S. 271, 129 S.Ct. 846 (2009), little doubt remains that the word “oppose” should take on its ordinary meaning. There is no reason to adopt a “freakish rule” where certain employees are protected for opposing discrimination, but not those perhaps in a best position to know what discrimination exists within a company. Id. at 851.

B. Even if Washington Were to Require that the Employee “Step Outside” His Role and Take a Position Adverse to the Company, Lodis Would Prevail

In the responsive brief, Corbis attempts to significantly downplay Lodis’ opposition activities, claiming that he was “warning the company’s

CEO or other senior management to comply with employment laws” and that he “‘warned’ Corbis General Counsel Mitchell about the impropriety of age discrimination.” Resp. Br. at 19, 22. Given that Lodis is an experienced human resources professional and Mitchell an experienced lawyer, it is not believable that Lodis would have gone to Mitchell simply to inform him that age discrimination is illegal. Lodis testified that he went to Mitchell to express his concerns about Shenk trying to “get Mark Sherman,” about whom Shenk had told Lodis he wanted to replace with a “young Hollywood type.” CP 3373-74, 3640, 3647-48. Lodis explained to Mitchell that Shenk had terminated several over-40 employees, specifically, Merritt, Bradley, and McDonald, and now was trying to terminate Sherman and replace him with a younger employee. CP 3374.

Even if this Court were to adopt the FLSA requirement that Lodis must step outside the scope of his job duties and take a position adverse to the company in order to oppose age discrimination, Lodis would be able to satisfy this requirement. First, the FLSA “step outside” requirement only applies when the plaintiff is not asserting his or her own rights under the statute, but is assisting another employee. McKenzie v. Renberg’s, Inc., 94 F.3d 1478, 1486 (10th Cir. 1996), Pettit v. Steppingstone, Ctr. for the Potentially Gifted, 429 Fed. Appx. 524, 530-31 (6th Cir. 2011). Lodis asserted his own rights when he admonished Shenk about Shenk’s age

discriminatory language and actions when he told Shenk that he was concerned for himself as well as other over-40 employees. App. Br. at 10. As an over-40 employee, Lodis had his own concerns about being terminated from Corbis based on his age, and he expressed those concerns to Shenk when he verbally complained to Shenk about Shenk's age discriminatory comments and actions.

The FLSA case Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617 (5th Cir. 2008), adopted the reasoning of McKenzie v. Renberg's, Inc., 94 F.3d 1478, 1486 (10th Cir. 1996), in finding that McKenzie had a "correct and balanced approach" in requiring that the employee either file or threaten to file an action adverse to the employer, or actively assist other employees in asserting FLSA rights, or engage in activity "that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA." Hagan, 529 F.3d at 627-28 (quoting McKenzie, 94 F.3d at 1486-87). Lodis actively assisted McDonald in asserting her rights under the WLAD when he admonished Shenk for making age discriminatory statements and told Shenk about his own concerns and McDonald's concerns related to Shenk's age discrimination. Additionally, Lodis engaged in activity that could reasonably be perceived as directed towards the assertion of rights protected by the WLAD when he went to Mitchell to seek assistance after Shenk expressed his desire to terminate over-40 employee Sherman and replace him with a

“young Hollywood type.” App. Br. at 10-12. EEOC v. HBE Corp., 135 F.3d 543, 554 (8th Cir. 1998), citing McKenzie, found that the requirement “is satisfied by a showing that the employee took some action against a discriminatory policy,” which Lodis also did when he went to Mitchell.

The fact that Lodis made some of his complaints in his official capacity is not an absolute bar under the FLSA analysis. In Pettit v. Steppingstone, Ctr. for the Potentially Gifted, 429 Fed. Appx. 524, 530-31 (6th Cir. 2011), the plaintiff wrote an email stating, in part “As your Human Resources Director..., it is my professional opinion that...” The court went on to note that the content of the email was threatening enough to constitute finding that the plaintiff stepped outside her official capacity. Id. at 531. Lodis’ repeated admonishments of Shenk, and his going to Mitchell, were more than simply “warnings to comply with employment laws,” but active opposition to age discrimination beyond the scope of Lodis’ official job duties. App. Br. at 9-12.

C. Lodis is Able to Show Pretext at Summary Judgment and the “Same Actor Inference” Does Not Apply to Retaliation Claims

Corbis argues that Lodis is not able to show pretext or overcome the same-actor inference on the retaliation claim because Shenk promoted Lodis not long before Shenk terminated him. Resp. Br. at 27-29. Shenk did not hire Lodis. Resp. Br. at 5. Evidence supporting pretext is discussed

above and in the opening brief, including Shenk's decision to conduct the 360 evaluation, the way in which it was conducted and used as a disciplinary tool, the decision to place Lodis on a performance improvement plan, and Shenk's articulated reasons for abruptly terminating Lodis allegedly for lying.⁶ App. Br. at 12-14, 29-30. Lodis presented sufficient evidence on pretext to overcome summary judgment on the retaliation claim.

Corbis states without citation that the "same actor inference" applies equally to retaliation claims under the WLAD as to discrimination claims.⁷ Resp. Br. at 28. Appellant is unable to locate any Washington authority applying the same actor inference to a retaliation claim under RCW 49.60.210.⁸ See Barker v. Adv. Silicon Materials, L.L.C., 131 Wn. App. 616, 128 P.3d 633 (2006) (plaintiff appealed both her sex discrimination and retaliation claims and the court analyzed the same actor

⁶ Additionally, the opening brief discusses the "rebuttable presumption" that is created when the employee establishes that he or she participated in an opposition activity, the employer knew of the opposition activity, and he or she was discharged," which precludes the court from dismissing the case at summary judgment. Kahn v. Salerno, 90 Wn. App. 110, 129, 951 P.2d 321 (1998), rev. denied, 136 Wn.2d 1016, 821 P.2d 18 (1998), App. Br. at 27-28.

⁷ Corbis also notes that Lodis did not assign error to the same actor inference jury instruction, but Lodis' retaliation claims never made it to the jury because they were dismissed at summary judgment. Resp. Br. at 28, n.11, App. Br. at 14-15.

⁸ Although the federal case Johnson v. Stupid Prices, Inc., 2008 U.S. Dist. LEXIS 90893, *11-12 (W.D. Wash. Nov. 6, 2008), briefly discusses the same actor inference in the retaliation context, the opinion does not apply the inference specifically to the retaliation facts. Coghlan v. Am. Seafoods Co. LLC, 413 F.3d 1090, 1093, n.3 (9th Cir. 2005), did not involve a retaliation claim.

inference only in the context of the sex discrimination claim). It makes little sense to apply the inference in the retaliation context because the plaintiff is alleging an adverse employment action was taken against him or her for opposing discrimination, not because of some “attribute the decisionmakers were aware of at the time of hiring.” Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 189, 23 P.3d 440 (2001). The “question” the plaintiff must answer in order to overcome the same actor inference, “if the employer is opposed to employing persons with a certain attribute, why would the employer have hired such a person in the first place?,” is not relevant to a retaliation claim. Id. at 189-90. However, even if Lodis were required to overcome the same actor inference on his retaliation claim, unlike the plaintiff in Hill, Lodis was not hired by the person who fired him. CP 3367. And even if Hill were to be extended to include the doctrine as applied to promotion, in the light most favorable to Lodis, the promotion was a means to cover-up Sherk’s intentions, or his termination was planned and implemented after Lodis reported Sherk’s illegal actions to Mitchell. CP 3373-74. Lodis’ opposition activities between his promotion and termination by Sherk abrogate any inference created.

D. The Court's Determination of Whether Lodis Waived His Physician-Patient or Psychologist-Patient Privilege by Asserting a Claim for Emotional Distress Damages Is Pertinent to Lodis' Retaliation Claim

Corbis argues that this Court need not consider Lodis' assignment of error related to waiver of the physician-patient and psychologist-patient privileges because the jury found against Lodis on liability for his age discrimination claim. Resp. Br. at 29-30. This argument ignores the fact that Lodis is also entitled to emotional harm damages under his retaliation claim, which was dismissed at summary judgment and therefore not considered by the jury. RCW 49.60.030(2). If the Court finds that summary judgment was improperly granted on the retaliation claim, the parties would need to know whether or not, absent waiver, Lodis is entitled to a claim for emotional harm damages. Corbis' argument also ignores Lodis' request for a new trial on the age discrimination claim based on prejudice related to the trial court's failure to dismiss Corbis' breach of fiduciary duty counterclaims at summary judgment before the first trial. App. Br. at 42-43.

E. This Court Should Adopt the Narrow Approach to Waiver of the Physician-Patient and Psychologist-Patient Privileges in Washington

The trial court did not grant the least severe sanction when it struck Lodis' claim for emotional harm damages based on his refusal to waive

his physician-patient and psychologist-patient privileges. Fisons v. Physicians Ins. Exch., 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993). The court abused its discretion.⁹ The trial court could have found that Lodis was not using his privileged communications as a sword and only found waiver if Lodis attempted to bolster his emotional harm claim by relying on privileged communications at trial. Fritsch v. City of Chula Vista, 187 F.R.D. 614, 626-27 (S.D. Cal. 1999) (discussing Vanderbilt v. Town of Chilmark, 174 F.R.D. 225, 230 (D. Mass. 1997)).

Corbis claims that Lodis “cites no Washington authority to support his argument that a plaintiff claiming emotional distress damages can shield from discovery relevant information under a claim of privilege.” Resp. Br. at 31. Yet, Lodis cited two Washington statutes providing that his physician-patient privilege, RCW 5.60.060, and psychologist-patient privilege, RCW 18.83.110, specifically shield his communications with his health care provider from discovery. App. Br. at 31-32. Corbis agrees that no Washington court has ruled on the issue of whether asserting a

⁹ Lodis does not abandon his claim that *de novo* review should be applied when determining whether a privilege exists or has been waived. Dietz v. Doe, 80 Wn. App. 785, 788, 911 P.2d 1025 (1996), rev'd on other grounds, 131 Wn.2d 835, 935 P.2d 611 (1997), App. Br. at 31.

claim for “garden variety” emotional harm damages serves as a waiver of the privileges.¹⁰

Although Petersen v. State, 100 Wn.2d 421, 429, 671 P.2d 230 (1983), notes that the two privileges, RCW 5.60.060 and RCW 18.83.110, essentially provide the same protection, and that both are “procedural safeguards which derogate from common law,” the Court did not go on to apply the statutes to the facts of the case, which dealt primarily with RCW 71.05.390, an exception to RCW 18.83.110 related to involuntarily detained persons. There are differences between the nature and origins of the Washington state privileges and the federal common law psychotherapist-patient privilege recognized in Jaffee v. Redmond, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), but the context in which these claims arise is the same. The lower courts need guidance on whether, and to what extent, a claim for emotional harm damages serves as a waiver of the physician-patient or psychologist-patient privilege. Lodis urges the Court to adopt the narrow approach to waiver, which is consistent with the purpose of the privilege recently articulated in Smith v. Orthopedics

¹⁰ “Garden variety” emotional distress has been defined as: “ordinary or commonplace emotional distress...that which [is] simple or usual. In contrast, emotional distress that is not garden-variety may be complex, such as that resulting in a specific psychiatric disorder, or may be unusual, such as to disable one from working.” Ruhlmann v. Ulster County Dep’t of Soc. Servs., 194 F.R.D. 445, 449 n. 6 (N.D.N.Y. 2000), Fitzgerald v. Cassil, 216 F.R.D. 632, 637 (N.D. CA. 2003).

International, Ltd., PS, 170 Wn.2d 659, 667, 244 P.3d 939 (2010), and the level of proof necessary to prove a claim for emotional harm damages recognized in Bunch v. King County Dept. of Youth Services, 155 Wn.2d 165, 180-81, 116 P.3d 381 (2005). App. Br. at 32-34. Whether characterized as a waiver of privilege or placing medical records “at issue” in a particular case, the analysis is the same.

Carson v. Fine, 123 Wn.2d 206, 867 P.2d 610 (1994) and In re Rice, 118 Wn.2d 876, 828 P.2d 1086 (1992), cited by Corbis, are not analogous to the present case and not helpful because they deal with situations where the individual’s medical records are clearly at issue – a medical malpractice and a personal restraint case involving waiving in an insanity defense, respectively. Respondents misconstrue Carson, using an incomplete quotation to argue that the statute must be strictly construed, but Respondents cut short the court’s holding, which states, “the introduction by the patient of medical testimony describing the treatment and diagnosis of an illness waives the privilege as to that illness, and the patient’s own testimony to such matters has the same effect.” Here, no medical testimony or evidence would be offered.

Uzzell v. Teletech Holdings, Inc., 2007 U.S. Dist. LEXIS 95197, *7-8 (W.D. Wash. Dec. 7, 2007), can be distinguished from the instant case because, in that case, the court’s ruling on waiver, as Corbis notes,

turns on the fact that the plaintiff sought reimbursement for medical expenses at trial. Resp. Br. at. 36. Although Lodis claimed medical expenses in his complaint, when asked in interrogatories for a list of damages, Lodis made no claim for medical expenses, and in witness and exhibit lists, identified no psychologists, medical records, or medical billings. CP 5275. Lodis was not pursuing a claim for medical expenses.

Corbis also relies on Prue v. Univ. of Washington, 2008 U.S. Dist. LEXIS 67341 (W.D. Wash. Aug. 19, 2008), as being another case from this federal district which adopts the broad approach to waiver. Resp. Br. at. 36. In Prue, the court noted three specific reasons why it felt the broad approach was appropriate in that case, but stated that “a defendant would not automatically be entitled to review all of a plaintiff’s medical records every time an emotional distress claim is made.” Id. at *3. The court found that the plaintiff, unlike Lodis, had “alleged damages well beyond ‘garden variety’ emotional distress.” Id. Doe v. Oberweis Dairy, 456 F.3d 704 (7th Cir. 2006) and Schoffstall v. Henderson, 223 F.3d 818 (8th Cir. 2000), adopt the broad approach to waiver as discussed in Fitzgerald v. Cassil, 216 F.R.D. 632 (N.D. CA. 2003), St. John v. Napolitano, 274 F.R.D. 12 (D.D.C. 2011), and the opening brief. App. Br. at 35-39.

Corbis cites to Fox v. Gates Corp., 179 F.R.D. 303, 306 (D. Colo. 1998), as an example of a case where the court found waiver of the

psychotherapist-patient privilege even when the plaintiff did not intend to rely on testimony from a treating physician to support her case. Resp. Br. at 35. Oddly, the Fox court also found that the plaintiff had not placed her mental condition “in controversy” and denied the defendant’s request for a CR 35 independent medical examination, a result which at least two courts found “internally inconsistent.” Fox, 179 F.R.D. at 307-08, Stevenson v. Stanley Bostitch, Inc., 201 F.R.D. 551, 557, n.7 (N.D. Ga. 2001), Fritsch v. City of Chula Vista, 187 F.R.D. 614, 623, n.4 (S.D. Cal. 1999). The court found that the plaintiff had alleged only “a ‘garden variety’ claim for emotional distress damages,” did not assert a claim for intentional infliction of emotional distress, did not intend to rely on expert medical testimony at trial, and did not allege a specific mental or psychiatric injury or disorder was caused by the defendants in denying the request for a CR 35 exam. Fox, 179 F.R.D. at 307-08. These same factors support finding no waiver under the narrow view. App. Br. at 32.

Despite Corbis’ contention, EEOC v. Wyndham Worldwide Corp., 2008 U.S. Dist. LEXIS 83558, *15 (W.D. Wash. Oct. 3, 2008), is like the instant case because Corbis never filed a motion to compel or otherwise challenged Lodis’ claim of privilege and objections to discovery before filing its motion in limine to exclude the emotional harm damages. Resp. Br. at 35, App. Br. at 15-16.

Corbis is incorrect to suggest that the majority view adopts a broad approach to waiver. Several courts have noted that “upon close inspection, many of the cases purporting to reject the narrow view and adopt a broad view actually take a middle ground.” Stevenson v. Stanley Bostitch, Inc., 201 F.R.D. 551, 556 (N.D. Ga. 2001) (agreeing with the findings of Ruhlmann v. Ulster County Dep’t of Soc. Servs., 194 F.R.D. 445, 449 (N.D.N.Y. 2000)). In Beltran v. County of Santa Clara, 2009 U.S. Dist. LEXIS 129956, *6-7 (N.D. Cal. Jan. 30, 2009), the court noted that the Ninth Circuit has yet to address the issue, but that courts in the district have embraced the narrow approach. This Court should likewise adopt the narrow approach.

F. Lodis Was Prejudiced by the Trial Court’s Failure to Decide Whether a Fiduciary Duty Existed As a Matter of Law Before the First Trial, Corbis Did Not Submit Admissible Evidence At Summary Judgment Before the Second Trial to Establish that Lodis Was An Officer, and Substantial Evidence Did Not Support the Jury’s Verdict at the Second Trial

Lodis was prejudiced by the trial court’s failure to decide the issue of duty on the breach of fiduciary duty counterclaims as a matter of law prior to the first trial because it was a question of law. Additionally, the trial court should have found as a matter of law that Lodis did not owe Corbis a fiduciary duty. Before the first trial, Corbis had presented no evidence to support that Lodis was an officer. As described in the opening

brief, Corbis fought to keep out all reference to Bill Gates from the first trial and the documents signed by Gates to allegedly prove that Lodis was an officer were not disclosed until Corbis' summary judgment reply brief before the second trial. App. Br. at 41-43. These documents were responsive to Lodis' requests for production before the first trial and Corbis failed to produce them. CP 9973-77. The errors prejudiced Lodis because they created a scenario where the jury decided the issue of duty without access to documents showing whether a fiduciary duty existed. The jury also heard widespread character attacks of Lodis related to his vacation time recording, alleged vacation time abuse, and accidental double bonus, which undoubtedly tainted Lodis' age discrimination claim. "Where there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.'" Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 673, 230 P.3d 583 (2010) (quoting Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)). For the reasons stated in the opening brief, the trial court should have decided the issue of duty as a matter of law before the first trial, found no duty, and if there was a duty, found no breach in the failure to record limited vacation time taken and in receiving an inadvertent overpayment. App. Br. at 39-43.

Corbis incorrectly argues that Lodis never moved to strike the documents signed by Gates that Corbis submitted to allegedly prove that Lodis was an officer. Resp. Br. at 40, n. 18. Lodis did move to strike the documents, which were submitted in a declaration by Corbis employee Juliana Genovesi. CP 9880-89, CP 9974. Lodis moved to strike the Genovesi declaration and her exhibits pursuant to ER 402, 403, 602, 802, and 901 in the second supplemental declaration of plaintiff's counsel. CP 9974. Plaintiff's counsel also moved to strike the documents during summary judgment oral argument (although that hearing apparently was not transcribed).

Corbis cites to Matteson v. Ziebarth, 40 Wn.2d 286, 293, 242 P.2d 1025 (1952), to argue that Corbis' corporate resolutions were admissible as business records. But in Matteson, the Court specifically stated that the proffered evidence, a letter and board meeting minutes, were not offered as proof of the facts stated therein. Id. In the instant case, the corporate resolutions signed by Gates were offered at summary judgment as substantive evidence that Lodis was an officer. Lodis moved to strike and the trial court improperly considered the evidence.

To the extent that Lodis stated during the first trial that he owed fiduciary duties to Corbis as an officer, this was a set-up question by Corbis' counsel and called for a legal conclusion. The statement was

objected to on that basis. Lodis' legal opinion is irrelevant and inadmissible. ER 701, 402, 403, 601, 602, Cotton v. Kronenberg, 111 Wn. App. 258, 44 P.3d 878, 266, (2002) (expert's legal conclusions stricken).

Lodis did not breach any fiduciary duties or duties of loyalty to Corbis by failing to record 17 vacation days over a two year and eight month period and by accidentally receiving and failing to notice an overpayment. RP Vol. IV at 626, CP 2411-20. There was no evidence to support a \$43,000 award on the vacation claim, as though Corbis had proven that he used every day of vacation. The trial court erred when it denied Lodis' motion for a new trial on the breach of fiduciary duty claim related to the vacation time recording. Substantial evidence did not exist to support the jury's verdict, or the verdict amount. App. Br. at 46-49. Lodis admitted to taking approximately 17 vacation days while employed by Corbis. RP Vol. IV at 626, CP 2411-20. His vacation time accrual was not "ever increasing" as Corbis suggests. Resp. Br. at 12. It capped at two years of accrued vacation. RP Vol. IV at 641. In Lodis' case, two years of accrued vacation was eight weeks, or 40 days, which is the amount that Lodis was paid out up termination. Lodis would have accrued approximately 66 days during his employment with Corbis, so there was at most a day or two difference between what he took and what he was paid.

This amount ignores the extra two weeks of vacation promised to Lodis by McDonald at his time of hire. RP Vol. III at 598-600.

G. Lodis' Outlook Calendar Did Not Qualify as a Business Record or an Admission by a Party Opponent and Therefore It, and Tomblinson's Summary, Should Not have Been Admitted

The Outlook calendar was the only evidence Corbis presented to show that Lodis took an excessive amount of vacation while employed at Corbis. Corbis did not call any witnesses to testify as to specific days Lodis was on vacation. Lodis had permission, like many other Corbis employees, to work from home. When Lodis was recruited by Corbis, he told McDonald he had no intention of giving up his home in Arizona and she suggested he maintain dual residences as she did. CP 1576, CP 4196, RP Vol. IV at 644.

The Outlook calendar did not fall under the business record hearsay exception, ER 803(a)(6)/RCW 5.45, because the surrounding circumstances did not show that the record was reliable. Karl B. Tegland, Courtroom Handbook on Washington Evidence, Ch. 5, ER 803(a)(6), Cmt. 10 (2010-2011 ed.). The calendar was maintained by Chihara and not made with the intention of being used as substantive proof of where Lodis was on a given day or when he was on vacation. In U.S. v. McPartlin, 595 F.2d 1321, 1347 (7th Cir. 1979), cited by Corbis, the court stated that, with respect to diaries or calendars, "the central rationale of the business records exception" is that "since [the individual] had to rely on the entries

made, there would be little reason for him to distort or falsify the entries.” Here, Lodis did not rely on, or agree with, the entries made by his assistant in terms of when he would be on vacation. For much of the same reasons, the calendar was not an admission by a party opponent under ER 801(d)(2). Lodis never “manifested an adoption or belief in its truth;” he disagreed with the accuracy of Chihara’s vacation time entries. ER 801(d)(2), RP Vol. IV at 631-32, 639, 645, CP 2409-10, CP 7005-06. Because the underlying documents used to create Tomblinson’s summary were not reliable, it also should not have been admitted into evidence. Pollock v. Pollock, 7 Wn. App. 394, 405, 499 P.2d 231 (1972).

Tomblinson should not have been permitted to testify as an expert. There was no evidence that her testimony was more than conjecture and speculation. State v. Lewis, 141 Wn. App. 367, 166 P.3d 786 (2007).

IV. APPELLANT’S RESPONSE TO CORBIS’ CROSS-APPEAL

A. Lodis Did Not Breach His Fiduciary Duty to Corbis Through the Accidental Receipt of a Bonus That He Did Not Cause

Corbis appeals the trial court’s denial of its CR 50 motion for judgment as a matter of law related to its breach of fiduciary duty claim on the bonus issue. Resp. Br. at 46. No error was assigned concerning Corbis’ previous counterclaim for unjust enrichment. Upon the conclusion of the

second trial, the jury found that Lodis had not breached his fiduciary duty to Corbis when he received an accidental overpayment two years before he was terminated from Corbis. CP 10528. The facts related to the bonus issue are discussed in the opening brief. App. Br. at 16-18. Lodis did not “solicit” the payment from Masters. He inquired as to whether it should be a different amount based on an agreement at his time of hire. RP Vol. III at 576-79.

The jury heard all of the evidence and determined that Lodis was not liable on the bonus issue. CP 10528. “Overturning a jury verdict is appropriate only when it is clearly unsupported by substantial evidence.” Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107-08, 864 P.2d 937(1994). “The reviewing court will not substitute its judgment for that of the jury.” Id. (quoting State v. O’Connell, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)). Post-trial motions for judgment as a matter of law are reviewed with the evidence and all reasonable inferences taken in the light most favorable to the nonmoving party. Kaech v. Lewis County P.U.D., 106 Wn. App. 260, 270, 23 P.3d 529 (2001). The “motion can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest.” Id. (quoting Moore v. Wayman, 85 Wn. App. 710, 719, 934 P.2d 707 (1997), Queen City

Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 126 Wn.2d 50, 98, 882 P.2d 703 (1994)).

Substantial evidence was presented to the jury to establish that Lodis did not breach his fiduciary duty to Corbis when Corbis mistakenly paid Lodis a duplicate bonus. Breach of fiduciary duty imposes liability in tort. Restatement (Second) of Contracts § 193 (1981), Tedvest Agrinomics VI v. Tedmon Properties V, 49 Wn. App. 605, 607, 744 P.2d 648 (1987). In order to prevail Corbis ““must establish: (1) the existence of a duty owed; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury.” Miller v. U.S. Bank of Washington, N.A., 72 Wn. App. 416, 865 P.2d 536 (1994) (citing Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992)). Corbis cites to a Colorado district court opinion, T.A. Pelsue Co. v. Grand Enterprises, Inc., 782 F. Supp. 1476, (D. Col. 1991), for the proposition that Lodis owed Corbis a fiduciary duty to repay the bonus years after his termination because the bonus was paid during Lodis’ employment. First, there was no breach in receiving the bonus. Second, Lodis did attempt to repay the bonus, but Corbis rejected it.

Jury Instruction No. 7 was a modified version of the business judgment rule, RCW 23B.08.420. It stated:

As an officer of Corbis, Lodis owed Corbis a fiduciary duty. An individual who has a fiduciary relationship with a corporation must discharge the duties of his position in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner the officer believes to be in the best interests of the corporation.

In discharging an officer's duties, the officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by: One or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

On the other hand, an officer is not acting in good faith if the officer has knowledge concerning the matter in question that makes the reliance described in the previous paragraph unwarranted.

CP 10519. Jury Instruction No. 9 stated:

To establish that Lodis breached his fiduciary duty to Corbis by receiving and retaining a \$35,000 Short Term Incentive Payment and a related 401(k) contribution of \$1,050 to which he was not entitled, Corbis has the burden of establishing by a preponderance of the evidence:

- (1) That Lodis breached a fiduciary duty owed to Corbis;
- (2) A resulting injury to Corbis; and
- (3) That Lodis' breach of fiduciary duty was the proximate cause of the injury.

If you find from your consideration of all the evidence that each of the propositions stated above has been proved, your verdict should be for Corbis on this claim. On the other hand, if any of the propositions has not been proved, your verdict should be for Lodis on this claim.

CP 10521.

Corbis cannot show that, in the light most favorable to Lodis, it was entitled to judgment as a matter of law on the breach of fiduciary duty claim related to the bonus. First, as noted in Jury Instruction No. 7, Lodis was entitled to rely on the actions of Masters, Tomblinson, and his supervisor Sue McDonald, in competently performing their job duties. There was no testimony at trial or evidence presented to show that Lodis caused the bonus payment to be made to himself or that Masters, Tomblinson, and McDonald were not competent in performing their job duties related to the 2006 STI bonuses, or that Lodis had reason to question their competency. RP Vol. IV at 639-40. Second, in the light most favorable to Lodis, Corbis failed to show that Lodis did not act in “good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner the officer believes to be in the best interests of the corporation.” It is undisputed that no one at Corbis knew of the overpayment until Tomblinson discovered it while reviewing documents in this litigation. Resp. Br. at 14, RP Vol. II at 252. Lodis continued to work for Corbis for two years after receiving the bonus and was promoted during that time. Third, the jury could properly conclude that as soon as Lodis realized that the bonus was an accidental overpayment, he sought to repay the amount. RP Vol. IV at 634-35. Corbis rejected Lodis’ attempt at repayment and the jury could properly

conclude that any alleged breach was therefore not the proximate cause of Corbis' injury. Id.

As former Corbis Finance Department Vice President Bruce Bryant testified at trial, Human Resources did not have the authority to approve or change STI bonus amounts and Lodis did not have authority to authorize his own STI bonus. RP Vol. IV at 680-85. Bryant testified that STI payments were processed by the Finance Department and required managerial approval. Id. He also testified that STI exceptions required proper documentation and could not be changed by a clerk-level employee absent proper documentation. Id. Lodis testified that he did not have authority to change or authorize his STI bonus amount. RP Vol. IV at 644. Corbis' computer system shows that Lodis' March 2006 STI bonus was authorized by his supervisor, Sue McDonald. Second Trial Ex. 332. Becky Masters testified at trial that she could not remember whether Lodis asked her to review his offer letter, or whether she took it upon herself to review the letter. RP Vol. III at 576-77. Either way, she testified that, based on her review of Lodis' offer letter, she felt Lodis was entitled to a \$35,000 STI bonus in March 2006 and informed Tomblinson in Payroll/Finance to change the amount. Id. Masters had access to the offer letter, reviewed Lodis' offer letter, and had access to databases showing Lodis' prior bonuses.

Corbis paid Lodis approximately \$22,000 net through direct deposit in March 2006, which Lodis believed to be a part of his compensation in connection with his offer letter. Second Trial Ex. 13. While he was employed at Corbis, no one told Lodis that he had been overpaid. RP Vol. IV at 642. No one requested a return of the funds or even indicated that they may have been paid in error. Id. Lodis did not suspect that the funds were paid in error. Id. at 642-44. During the course of this litigation, Corbis first alleged that the March 2006 STI payment Lodis received was paid in error. Id. at 643.

Lodis did not know he allegedly received an overpayment until he was questioned about an overpayment during his deposition. Id. Lodis filed a motion to deposit \$35,000 with the court until the issue could be resolved, but the court never approved his request. RP Vol. IV at 634-35. Based on discovery, by September 2009, Lodis became convinced that he had received an overpayment and sought to repay the \$35,000, even though Corbis had made no demand for repayment and did not state what amount was owed. Id. Corbis returned the check without making a demand. Id.

In the cross-appeal seeking entry of a judgment as a matter of law regarding the \$35,000 bonus payment, Respondents argue, “If Lodis unfairly gained an advantage during his employment, he is obligated to

return to Corbis any sums unfairly obtained until after termination of his employment.” Resp. Br. at 48. This is really an unjust enrichment argument, and the jury during the first trial found in favor of Lodi on the unjust enrichment counterclaims regarding bonus and vacation time recording. CP 9016. There, the jury rejected the third element of unjust enrichment: that Lodi retained the combined payment of \$36,050 under circumstances that would make it inequitable for him to retain the money. CP 9003. Perhaps this was because Lodi tried to repay the bonus after learning of the double payment during the litigation, but Corbis refused the payment so it could maintain its counterclaim.

The trial court did not err in denying Corbis’ motion for judgment as a matter of law. Substantial evidence showed that Lodi did not breach his fiduciary duty to Corbis when Corbis mistakenly paid Lodi a duplicate bonus.

B. The Trial Court Did Not Abuse Its Discretion in Excluding the Hale Demand Letter

In 2007, defendants’ counsel’s law partner, Mark Busto, conducted an investigation into Hale’s complaint against Lodi after Lodi requested an investigation. CP 5666-67, CP 7290-92. Busto cleared Lodi of all charges and during this litigation Corbis sought to exclude Busto’s investigation from evidence and Busto as a witness at trial under ER 403.

CP 5166-67, CP 5666-67. Lodis sought to exclude Hale's post-termination demand letter under ER 401, 402, 403, 404, 608, 611, and/or 613. CP 4983-84. Lodis discussed the circumstances related to Hale's complaint, her departure from the company, and her demand letter at length in his deposition. CP 4983, CP 7275-79, CP 7285-7334.

The trial court heard full oral argument on the matter before issuing its order, granting Lodis' motion in part and denying it in part. CP 6560. Corbis' cross-appeal identifies no new reason for admitting the evidence on remand except to say that it is "highly relevant." Resp. Br. at 48-49. The court permitted the introduction of the warning memo placed in Lodis' personnel file (First Trial Ex. 306), but found that there was no "evidence to that the memo played a role in the decision to terminate Mr. Lodis" and that "[a]bsent such a nexus, the memo may not be introduced as support for the termination decision." CP 6560. The order also stated: "The memo finds that Mr. Lodis did not violate the company's anti-harassment policy and makes no finding that Mr. Lodis engaged in retaliation. It does not appear that Ms. Coskey made any findings regarding Ms. Hale's allegations. Accordingly, the Court GRANTS the motion with respect to any allegation that Mr. Lodis harassed or retaliated against Ms. Hale." Id. Corbis' conditional cross-appeal notes that the Hale complaint was relevant to Corbis' "same actor" argument, but the court's

ruling on the memo allowed the memo to be introduced in support of this defense. CP 6560.

Plaintiff sought exclusion of the Hale demand letter on a number of evidentiary grounds, including ER 401, 402, 403, 404, 608, 611, and/or 613. CP 4983-84. Corbis cannot show that the court's ruling on the motion in limine was an abuse of discretion. State v. Smith, 30 Wn. App. 251, 257-58, 633 P.2d 137 (1981), Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107, 864 P.2d 937(1994). Assuming the letter was excluded under ER 403, the court engaged in an appropriate balancing test to weigh the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury. Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 671, 230 P.3d 583 (2010). The demand letter was highly inflammatory and contained allegations that were never substantiated. Not only that, but Busto's investigation had already cleared Lodis of wrongdoing before the letter was written. Hale was let go as part of a RIF on the recommendation, and with the approval, of Corbis' legal counsel. CP 3389, CP 7276, CP 7294, RP 3/11/10 at 19. The danger of unfair prejudice and confusion of the issues highly outweighed any probative value of the letter and the court did not abuse its discretion in excluding the letter.

V. CONCLUSION

For the foregoing reasons, as well as those stated in the Brief of Appellant, Lodis respectfully requests that the Court remand this case for trial of his age discrimination and retaliation claims, find that he did not breach his fiduciary duty with regard to his vacation time recording, order that the after acquired evidence defense be stricken, and deny Corbis' cross-appeal.

Respectfully submitted this 27th day of February, 2012.

The Sheridan Law Firm, P.S.

By: 

John P. Sheridan, WSBA # 21473
Attorneys for Plaintiffs/Appellants/Cross-
Respondents

DECLARATION OF SERVICE

Beth Touschner states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am an attorney employed by Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.
2. On February 27, 2012, I caused to be delivered via email addressed to:

Jeffrey James
Sebris Busto James
14205 SE 36th Street, Suite 325
Bellevue, WA 98006

Howard M. Goodfriend
Edwards, Sieh, Smith and Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101

a copy of the REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED February 27, 2012 at Seattle, King County, Washington.



Beth Touschner

No. 67215-1-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

STEVEN LODIS and DEBORAH LODIS, a marital community,

Plaintiffs/Appellants/Cross-Respondents,

v.

CORBIS HOLDINGS, INC., CORBIS CORPORATION, and GARY
SHENK,

Defendants/Respondents/Cross-Appellants,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Michael Hayden and Hon. Bruce Heller)

Case No. 08-2-20301-8 SEA

APPENDIX OF UNPUBLISHED AUTHORITY CITED IN REPLY
BRIEF OF APPELLANT/CROSS-RESPONDENT (GR 14.1)

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DIVISION ONE
FEB 27 2012

ORIGINAL

Appendix 1: Beltran v. County of Santa Clara, 2009 U.S. Dist. LEXIS 129956 (N.D. Cal. Jan. 30, 2009)

Appendix 2: Bolla v. Univ. of Haw., 2010 U.S. Dist. LEXIS 134143 (D. Haw. Dec., 16, 2010)

Appendix 3: EEOC v. Wyndham Worldwide Corp., 2008 U.S. Dist. LEXIS 83558 (W.D. Wash. Oct. 3, 2008)

Appendix 4: Johnson v. Stupid Prices, Inc., 2008 U.S. Dist. LEXIS 90893 (W.D. Wash. Nov. 6, 2008)

Appendix 5: Pettit v. Steppingstone, Ctr. for the Potentially Gifted, 429 Fed. Appx. 524 (6th Cir. 2011)

Appendix 6: Prue v. Univ. of Washington, 2008 U.S. Dist. LEXIS 67341 (W.D. Wash. Aug. 19, 2008)

Appendix 7: Rangel v. Omni Hotel Mgmt. Corp., 2010 U.S. Dist. LEXIS 105400 (W.D. Tex. Oct. 4, 2010)

Appendix 8: Uzzell v. Teletech Holdings, Inc., 2007 U.S. Dist. LEXIS 95197 (W.D. Wash. Dec. 7, 2007)

Appendix 9: Vaughn v. City of New York, 2010 U.S. Dist. LEXIS 50791 (E.D.N.Y. May 24, 2010)

Appendix 1



**LORI BELTRAN, et al., Plaintiffs, v. COUNTY OF SANTA CLARA, et al.,
Defendants.**

NO. C 03-3767 RMW (RS)

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA, SAN JOSE DIVISION**

2009 U.S. Dist. LEXIS 129956

**January 30, 2009, Decided
January 30, 2009, Filed**

PRIOR HISTORY: *Beltran v. Santa Clara County*,
2008 U.S. App. LEXIS 3095 (9th Cir., Feb. 13, 2008)

COUNSEL: [*1] For Lori Beltran, Robert Beltran,
Plaintiffs: Robert Ross Powell, LEAD ATTORNEY,
Dennis R. Ingols, Law Offices of Robert R. Powell, San
Jose, Ca; Douglas D. Durward, Law Office of Douglas D.
Durward, Saint Helena, CA.

For County of Santa Clara, Melissa Suarez, individually
and as an employee of the County of Santa Clara,
Jennifer Hubbs, individually and as an employee of the
County of Santa Clara, Emily Tjhin, individually and as
an employee of the County of Santa Clara, Defendants:
Gregory Joseph Sebastinelli, Santa Clara Cty. Ofc. of the
 Cty. Counse, San Jose, CA; Melissa R. Kinyalocets,
Office of the County Counsel, San Jose, CA.

JUDGES: RICHARD SEEBORG, United States
Magistrate Judge.

OPINION BY: RICHARD SEEBORG

OPINION

ORDER DENYING MOTION TO COMPEL

I. INTRODUCTION

Defendants Melissa Suarez and Emily Tjhin move to compel compliance with subpoenas issued for the records of therapists Glenda Catanzarite and Roger Duke who treated plaintiffs Lori, Robert, and Coby Beltran after Coby's removal from his parents' custody. Defendants allege that the therapists' records are relevant to the Beltrons' claims and defenses because in paragraph fifty-nine of their first amended complaint ("FAC") they allege emotional distress [*2] damages as a result of Coby's removal from his parents' custody. For the reasons stated below, the motion to compel will be denied.

II. BACKGROUND

The facts underlying this dispute go back to 2002 when Suarez, a social worker for Santa Clara County's child protective services, investigated whether Lori Beltran was abusing her four-year-old son, Coby. *Beltran v. Santa Clara County*, 514 F.3d 906, 908 (9th Cir. 2008) (en banc). After investigating, Suarez's supervisor, Tjhin, filed a child dependency petition, which included the facts describing Suarez's investigative findings. *Id.* Suarez also filed a separate custody petition. *Id.* The dependency petition was denied, Coby was returned to his parents, and they then sued Suarez, Tjhin, and other defendants alleging four claims linked to the removal of Coby from their custody and the attempt to place him

under the supervision of the state. *Id.* The Beltrans specifically claim that Suarez and Tjhin fabricated the information in their petitions. *Id.*

Coby's parents currently are in the middle of a custody dispute after commencing divorce proceedings in 2006. Defendants believe the therapist records, which go to marital and custody problems, have [*3] some overlap with Coby's removal. Such records, according to defendants, could explain another source of the emotional distress the Beltrans allegedly incurred beyond that associated with the removal of Coby, and therefore could support or refute their claim for damages.

III. DISCUSSION

As noted above, defendants maintain that because the Beltrans allege emotional distress in paragraph fifty-nine of their FAC, they have placed their mental health at issue and have waived any right to withhold their therapists' records. Plaintiffs oppose the motion on the grounds that: (1) the records are irrelevant to their claims for emotional distress; and (2) the therapists were not served with the motion after being served with the subpoenas.¹

1 Serving the motion on the Beltrans rather than the therapists was correct as they have to consent to the disclosure of their records, not the therapists.

A. Relevance

Under *Rule 26(b)(1) of the Federal Rules of Civil Procedure*, parties may obtain discovery of any nonprivileged matter that is relevant to any party's claims or defenses, or "for good cause," discovery of any matter relevant to the subject matter involved in the action. "Relevant information need [*4] not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* The therapists' records relate to both the liability and damages aspects of this action. As such, the records sought are relevant to the Beltrans' claim for emotional distress in paragraph fifty-nine of the FAC.

B. Therapist-Patient Privilege

The first question is whether federal or state privilege law applies. When evidence is relevant to both federal and state claims, a court looks to the federal

privilege law. *Fitzgerald v. Cassil*, 216 F.R.D. 632, 635 (N.D. Cal. 2003). Here, the records from the therapists are relevant to the Beltrans' federal claims concerning Coby's removal, and thus, the federal therapist-patient privilege is applicable. The next question becomes, therefore, whether the Beltrans waived their therapist-patient privilege to the records at issue, thereby permitting discovery.

The Supreme Court ruled in *Jaffee v. Redmond*, 518 U.S. 1, 15, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996), that a therapist-patient privilege exists under federal common law. The Court held that confidential communications between therapists and their patients in the course of diagnosis or treatment are [*5] protected from compelled disclosure under *Rule 501 of the Federal Rules of Evidence*. *Id.* The privilege, however can be waived, *id.* at 15 n.14, with the burden of demonstrating non-waiver on the Beltrans. *Fitzgerald*, 216 F.R.D. at 636. Importantly, the Court rejected the prior balancing approach where a court would weigh the interests of justice in determining whether the privilege applied. *Jaffee*, 518 U.S. at 17.

Since *Jaffee*, three different approaches have developed to determine when a waiver occurs. First, courts taking the broad approach find that merely asserting emotional distress damages will operate as a waiver. *Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006). These courts focus on fairness considerations such as a defendant's need to be able to investigate the privileged information to determine whether there are sources of emotional distress other than defendant's conduct. *Doe v. City of Chula Vista*, 196 F.R.D. 562, 569 (S.D. Cal. 1999). Second, courts following the middle or "limited broad" approach find waiver where a plaintiff alleges more than "garden variety" emotional distress; that is, courts limit waiver to allegations of a separate tort for emotional distress, [*6] specific psychiatric injury, or unusually severe distress. *Fitzgerald*, 216 F.R.D. at 637 (citing *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 226 (D. N.J. 2000)).

Third, courts using the narrow approach hold that there must be an affirmative reliance on the therapist-patient communication before the privilege is waived. *Id.* at 636. These courts focus on the privacy interest that is inherent in the privilege and reason that it should be protected even if a plaintiff claims emotional distress damages. *Id.* at 640. Waiver under this approach

is appropriate when the privileged therapist-patient communications are being used as a sword as well as a shield. This could occur when a plaintiff calls a therapist as a witness or presents independent expert testimony concerning his or her mental condition. *Vann v. Lone Star Steakhouse & Saloon*, 967 F. Supp. 346, 349-50 (C.D. Ill. 1997); *Sidor v. Reno*, No. 95 Civ. 9588(KMW), 1998 U.S. Dist. LEXIS 4593, 1998 WL 164823, at *2 (S.D.N.Y. 1998).

While the Ninth Circuit has yet to address this issue, courts in this district have embraced the narrow approach. *Fitzgerald*, 216 F.R.D. at 639; *Boyd v. City & County of San Francisco*, No. C-04-5459 MMC (JCS), 2006 U.S. Dist. LEXIS 34576, 2006 WL 1390423, at *6 (N.D. Cal. May 18, 2006). [*7] In *Fitzgerald*, 216 F.R.D. at 637-40, the court noted that the narrow approach best embodied the goals articulated in *Jaffee* while the other approaches do not sufficiently protect the therapist-patient privilege and come too close to the type of balancing that the Supreme Court rejected. Under either the "limited broad" or "narrow" approaches, the Beltrans have not waived their therapist-patient privilege. While paragraph fifty-nine of the FAC recites emotional distress damages (plaintiffs "suffered, and will continue to suffer in the

future, severe and enduring emotional distress and disruption of their psyche"), such language is nothing more than garden variety emotional distress damages insufficient as a basis for privilege waiver. Furthermore, the Beltrans have placed no affirmative reliance on any therapist-patient communication, and explicitly state that they do not want their records released. Should the Beltrans attempt to use any such communication as a sword later in the litigation, a waiver could arise but at this juncture the record reflects that they have not done so.

IV. CONCLUSION

Accordingly, the motion to compel is denied.

IT IS SO ORDERED.

Dated: January 30, 2009

/s/ [*8] Richard Seeborg

RICHARD SEEBORG

United States Magistrate Judge

Appendix 2



**JAMES A. BOLLA, Plaintiff, vs. UNIVERSITY OF HAWAII; DAVID McCLAIN;
VIRGINIA HINSHAW; JAMES DONOVAN; CARL CLAPP, and DOE
DEFENDANTS 1 THROUGH 100, Defendants.**

CIV. NO. 09-00165 SOM/LEK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

2010 U.S. Dist. LEXIS 134143

December 16, 2010, Decided

December 16, 2010, Filed

COUNSEL: [*1] For James Bolla, Plaintiff: R. Steven Geshell, LEAD ATTORNEY, Honolulu, HI.

For David McClain, individually and in his capacity as President of the University of Hawaii, Virginia Henshaw, individually and in her official capacity as Chancellor of the University of Hawaii, James Donovan, individually and in his official capacity as Athletic Director of the University of Hawaii, Carl Clapp, individually and in his official capacity as Assistant Athletic Director of the University of Hawaii, University of Hawaii, Defendants: John-Anderson L. Meyer, Kenneth S. Robbins, Sergio Rufo, LEAD ATTORNEYS, Robbins & Associates, Honolulu, HI.

JUDGES: Susan Oki Mollway, Chief United States District Judge.

OPINION BY: Susan Oki Mollway

OPINION

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO SEAL CERTAIN EVIDENCE; ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION.

In 2004, Defendant University of Hawaii ("UH") hired Plaintiff James A. Bolla to be the head coach of its women's basketball program. Bolla claims that he complained of gender inequities between the men's and women's basketball programs at UH and was retaliated against for doing so. Bolla sues various individual Defendants, asserting [*2] that they violated his *First Amendment* rights. Bolla also sues UH, asserting that it retaliated against him in violation of Title IX.

The individual Defendants move for summary judgment. This court grants that motion, because Bolla's alleged complaints about Title IX violations were not protected by the *First Amendment*, because the individual Defendants have qualified immunity with respect to those claims, and because Defendants David McClain and Virginia Hinshaw cannot be liable, having not personally participated in the alleged retaliation.

UH also moves for summary judgment. This court grants that motion because Bolla fails to raise a genuine issue of fact as to whether UH's proffered reasons for terminating him were pretextual.

Before reaching the merits of the motions for summary judgment, the court addresses Defendants' motion to seal certain exhibits. The court grants that motion in part and denies it in part.

II. MOTION TO SEAL.

Defendants move to seal certain exhibits containing confidential information. See Ex Parte Motion for Leave to File Exhibits Under Seal, Sept. 1, 2010, ECF No. 85. On September 2, 2010, this court issued a minute order, noting that, when evaluating such [*3] motions under *Local Rule 83.12*, the court makes every effort to seal only the confidential information and to allow filings to be open to the public to the fullest extent possible. The court ordered the parties to meet and confer about proposed redactions and asked the parties to submit proposed redactions. See Minute Order, Sept. 2, 2010, ECF No. 86.

On September 10, 2010, Defendants filed proposed redacted exhibits. See Letter from John-Anderson L. Meyer to this court, Sept. 10, 2010, ECF No. 89. On September 17, 2010, Bolla filed general objections to the unsealing of any document. Bolla's general objections did not address why any particular document should be sealed. See Plaintiff's objection to unsealing of documents, Sept. 17, 2010, ECF No. 90.

Local Rule 83.12 provides a detailed structure for filing confidential information under seal. Defendants have made great efforts to comply with that rule, demonstrating "compelling reasons" to seal the names of student-athletes and coaches who participated in the events underlying the complaints against Bolla. The proposed redactions of the names maintain those individuals' rights to medical privacy and spare those individuals from the [*4] public embarrassment of being the alleged victims of Bolla's actions or the subject of possible discipline by UH. In other words, the redactions of the names prevents the use of court files for improper purposes, such as promoting public scandal. Bolla's general objections about his own privacy rights are too vague to be persuasive. The court concludes that Defendants' proposed redactions of names satisfy the "compelling reasons" test and maintain the confidentiality of the information, while allowing the public access to the substance of the information. See *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006).

Defendants' motion regarding the sealing of documents is granted in part and denied in part. Defendants are ordered to file in the public file the redacted documents submitted to the court for review. Defendants, however, shall make further redactions. In

this community, which does not have professional sports teams, college athletics are closely followed, and student athletes are often easily identifiable by fans. Because the identity of persons involved with UH's women's basketball program may easily be determined even from their initials, Defendants [*5] are ordered to redact initials as well. Defendants are further ordered to file a single envelope under seal that contains all of the unredacted documents corresponding to the redacted documents that are filed in the public file. Defendants are also ordered to file in the public files all documents that contain no redacted information, including such documents previously proposed to be filed under seal.

III. MOTION FOR SUMMARY JUDGMENT.

A. STANDARD OF REVIEW.

Summary judgment shall be granted when "the pleadings, the discovery and disclosure 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)*. One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Accordingly, "[o]nly admissible evidence may be considered in deciding a motion for summary judgment." *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 988 (9th Cir. 2006). Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential [*6] element at trial. See *Celotex*, 477 U.S. at 323. A moving party has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden initially falls on the moving party to identify for the court "those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp.*, 477 U.S. at 323); accord *Miller*, 454 F.3d at 987. "A fact is material if it could affect the outcome of the suit under the governing substantive law." *Miller*, 454 F.3d at 987.

When the moving party fails to carry its initial burden of production, "the nonmoving party has no obligation to produce anything." In such a case, the nonmoving party may defeat the motion for summary

judgment without producing anything. *Nissan Fire*, 210 F.3d at 1102-03. On the other hand, when the moving party meets its initial burden on a summary judgment motion, the "burden then shifts to the nonmoving party to establish, beyond the pleadings, that there [*7] is a genuine issue for trial." *Miller*, 454 F.3d at 987. This means that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (footnote omitted). The nonmoving party may not rely on the mere allegations in the pleadings and instead "must set forth specific facts showing that there is a genuine issue for trial." *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 891 (9th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). "A genuine dispute arises if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *California v. Campbell*, 319 F.3d 1161, 1166 (9th Cir. 2003); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000) ("There must be enough doubt for a 'reasonable trier of fact' to find for plaintiffs in order to defeat the summary judgment motion.").

On a summary judgment motion, "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor." *Miller*, 454 F.3d at 988 (quotations and brackets omitted).

B. FACTUAL BACKGROUND.

In [*8] 2004, UH hired Bolla to be the head coach of its women's basketball program. See Decl. of James A. Bolla ¶ 2, Nov. 9, 2010, ECF No. 107. In July 2007, Bolla's contract was extended for an additional four years, to June 30, 2011. Id. ¶ 3.

In March 2008, UH hired Defendant James Donovan as its new athletic director. See Decl. of James Donovan ¶ 1, Aug. 31, 2010, ECF No. 84-2. In March 2008, immediately after starting as the new athletic director, Donovan met with the head coaches of the various sports to discuss what they needed to make their programs successful. Id. ¶ 3. On or about March 25, 2008, Donovan met with Bolla. Id. ¶ 5. Bolla says he told Donovan at this meeting that he wanted the women's basketball program to be put on equal footing with the men's basketball program, in compliance with Title IX. See Bolla Decl. ¶¶ 7-8. Bolla wanted things like a secretary, more coaches, increased budget, the ability to use buses instead of cars,

and summer school for the student-athletes. See Exs. C-1 and C-2, ECF Nos. 84-11 and 84-12. Donovan disputes that, at the March 2008 meeting, Bolla voiced Title IX complaints. See Donovan Decl. ¶ 10; see also Decl. of Jeannie Lee ¶¶ 1, 2, 5, Aug. [*9] 31, 2010, ECF No. 84-3 (Lee was Donovan's executive assistant, was present at the meeting, and says that Bolla did not raise Title IX concerns at the meeting).

Donovan says that, shortly after his meeting with Bolla, he began hearing complaints from student-athletes about Bolla's conduct as a coach. See Donovan Decl. ¶ 12. On April 30, 2008, Donovan appointed UH human resources specialists to do a fact-finding investigation regarding those complaints. Id.; Ex. E-A. Donovan says he told Bolla about the investigation and Bolla's duty to cooperate. See Donovan Decl. ¶ 15; Ex. E-B. Bolla says that he was told of the investigation by Defendant Carl Clapp, who was acting on Donovan's behalf. See Bolla Decl. ¶ 18.

On July 30, 2008, the specialists submitted a report to Donovan about the complaints. See Donovan Decl. ¶ 17; Ex. E. This report contained six letters from student-athletes detailing their complaints against Bolla and noted that some of these complaints had been made to the previous athletic director's administration but had not been responded to. See Ex. E. The report included some extremely complimentary descriptions of Bolla. See id. Some of those complimentary descriptions indicated [*10] that the student-athlete complaints were really about Bolla's coaching style, which had a history of being effective. Id.

On August 22, 2008, after reviewing the fact-finding report, Donovan issued a written reprimand to Bolla. See Ex. H. Among other things, Donovan reviewed Bolla's offer to change a student's scholarship from an athletic scholarship to a manager's scholarship based on the student's pregnancy. Donovan informed Bolla that, even if Bolla was trying to help the student, a coach could not make such a change and that Bolla should have left the matter to the student. Id. Donovan cautioned Bolla against further unauthorized discussions and reviews of student-athletes' medical conditions. Id. Donovan reprimanded Bolla for inappropriate remarks concerning sexual orientation and for threatening to kick a student-athlete off the team for something her parent had said. Id. Donovan said that, if Bolla entered the women's locker room without first checking to see whether

everyone was dressed, that conduct was also improper. Id. Finally, Bolla was reprimanded for "verbal abuse and manipulation" of student-athletes. Id. Donovan told Bolla "that any further inappropriate and unprofessional [*11] behavior and conduct will not be tolerated. If such violations ever occur again, I will immediately take appropriate corrective action, up to and including discharge." Id.

In January 2009, Bolla was interviewed by Dave Reardon, a reporter for a daily Honolulu newspaper. Bolla says that he spoke to Reardon in his capacity as the women's head basketball coach at UH. See Plaintiff's Answers to All Defendants' First Request for Admissions ¶ 9, Sept. 1, 2010, ECF. No. 84-14. Bolla says that, in answer to Reardon's questions, he complained about UH's failure to provide gender equity in the women's basketball program. See Bolla Decl. ¶ 58. However, Reardon's published articles contained no mention of that. Those articles instead described how the women's basketball team had lost its previous game not because of lack of effort, but because of missed shots. The article reported that Bolla was critical of members of the public who did not attend games but who nevertheless commented on the team. See Exs. I-1 and I-2, ECF Nos. 84-21 and 84-22.

In January 27, 2009, Donovan reprimanded Bolla for his criticism about the public comments. Bolla was told not to say anything further that could be construed [*12] as inflammatory to the general public or ultimately derogatory about the UH athletics department. See Ex. J.

In early 2009, Donovan received a complaint from a student-athlete who said that, during a 2008 practice, Bolla had told her, "If you are not in the right place, I'm gonna put my foot up your ass." See Donovan Decl. ¶ 26. Bolla disputes having said "I'm gonna put my foot up your ass," stating instead that he told her he was going to "stick it where the sun don't shine." See Plaintiff's Answers to All Defendants' First Request for Admissions ¶ 5, Sept. 1, 2010, ECF. No. 84-14. When the student in a later play was not in the right place, the student said that Bolla kicked her in the buttocks hard enough to move her several feet. See Donovan Decl. ¶ 26. Bolla disputes having kicked the student, but does admit to having put his foot on her, causing her eyes to tear up. See Plaintiff's Answers to All Defendants' First Request for Admissions ¶¶ 2-3; Bolla Decl. ¶ 59 (indicating that he "tapped her buttocks" with his right foot), ¶ 61 (indicating that he

"gently hit her buttocks").

On February 6, 2009, Donovan appointed UH human resource specialists to perform another investigation. [*13] On February 9, 2009, without yet having the written report, Donovan suspended Bolla with pay. See Donovan Decl. ¶¶ 28, 30.

On or about March 5, 2009, the specialists issued a report describing the alleged kick and additionally noting that, during the course of the investigation, they had learned that Bolla had told other student athletes: "If that were me, I would have broken your fucking arm" and "You can take that one-handed pass and shove it up your ass." Bolla was also said to have told a student that she needed to go to a psychologist and another that she should be tested for Attention Deficit Disorder. See Ex. K.

Donovan says that he believed the 2009 report was accurate. On or about March 13, 2009, Donovan wrote to Bolla to say that, based on the report's summary of Bolla's statements and the "kick," he was concluding that Bolla had acted unprofessionally, inappropriately, and even violently. According to Donovan, because Bolla had previously been reprimanded and told that further violations would result in appropriate corrective actions, Donovan terminated Bolla. See Ex. L; Donovan Decl. ¶¶ 35, 42. Donovan said that the termination decision was his alone. Id. ¶ 43.

Bolla says [*14] that he has been punished more severely than other coaches for similar conduct. Bolla says that, at a preseason media day, UH's football coach implied that another school's players were "faggots." Bolla says that this coach's punishments were only a suspension and a pay reduction. See Bolla Decl. ¶ 27. Bolla says that this coach threw a projector, a computer, and a water jug in a half-time speech, and, later in the same season in which that coach made the "faggot" comment, swung a power chainsaw in a pregame speech, but was not reprimanded. Id. ¶ 26.

C. ANALYSIS.

Given the October 9, 2009, order and the October 26, 2009, stipulation, the only claims remaining are Count I (seeking injunctive relief), Count II (Title IX retaliation against UH only), and Count III (a § 1983 claim against the individual Defendants in their personal capacities for retaliation based on Bolla's exercise of *First Amendment*

rights).

1. Summary Judgment is Granted in Favor of the Individual Defendants on the § 1983 Claim.

a. Bolla's Speech was Not Protected.

Because Defendants argue that the *First Amendment* issue controls the Title IX issue, the court starts by addressing the *First Amendment* issue. Count III alleges [*15] that the individual Defendants (McClain, Hinshaw, Clapp, and Donovan) violated 42 U.S.C. § 1983, which provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity

"Section 1983 imposes two essential proof requirements upon a claimant: 1) that a person acting under color of state law committed the conduct at issue, and 2) that the conduct deprived the claimant of some right, privilege or immunity protected by the Constitution or laws of the United States." *Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988).

Bolla claims that the individual Defendants violated his *First Amendment* rights by retaliating against him for his exercise of his Title IX rights. See *Mendocino Environ. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) (stating that, to demonstrate a *First Amendment* violation, [*16] a plaintiff must demonstrate that a defendant "deterred or chilled" the plaintiff's speech and that such deterrence was a substantial or motivating factor in the defendant's conduct). In other words, Bolla says he was retaliated against in violation of § 1983 because he complained about gender inequities between the men's and women's basketball teams. See *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (holding that a free speech retaliation claim is cognizable under § 1983). Count III fails because Bolla's complaints do not qualify as speech protected by

the *First Amendment*.

In *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006), the Supreme Court ruled that the *First Amendment* does not protect government employees from discipline based on speech made pursuant to the employee's official duties. Richard Ceballos, a calendar deputy for the district attorney's office in Los Angeles, was told by a defense attorney that an affidavit used to obtain a search warrant had been inaccurate. *Id.* at 413. Ceballos determined that the affidavit had indeed contained "serious misrepresentations." *Id.* at 414. Ceballos then prepared a memorandum that recommended dismissal of the case. *Id.* [*17] Ceballos claimed that he suffered retaliation for his actions.

The Supreme Court rejected Ceballos's *First Amendment* claim, ruling that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for *First Amendment* purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. Because Ceballos wrote his memorandum as part of his duties as a calendar clerk, the Supreme Court reasoned that it was written pursuant to his official duties and was therefore unprotected by the *First Amendment*. *Id.* The Supreme Court said that the inquiry into whether an employee is acting pursuant to official duties is a "practical one," noting that "the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for *First Amendment* purposes." *Id.* at 425.

Bolla claims to have exercised rights under Title IX when he met with Donovan in March 2008, allegedly telling Donovan about gender inequities, and when he later talked with Reardon, a member of the press. Bolla claims [*18] to have suffered retaliation for his speech. However, the record establishes that the speech on which Bolla premises his claim was made in his official capacity.

In March 2008, Donovan, having just been appointed athletic director, met with the head coaches of each sport to ask them what they needed to be successful. Bolla says that he complained to Donovan that the women's basketball team was being treated less favorably than the men's basketball team. That speech was not protected by the *First Amendment*, as Bolla conceded at the hearing

that he was making those statements in his official capacity as head coach of the women's basketball team. Bolla was at the meeting with UH's athletic director only because Bolla was the head coach. He had the opportunity to make his alleged statements only because he was a head coach meeting with the new athletic director. Like Ceballos's memorandum discussed above, Bolla's speech was part of his official duties and is therefore not protected by the *First Amendment*.

Similarly, Bolla's statements to Reardon are not protected by the *First Amendment*, as Bolla admits that those statements were made in his official capacity as head coach of the women's [*19] basketball team.

Given the lack of *First Amendment* protection for Bolla's speech, Count III does not state a § 1983 claim.

b. The Individual Defendants Have Qualified Immunity with Respect to the § 1983 Claims.

Another way to express the failing in Count III is to say that the individual Defendants have qualified immunity with respect to Count III.

"[G]overnment officials performing discretionary functions [are entitled to] a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The doctrine of qualified immunity protects government officials from "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009) (quotations omitted). Although the Supreme Court earlier laid out a two-step sequence for a court to follow in resolving a government official's qualified immunity claim, that sequence is no longer mandatory. *Id.* at 817. This court may therefore [*20] exercise its "sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 818; *Bryan v. MacPherson*, 630 F.3d 805, 2010 U.S. App. LEXIS 24437, 2010 WL 4925422, *14 (9th Cir. Nov. 30, 2010).

Under one prong, this court must decide whether the facts that Bolla alleges as the basis for his § 1983 claim

make out a violation of a constitutional right. *Pearson*, 129 S. Ct. at 815-16; *MacPherson*, 608 F.3d at 619 ("taking the facts in the light most favorable to the non-moving party, the first prong examines whether the officer's conduct violated a constitutional right"). Under the other prong, this court must decide whether the right at issue was "clearly established at the time of the defendant's alleged misconduct." *Pearson*, 129 S. Ct. at 815-16; *MacPherson*, 608 F.3d at 619 (asking whether the right was "clearly established in light of the specific context of the case").

As discussed above, Bolla's factual allegations fail to "make out a violation of a constitutional right." Moreover, given Garcetti, Bolla fails to show that his alleged *First Amendment* rights were "clearly established" at the time [*21] of the alleged misconduct. It is far from clear that any right head coaches at universities have to comment and/or complain in their official capacities about perceived Title IX violations is protected by the *First Amendment*. Accordingly, the individual Defendants have qualified immunity with respect to a § 1983 claim premised on an alleged *First Amendment* violation.

Pointing to Hawaii's Whistleblower's Protection Act, sections § 378-61 and/or -62 of the *Hawaii Revised Statutes*, Bolla argues that the individual Defendants lack qualified immunity with respect to his § 1983 claim. This court disagrees. Bolla's Hawaii Whistleblower's Protection Act claim has already been dismissed by this court and cannot form the basis of a claim that the individual Defendants lack qualified immunity. As the Ninth Circuit stated in *Doe v. Petaluma City School District*, 54 F.3d 1447, 1451 (9th Cir. 1995), in deciding questions of qualified immunity, this court "must focus on the right [the plaintiff] alleges was violated." Just as the Ninth Circuit concluded in that case that Title VII could not serve as the basis for a clearly established right for purposes of a sexual-harassment claim brought under the [*22] similarly worded Title IX, Hawaii Whistleblower's Protection Act cannot form the basis of a clearly established right for purposes of the asserted *First Amendment* violation. See *id.* at 1450-51.

c. McClain and Hinshaw Did Not Participate in Bolla's Termination.

Defendant David McClain and Defendant Virginia Hinshaw have yet another ground on which to challenge the viability of Count III. There is no evidence that either

played any actual role in Bolla's termination, and Bolla fails to establish supervisor liability for either.

McClain was the President of the University of Hawai'i system, overseeing 10,000 employees. See Declaration of David McClain ¶¶ 1-3, Aug. 28, 2010, ECF No. 84-6. McClain says he "had no personal participation in the ultimate decision to terminate James Bolla's . . . employment and did not direct the decision to terminate his employment." Id. ¶ 5.

Hinshaw is Chancellor of UH's Manoa campus, overseeing 8,000 employees. See Declaration of Virginia Hinshaw ¶¶ 1-2, Aug. 31, 2010, ECF No. 84-5. Like McClain, Hinshaw did not personally participate in the decision to terminate Bolla's employment. Id. ¶ 4.

Donovan says that he alone made the decision to terminate Bolla, not [*23] any of the other individual Defendants. See Donovan Decl. ¶ 43.

A supervisor may be liable under § 1983 only when he or she personally participated in a constitutional deprivation, or when there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. See *Edgerly v. City & County of San Francisco*, 599 F.3d 946, 961 (9th Cir. 2010); *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680 (9th Cir. 1984) ("A supervisor cannot be held personally liable under § 1983 for the constitutional deprivations caused by his subordinates, absent his participation or direction in the deprivation"). Supervisory officials are not vicariously liable for the actions of their subordinates. *Hansen*, 828 F.2d at 645-46 (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)). Because the only evidence before this court indicates that McClain and Hinshaw did not personally participate in the decision to terminate Bolla, they are not liable for that termination under § 1983.

2. Summary Judgment is Granted to UH on the Title IX Retaliation Claims.

Count II alleges that UH violated Title IX [*24] by retaliating against Bolla for the exercise of his rights under Title IX, 20 U.S.C. § 1681. Title IX provides in relevant part:

(a) No person in the United States shall,

on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,

The Supreme Court has held that an implied cause of action exists under Title IX for retaliation. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005) ("Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action.").

Although the Ninth Circuit has not addressed the issue of how Title IX claims are to be handled, most courts look to Title VII when reviewing claims under Title IX. That is, the relevant analysis to be followed in connection with alleged employment discrimination on the basis of sex under Title IX is similar to that followed in Title VII. See, e.g., *Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996) ("when a plaintiff complains of discrimination with regard [*25] to conditions of employment in an institution of higher learning, the method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case."); *Murray v. N.Y. Univ. College of Dentistry*, 57 F.3d 243, 248 (2d Cir. 1995) ("In reviewing claims of discrimination brought under Title IX by employees, whether for sexual harassment or retaliation, courts have generally adopted the same legal standards that are applied to such claims under Title VII."); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896-99 (1st Cir. 1988) (applying Title VII burden-shifting analysis to Title IX claim); *Emeldi v. Univ. of Or.*, 2010 U.S. Dist. LEXIS 56543, 2010 WL 2330190, *2 (D. Or., June 4, 2010) ("Title IX should be analyzed under the same burden shifting scheme recognized for Title VII cases."); *Stucky v. Haw.*, 2008 U.S. Dist. LEXIS 5627, 2008 WL 214944, *17 (D. Haw., Jan. 25, 2008) ("Title VII principles guide the resolution of Title IX discrimination claims."). Those cases are persuasive to this court, which applies the Title VII framework to this Title IX case.

Accordingly, to survive summary judgment on the Title IX claim, Bolla must first establish a prima facie discrimination case. See, e.g., *Anthoine v. N. Central Counties Consortium*, 605 F.3d 740, 753 (9th Cir. 2010).

[*26] If Bolla makes out a prima facie case, the burden shifts to UH to provide nondiscriminatory reasons for the adverse employment action--Bolla's termination. If UH does so, the prima facie case "drops out of the picture," and this court evaluates the evidence to determine whether a reasonable jury could conclude that UH discriminated against Bolla. See *Anthoine*, 605 F.3d at 753. At this point, Bolla may defeat summary judgment by offering direct and/or circumstantial evidence that a discriminatory reason more likely motivated the employer, or that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable. See *id.* When the evidence on which a plaintiff relies is direct, little evidence is required to survive a summary judgment motion. *EEOC v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009). However, when the evidence on which a plaintiff relies is circumstantial, "that evidence must be specific and substantial to defeat the employer's motion for summary judgment." *Anthoine*, 605 F.3d at 753 (quoting *EEOC v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009)). Bolla may not defeat this motion for summary judgment merely by [*27] denying the credibility of UH's proffered reason for the challenged employment action. See *id.*

a. Prima Facie Case.

For Bolla to establish a prima facie case of retaliation, he must show that: (1) he engaged in protected activity; (2) he was thereafter subjected to an adverse action; and (3) a causal link exists between the protected activity and the adverse action. See *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 891 (9th Cir. 1994). On this motion for summary judgment, the requisite degree of proof necessary to establish a prima facie case is "minimal." See *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1148 (9th Cir. 1997) (discussing prima facie case in Title VII context). The Ninth Circuit notes that a plaintiff makes a prima facie showing even if his or her case is "weak." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002).

A question of fact exists as to whether Bolla engaged in a protected activity under Title IX. Bolla says that, when he met with Donovan in March 2008, he complained about gender inequities for purposes of Title IX. Donovan disagrees, indicating that they only talked about Bolla's wish list for what could make his program more successful. Because this [*28] is a motion for summary judgment, the court accepts Bolla's version of

the facts for purposes of this motion. The court therefore assumes that Bolla complained about Title IX violations in his March 2008 conversation with Donovan.

Bolla also claims to have complained about Title IX violations to a reporter in January 2009. The court assumes this to be true, even though there is no evidence that Defendants even knew of these alleged statements, as what was published in the paper did not address this subject.

Bolla was ultimately terminated. Bolla relies on the temporal closeness of his alleged Title IX comments to his termination to demonstrate causation. Bolla makes out a sufficiently close connection between his alleged Title IX complaints and his termination to satisfy his minimal prima facie burden. Immediately after talking with Donovan in March 2008, Donovan asked for a fact-finding report as to allegations made by student-athletes, beginning the lengthy process that led to Bolla's official reprimand. Bolla says that, in January 2009, he talked to a reporter about the alleged Title IX violations. Soon after that, Donovan asked a fact-finding body to look into further allegations [*29] made by a student-athlete. This fact-finding body issued a report that Donovan says he relied on in terminating Bolla.

The court rejects UH's argument that Bolla did not exercise protected activity when, in his official capacity as head coach of the team, he allegedly complained of Title IX violations. In making this argument, UH relies on *Atkinson v. Lafayette College*, 653 F. Supp. 2d 581 (E.D. Pa. 2009), which extended the Supreme Court's Garcetti decision beyond the *First Amendment* context. The district court in *Atkinson* applied Garcetti in a Title IX case to bar a claim of retaliation based on speech made in the employee's official capacity. See *id.* at 596. The court is not persuaded by *Atkinson*, which did not examine the Supreme Court's *Jackson* decision.

In *Jackson*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005), the Supreme Court recognized a claim of retaliation in a Title IX case involving a high school girl's basketball coach who had complained to his supervisor that the boy's basketball team was receiving more funding than the girl's team. *Jackson's* complaint had alleged that he then began to receive negative evaluations and was removed as the coach in retaliation for those complaints. *Id.* at 171-72. [*30] The district court dismissed the Title IX retaliation claim on the ground that Title IX does not prohibit retaliation. The Eleventh

Circuit affirmed. *Id. at 171*. The Supreme Court reversed, ruling that Jackson could assert a retaliation claim under Title IX. In so ruling, the Supreme Court reasoned that, unless individuals were protected from retaliation, they would not report discrimination, and Title IX's "enforcement scheme would be subverted." *Id. at 181*. The Supreme Court recognized that teachers and coaches were often in the best position to advocate for gender equity for students because they could detect discrimination and bring it to the attention of administrators. *Id.* The Supreme Court therefore allowed Jackson's Title IX retaliation claim to go forward.

The present case involves factual allegations nearly identical to those in *Jackson*. This court therefore rules that Bolla alleges a Title IX violation based on having allegedly been terminated because of his complaints that the women's basketball team was treated less favorably than the men's basketball team. Given *Jackson*, this court is not persuaded by UH's argument that, having allegedly made Title IX complaints as the [*31] head coach of the women's basketball team that are not protected by the *First Amendment*, Bolla lacks a Title IX retaliation claim.

b. Legitimate, Nondiscriminatory Reasons for the Adverse Employment Action.

There is no question that UH has articulated legitimate, nondiscriminatory reasons for terminating Bolla. After being reprimanded and warned about future unprofessional conduct, Bolla told a team member either "I'm gonna put my foot up your ass" or "[I'm going to] stick it where the sun don't shine," before either "kicking" or "nudging" her with his foot for not being in proper position. UH had evidence that Bolla told other student-athletes, "If that were me, I would have broken your fucking arm" and "You can take that one-handed pass and shove it up your ass." See Bolla Decl. ¶¶ 59-61, 64, 65. These comments and actions qualify as nondiscriminatory reasons for Bolla's termination.

c. Pretext

Calling Bolla's declaration "self-serving," UH argues that it should be disregarded and stricken, leaving Bolla with no evidence of pretext. This court declines to disregard Bolla's declaration. This court may disregard "sham" affidavits and declarations when they contradict prior sworn testimony. [*32] See, e.g., *Leslie v. Grupo ICA*, 198 F.3d 1152, 1157 (9th Cir. 1999). This court may also disregard conclusory, self-serving statements in

affidavits and declarations when those statements are "lacking detailed facts and supporting evidence." *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997). Neither reason justifies disregarding Bolla's declaration. Bolla did not simply state that UH's stated reason for terminating him was pretextual. Such a statement, by itself, would have been insufficient to raise a genuine issue of fact as to pretext. Bolla's declaration sets forth a sufficient factual basis to be considered when evaluating UH's motion for summary judgment, although, as explained below, the factual detail is not sufficient to avoid summary judgment on the issue of pretext.

UH next argues that this court should disregard hearsay statements contained in Bolla's declaration concerning newspaper reports of "motivational speeches" by another coach. This court agrees that, under *Rule 56(c)(4) of the Federal Rules of Civil Procedure*, affidavits and declarations in support of or in opposition to a motion for summary judgment must be made on personal knowledge. The [*33] court declines to disregard Bolla's declaration to the extent it relies on newspaper articles for the factual assertions concerning what another coach said or did. That is because this court is not persuaded by Bolla's assertion of pretext even if this court assumes the truth of the newspaper articles pursuant to *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003), which allows this court to focus on the admissibility of the contents of evidence rather than its form. The circumstantial evidence in the newspaper reports, combined with the other circumstantial evidence Bolla relies on, is not sufficiently "specific and substantial" to defeat UH's motion for summary judgment. See *Anthoine*, 605 F.3d at 753. The court is not here ruling that newspaper articles may be considered in adjudicating a summary judgment motion, but is instead noting that Bolla fails to show pretext even assuming the truth of the newspaper reports.

Donovan says that he terminated Bolla because Bolla was verbally abusive, and because Donovan concluded that Bolla had kicked a member of his team. Bolla concedes that he told a member of the team that, if she were out of position on another play, Bolla would stick [*34] his foot where the sun did not shine. Bolla also concedes that he subsequently tapped the buttocks of the team member's behind, nudging her into the proper position, which made her tear up. See Bolla Decl. ¶¶ 59-61. Bolla further admits to telling a team member, "If it were me, I would have broken your fucking arm," to

make the point that what she was doing could have resulted in serious injury to her. Id. ¶ 64. He further concedes that he told another team member that she could take her one-handed pass and stick it up her ass. See id. ¶ 65. Despite conceding these actions and statements, Bolla maintains that the real reason he was terminated is that Donovan was retaliating against Bolla for Bolla's assertion of rights under Title IX.

Bolla's factual concessions make it clear that he is not attempting to establish pretext by showing that Donovan's proffered explanation for his termination is unbelievable because it is internally inconsistent. Bolla is instead attempting to show pretext by offering circumstantial evidence that the proffered reasons were on their face not believable and/or that a discriminatory reason more likely motivated Donovan's decision to terminate him. See *Anthoine, 605 F.3d at 753*. [*35] However, the circumstantial evidence on which Bolla relies is not sufficiently "specific and substantial" to create an issue of fact using this method of establishing pretext. Id.

Bolla contends that Donovan wanted to punish Bolla allegedly from the time Bolla made his first Title IX complaint in March 2008. Bolla says that, after he made that complaint, Donovan started a series of actions adverse to Bolla, beginning with an investigation of complaints that had been made to the previous athletic director, ultimately leading to the August 22, 2008, written reprimand. Donovan then reprimanded Bolla for making statements to the press. Donovan said he ultimately fired Bolla for having been verbally abusive and having kicked a team member. Although Bolla does not dispute having done the acts for which he was reprimanded and terminated, he does dispute the severity of his conduct. Bolla says that, given what he says was his actual conduct, termination was an over-reaction. In claiming that his punishment was disproportionate and therefore the result of pretext, Bolla compares his situation to that of another UH coach. But that other coach was not similarly situated to Bolla.

Assuming that [*36] the newspaper accounts on which Bolla relies are correct, the other coach, the men's football coach, said that another team had done a little "faggot" dance. Bolla says that the men's football coach was only subjected to suspension and a pay reduction as a result. This same coach, at some unidentified time, reportedly threw objects during a half-time speech in the

locker room. This coach also apparently swung a power chain saw in the locker room during a pre-game "motivational speech" after he had been suspended and had his pay reduced. Noting that this coach was not terminated, Bolla argues that this unequal treatment raises an issue of fact as to whether UH's reasons for terminating Bolla were pretextual. However, the court finds significant the absence of any evidence that any student felt threatened or intimidated by the men's football coach's reported actions or that any student complained about those actions to Donovan or any other member of UH management. Donovan had a report not just describing Bolla's alleged conduct but also cataloging complaints about that conduct. Even if the football coach's reported conduct were equivalent to Bolla's conduct, there is no evidence that [*37] the audiences' reactions to the comments were equivalent.

In addition, Bolla was reprimanded and warned by Donovan concerning his abusive language. Bolla presents no evidence that the other coach's reported conduct followed a prior reprimand or warning that the other coach might be terminated if his inappropriate language continued. Nor is there any evidence that the football coach's "motivational speeches" in any way scared, offended, or intimidated a student-athlete, or were even directed to or in the general vicinity of any particular student-athlete or targeted a particular individual. The evidence certainly fails to establish that the football coach kicked, hit, or otherwise improperly touched any student-athlete. Thus, Bolla does not identify an issue of fact as to whether UH's stated reasons for terminating him were actually a pretext for discrimination based on allegedly different treatment of the men's football coach. There is simply no basis on which this court can conclude that the other coach was similarly situated.

This court recognizes that "similarly situated" employees are more often discussed in the context of analyzing prima facie cases than in the context of establishing [*38] pretext. However, Bolla makes UH's different treatment of the football coach the crux of his pretext argument. That is, Bolla says that UH's failure to fire the football coach is evidence that UH did not really care about harsh or inappropriate comments or actions at all. To evaluate this argument, this court is compelled to examine whether the coaches were similarly situated. If they are not, UH's different treatment of the football coach could hardly establish a pretextual reason for firing Bolla. If, for example, an employee was fired for having

punched someone, that employee could not establish pretext by saying that a colleague was not fired for having used racial epithets.

This court stresses that it is not saying that the coach of a men's team should be given more latitude than the coach of a women's team just because of the gender difference. But if two coaches are to be compared with respect to a school's reaction to allegedly offensive conduct by both, then a plaintiff claiming pretext must show comparability in the cited conduct. For all this court knows, male football players were as offended by their coach's actions as Bolla's players were offended by Bolla's actions, but [*39] the record gives no indication that any offense at all was taken by any football team member. Bolla had the burden of raising a genuine issue of fact as to pretext. That is, Bolla had the burden of showing how he would establish that UH's proffered reasons were pretextual if the matter went to trial. Bolla's reliance on UH's treatment of the football coach is not supported by evidence that the football coach's conduct offended student-athletes. Given this lack of evidence,

this court does not have a basis for deeming that conduct as comparable to Bolla's.

IV. CONCLUSION.

As set forth above, the motion to seal is granted in part and denied in part. The court grants the individual Defendants' and UH's motion for summary judgment. Because all of the substantive claims have been disposed of in Defendants' favor, Bolla's claim for reinstatement (Count I) fails as well. The Clerk of Court is directed to enter judgment in favor of Defendants and to close this case.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, December 16, 2010.

/s/ Susan Oki Mollway

Susan Oki Mollway

Chief United States District Judge

Appendix 3



**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v.
WYNDHAM WORLDWIDE CORPORATION, d/b/a WORLDMARK BY
WYNDHAM, formerly TRENDWEST RESORTS, INC., Defendant.**

CASE NO. C07-1531RSM

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON**

2008 U.S. Dist. LEXIS 83558; 91 Empl. Prac. Dec. (CCH) P43,348

**October 3, 2008, Decided
October 3, 2008, Filed**

COUNSEL: [*1] For Equal Employment Opportunity Commission, Plaintiff: John Freeman Stanley, LEAD ATTORNEY, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (WA), SEATTLE DISTRICT OFFICE, SEATTLE, WA; Teri L Healy, LEAD ATTORNEY, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEATTLE DISTRICT OFFICE, SEATTLE, WA; William R. Tamayo, LEAD ATTORNEY, US EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SAN FRANCISCO, CA; Molly P Kucuk, US EQUAL OPPORTUNITY COMMISSION (WA), SEATTLE, WA.

For Wyndham Worldwide Corporation, formerly known as Trendwest Resorts Inc, doing business as Worldmark By Wyndham, Defendant: Andrew Moriarty, Chelsea D Petersen, PERKINS COIE (SEA), SEATTLE, WA; Jeffrey Alan Hollingsworth, PERKINS COIE, SEATTLE, WA.

JUDGES: RICARDO S. MARTINEZ, UNITED STATES DISTRICT JUDGE.

OPINION BY: RICARDO S. MARTINEZ

OPINION

ORDER ON MOTION FOR PARTIAL SUMMARY

JUDGMENT

This matter is before the Court for consideration of defendant's motion for partial summary judgment, Dkt. # 14. The Court held oral argument on September 19, 2008, and the matter has been fully and carefully considered. For the reasons set forth below, the Court now GRANTS IN PART and DENIES IN PART defendant's motion.

FACTUAL BACKGROUND

Plaintiff Equal Employment Opportunity Commission [*2] ("EEOC") brought this employment discrimination action pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII") and Title I of the Civil Rights Act of 1991, alleging unlawful employment practices by the defendant Wyndham Worldwide Corporation ("Wyndham") at one of its properties, the Birch Bay Resort. Specifically, plaintiff contends that five male employees at the Birch Bay Resort were subjected to unlawful sexual harassment by a supervisor. Defendant has moved for partial summary judgment on five separate bases. The Court gave a preliminary ruling on the motion at the close of oral argument, and now sets forth the analysis.

BACKGROUND

The five young men--Ryan Vaughan, Bryan Berndtson, Michael Poitras, Steven Poitras, and Ryan Henley--worked in various capacities at Birch Bay Resort from September 2004 through December 2005, the date the harasser Matt Brennan resigned. Brennan was the resort manager. The claimants' allegations against him include touching, suggestive remarks, outright solicitation, lewd talk, invitations to drink, and one incident of groping. The conduct toward claimants Vaughan and Berndtson was the most egregious.

In moving for partial summary judgment, [*3] defendant does not dispute the allegations regarding Mr. Brennan's conduct, but rather asserts five separate bases for dismissal of some of the claims. Specifically, defendant contends that:

(1) Berndtson's claims must be dismissed as untimely;

(2) the claims of the two Poitras brothers and of Ryan Henley fail because they do not sufficiently allege severe or pervasive harassment;

(3) the claims of the Poitras brothers, Henley, and Berndtson fail under the Faragher/Ellerth "Reasonable Care" affirmative defense;

(4) there is no basis for injunctive relief; and

(5) the claimants cannot recover damages for emotional distress.

Defendant has not moved for summary judgment as to the merits of the claims asserted by Vaughan, except to the extent that grounds (4) and (5) would apply to him.

ANALYSIS

To prevail on a Title VII hostile work environment claim, a plaintiff must show that (1) he was subjected to verbal or physical conduct of a sexual nature; (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment. *Vasquez v. County of Los Angeles*, 349 F. 3d 634, 642 (9th Cir. 2003). To determine [*4] whether the conduct was sufficiently severe or pervasive, the Court should look at all the circumstances, "including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an

employee's work performance." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (internal quotations omitted).

The Ninth Circuit Court of Appeals has held that "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." *Ellison v. Brady*, 924 F. 2d 872, 878 (9th Cir. 1991) (citing *King v. Board of Regents of University of Wisconsin System*, 898 F. 2d 533, 537 (7th Cir. 1990)). Thus, multiple acts that individually might not create a hostile work environment may in the aggregate amount to a violation of Title VII. However, prior incidents of which a plaintiff is unaware cannot contribute to a hostile work environment with respect to that plaintiff. *Brooks v. City of San Mateo*, 229 F. 3d 917, 924 (9th Cir. 2000).

I. Motion regarding the claims of the two Poitras brothers and of Ryan Henley

Defendant [*5] asserts that the claims of these three men fail because they do not sufficiently allege severe or pervasive harassment. Defendant contends that "no reasonable factfinder could conclude that their allegations describe an actionably hostile and abusive work environment." Defendant's Motion, Dkt. # 14, p. 3.

The allegations made by these three men are that Brennan repeatedly touched their hair and faces (to check for shaving), sniffed their necks (to check if they had showered), leered suggestively at them, commented on their physical attributes, provided uniforms that were too tight, suggested that they change their clothes in his office and in his presence, said he knew where they could get great oral sex, and invited them to his home for drinks. While it may be arguable that none of these actions standing alone would create a hostile work environment, when they are viewed together, the Court cannot say as a matter of law that they are not sufficiently severe or pervasive to create a hostile work environment. "The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." *Ellison v. Brady*, 924 F. 2d 872, 878 (9th Cir. 1991).

The [*6] Court finds that Brennan's conduct toward these three men presents issues of fact for the jury and DENIES defendant's motion for summary judgment as to these men's claims.

II. The *Faragher/Ellerth* Affirmative Defense

Defendant also contends that the claims of the Poitras brothers, Henley, and Berndtson all fail under the *Faragher/Ellerth* "reasonable care" affirmative defense. This defense arises from two Supreme Court cases holding that when no adverse employment action has been taken, a defendant employer may raise an affirmative defense against damages where the employer can demonstrate that (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). The affirmative defense is intended to encourage the development of antiharassment policies, promote conciliation, and encourage employees to report harassing conduct before it becomes severe or pervasive. *Kohler v. Inter-Tel Techs*, 244 F. 3d 1167, 1175 (9th Cir. 2001) [*7] (quoting *Ellerth*, 524 U.S. at 764).

There is no dispute regarding the absence of adverse employment action here. Therefore, defendant is entitled to assert the defense if the required elements are proven.

As to the first element, defendant argues that it exercised reasonable care to prevent sexual harassment in the workplace through an anti-harassment policy, which is enunciated in a handbook given to every new employee. Defendant further states that when it first became aware of allegations that the Poitrases had been harassed, a Human Resources manager was dispatched to the resort to investigate. HR manager Ellen Perrin apparently obtained only one statement, from Steven Poitras (the only one besides Vaughan who was still working at the resort at the time). This was in December, 2005, and the investigation ended shortly thereafter with Brennan's resignation.

Plaintiff EEOC contends that defendant cannot meet the requirements for either prong of the affirmative defense. As to the first prong, plaintiff asserts that defendant has not demonstrated that it exercised reasonable care to prevent and correct the harassment. It is insufficient for the employer to simply have an anti-harassment [*8] policy in place. *Swinton v. Potomac Corp.*, 270 F. 3d 794, 811 (9th Cir. 2001). The

immediate investigation of a harassment complaint is an essential element of the affirmative defense. *Swenson v. Potter*, 271 F. 3d 1184, 1192-93 (9th Cir. 2001). According to plaintiff, defendant had notice of Mr. Brennan's conduct well before the December 2005 investigation was opened. Plaintiff states that Assistant Manager Kay McCroskey testified that defendant was aware of the harassment fifteen months before the investigation began, and complained to the regional vice-president at least six months prior to the investigation. These and other allegations by plaintiff regarding awareness within the company raise an issue of fact for the jury with respect to the first prong of the affirmative defense.

Similarly, the parties are in dispute regarding the facts relating to the second prong of the affirmative defense: whether the harassed employees "unreasonably" failed to take advantage of preventive or corrective measures. Defendant argues that none of the claimants utilized the "hotline" number given in the employee handbook to report the harassment anonymously, and four of them admitted that they did [*9] not report Brennan's behavior to Human Resources. Michael Poitras testified that he spoke to Vaughan about Brennan's actions in September or October of 2005, but three remaining claimants testified that they never reported the harassment to anyone other than each other. Defendant's Motion, Dkt. # 14, p. 16.

Plaintiff disputes this characterization of the employees' actions. Plaintiff contends that three of the men--M. Poitras, S. Poitras, and Berndtson--all reported the harassment to Vaughan, their immediate supervisor. Apparently Vaughan did not carry the reports forward as a formal complaint, but Vaughan was himself being harassed, and Brennan was also his supervisor. According to plaintiff, Vaughan did complain of his own harassment to his direct supervisor, Kay McCroskey, and she took the complaint to a district vice president, Mike Elson, who was Brennan's direct supervisor. Ms. McCroskey later requested a transfer to another resort, apparently due to the intolerable situation regarding Brennan.

The availability of the *Ellerth/Faragher* [*10] affirmative defense is a question of fact for the jury. The Comment to the Ninth Circuit's Model Jury Instruction on this affirmative defense states,

When harassment is by the plaintiff's immediate or successively higher supervisor, an employer is vicariously liable, subject to a potential affirmative defense. *Faragher*, 524 U.S. at 780; *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 875 (9th Cir. 2001). For vicarious liability to attach it is not sufficient that the harasser be employed in a supervisory capacity; he must have been the plaintiff's immediate or successively higher supervisor. *Swinton*, 270 F.3d at 805, citing *Faragher*, 524 U.S. at 806. An employee who contends that he or she submitted to a supervisor's threat to condition continued employment upon participation in unwanted sexual activity alleges a tangible employment action, which, if proved, deprives the employer of an *Ellerth/Faragher* defense. *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1173 (9th Cir. 2003) (affirming summary judgment for the employer due to insufficient evidence of any such condition imposed by plaintiff's supervisor). See *Pennsylvania State Police v. Suders*, 542 U.S. 129, 137-38, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004), [*11] for discussion of tangible employment action.

The adequacy of an employer's anti-harassment policy may depend on the scope of its dissemination and the relationship between the person designated to receive employee complaints and the alleged harasser. See, e.g., *Faragher*, 524 U.S. at 808 (policy held ineffective where (1) the policy was not widely disseminated to all branches of the municipal employer and (2) the policy did not include any mechanism by which an employee could bypass the harassing supervisor when lodging a complaint).

"While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may

appropriately be addressed in any case when litigating the first element of the defense." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

Although proof that the plaintiff failed to use reasonable care in avoiding harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the defendant, a demonstration of such failure will normally suffice to satisfy this prong. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

Comment, [*12] Ninth Circuit Model Civil Jury Instruction 10.2B. Thus, while the *Ellerth/Faragher* affirmative defense may be available to defendant, the parties' disputes regarding the immediacy of defendant's investigation, and the claimants' reports, present questions of fact for the jury as to its actual applicability. Summary judgment shall accordingly be DENIED as to this affirmative defense.

III. Injunctive Relief

The EEOC has requested injunctive relief in the complaint, asking the Court for a permanent injunction to enjoin defendant from "engaging in any employment practices which discriminate on the basis of sex against any individual." Complaint, p. 4. Plaintiff also asks the Court to order defendant to institute and carry out policies and programs which provide equal employment opportunities for all employees, and which "eradicate the effects of its past and present unlawful employment practices." *Id.* Defendant contends that there is no basis for awarding injunctive relief, because "the specific harassment alleged in this lawsuit cannot possibly reoccur because Brennan and all of the claimants have long since left Wyndham's employ." Defendant's Motion, p. 17. Defendant argues that injunctive [*13] relief is unavailable when an injunction is "unnecessary to prevent future violations of Title VII." *Id.*

The injunctive relief available under Title VII is far broader than that necessary to prevent a recurrence of the specific behavior alleged in the lawsuit (i.e., by the same perpetrator). Pursuant to statute, once the Court has found that the defendant has "intentionally" engaged in the unlawful employment practice charged in the complaint, the Court may enjoin the defendant from "engaging in

such unlawful employment practice, and order such affirmative action as may be appropriate, [including] . . . any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5(g). Thus, the Court is authorized to enjoin further acts of sexual harassment, regardless whether Mr. Brennan is still employed there.

Where a district court denies injunctive relief without specifically finding that the defendant employer is unlikely to repeat its actions, the court abuses its discretion. *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987). Although Mr. Brennan has resigned, other managers who knew of the on-going harassment and failed to react are still with the company. [*14] On the record now before the Court, the Court cannot find that the employer is unlikely to repeat its actions. Therefore, the Court shall decline to dismiss the claim for injunctive relief. Defendant's motion for summary judgment on this basis is DENIED.

IV. Damages for Emotional Distress

Plaintiff has requested that defendant compensate the claimants for losses arising from emotional distress, pain and suffering, and loss of enjoyment of life. Complaint, pp. 4-5. Defendant contends that the claimants are barred from recovering damages for emotional distress because the EEOC failed to produce evidence relating to the claimants' mental and emotional state when requested to do so in discovery. Plaintiff asserted objections in response to the request for medical or therapy records of each claimant, stating that the request was burdensome, overbroad, sought irrelevant information, and further was subject to doctor/patient and psychotherapist/patient privilege. Defendant's motion to exclude damages for emotional distress is based on the two-pronged argument that federal law does not recognize a physician-patient privilege, and while it does recognize a psychotherapist-patient privilege, that [*15] privilege was waived by the assertion of claims for emotional distress.

The courts are split on whether a plaintiff waives his psychotherapist-patient privilege by putting his mental state at issue when claiming damages for emotional distress. *See, Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (S.D.Cal. 1999) (collecting cases). The *Fritsch* court found that the plaintiff had not waived the privilege by claiming damages for emotional distress. *Id.* at 632. Here, this Court did not have an opportunity to consider the issue and weigh the various factors involved in the

waiver determination, because defendant never filed a motion to compel the discovery or otherwise challenged plaintiff's objections to the requested discovery. Those objections were not based on privilege alone. In the absence of any Court determination that plaintiff's objections to providing the claimants' medical records were invalid, the Court will not penalize claimants by denying their claims to damages for emotional distress.

This result is not prejudicial to defendant because the claimants' emotional distress claims are not based on their medical records but rather on their own testimony, which defendant may test [*16] by cross-examination. The medical records will not be used to support the claimants' testimony. This is appropriate where plaintiffs assert merely "garden variety" emotional distress symptoms, such as depression, anger, low self-esteem, and so on. These "garden variety" emotional distress claims do not place the claimants' mental state sufficiently at issue to constitute a waiver of the privilege. *See, Fitzgerald v. Cassil*, 216 F.R.D. 632, 636-40 (N.D.Cal. 2003).

Defendant's motion for summary judgment as to the claims for emotional distress is accordingly DENIED.

V. Time Bar as to Berndtson's Claim

Finally, defendant contends that the EEOC's claim on behalf of claimant Berndtson must be dismissed because the last conduct which he alleges occurred more than 300 days before the EEOC filed charges. Mr. Berndtson's last date of employment was December 23, 2004, and the EEOC suit was not filed until April 7, 2005 (originally based on the charges laid by Vaughan).

The parties are in agreement over the Title VII statute of limitations and filing limits, but disagree on how they should be applied in this case regarding hostile work environment claims. Defendant contends that the later-filed charges, [*17] even those involving the same perpetrator, cannot revive claims which are no longer viable at the time of filing. Plaintiff, in opposition to this argument, asserts that under the Supreme Court's recent clarification of the "continuing violation" doctrine set forth in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), no part of the EEOC's claim is time-barred. The Court finds that this is an overbroad reading of the holding in *Morgan*.

The *Morgan* Court rejected application of the continuing violation doctrine for discrete acts of harassment or discrimination by holding that "discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period. . . . [D]iscrete discriminatory acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges." *Id.* at 112-113. However, "hostile environment claims are different in kind from discrete acts." *Id.* at 115. "In order for the charge to be timely, the employee need only file a charge within . . . [the limitations period] of any act that is part of the hostile work environment." *Id.* at 118.

Plaintiff has focused on the language in *Morgan* stating [*18] that "it does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period." *Id.* at 117. Further, "[h]ostile work environment claims **will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period.**" *Id.* at 122 (emphasis added). Plaintiff argues that this means that even though all acts toward claimant Berndtson fell outside the statutory filing period, his claims are actionable because other acts toward different claimants fell within that period, thus fulfilling the "at least one act" requirement.

However, the Court finds that this language applies to **acts**, not **claimants**. Plaintiff has not cited to a single case in which additional claimants, whose stale claims would otherwise be time-barred, were bootstrapped into a Title VII case by acts directed toward other claimants which fell within the filing period. On the contrary, plaintiff's very argument has been rejected by at least one court in this circuit. In a case involving eight claimants, six with claims based on at least one act with the filing [*19] period and two whose harassment occurred entirely before the 300 day period began to run, the court found the claims of the two time-barred. *EEOC v. GLC Restaurants, Inc.*, 2006 U.S. Dist. LEXIS 78270, 2006 WL 3052224 (D.Ariz. 2006). The following language in the court's opinion is instructive:

The EEOC alleges a hostile work environment on behalf of eight people it claims were harassed from January, 2001 to September, 2002. The four named Plaintiffs filed charges with the EEOC on

March 17 and 20, 2003. Under Title VII, the EEOC can assert hostile work environment claims on behalf of these individuals only if at least one of the acts that contributes to the hostile work environment occurred within the 300 days that preceded those filings--that is, after May 21 and 24, 2002, respectively. Individual claims based on acts that occurred before that period are time-barred.

Class members Charlene Hannah and Mary Hellman allege harassment that occurred entirely before May 21, 2002. Neither filed a charge with the EEOC. The EEOC argues, nevertheless, that as long as *some* harassment directed toward *some* of the plaintiffs occurred within 300 days of the filing of the charge, it can bring suit on behalf of any Plaintiff, even [*20] if that Plaintiff did not experience harassment within the 300-day period. In support, the EEOC cites *EEOC v. Local 350 Plumbers and Pipefitters*, which allowed a challenge to a union's allegedly discriminatory policy using evidence of discrimination both within and outside the 300-day period. 998 F. 2d 641, 644-45 (9th Cir. 1993). Reliance on this case is misplaced, however, because the evidence of discrimination outside the 300-day period was used only to support the claims of a plaintiff who had alleged discrimination within the 300-day period. *Local 350* differs from this case, in which the EEOC attempts to use some Plaintiffs' timely charges to support other Plaintiffs' entirely untimely claims.

2006 U.S. Dist. LEXIS 78270, [WL] at *2.

Thus, while under *Morgan* "the entire time period of the hostile environment may be considered by a court for the purposes of determining liability," there is no basis for resurrecting the stale claims of claimant Berndtson. *Morgan*, 536 U.S. at 117. This language authorizes the use of Berndtson's testimony regarding his harassment, as it relates to Wyndham's liability for the hostile employment environment throughout the period

2004-2005. However, it does not authorize inclusion [*21] of Berndtson himself as a claimant, because his claims are time-barred. Defendant's motion for summary judgment as to claimant Berndtson is accordingly GRANTED.

Dated this 3rd day of October, 2008.

/s/ Ricardo S. Martinez

RICARDO S. MARTINEZ

UNITED STATES DISTRICT JUDGE

Appendix 4



1 of 1 DOCUMENT

BRUCE L. JOHNSON, Plaintiff, vs. STUPID PRICES, INC., Defendant.

Case No. C07-1817 MJP

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SEATTLE DIVISION**

2008 U.S. Dist. LEXIS 90893; 91 Empl. Prac. Dec. (CCH) P43,384

November 6, 2008, Decided

November 6, 2008, Filed

COUNSEL: [*1] Bruce L Johnson, Plaintiff, Pro se, Seattle, WA.

For Stupid Prices Inc, a Washington corporation, Defendant: D Jill Pugh, SEATTLE, WA.

JUDGES: HONORABLE MARSHA J. PECHMAN, United States District Court Judge.

OPINION BY: MARSHA J. PECHMAN

OPINION

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION TO CONTINUE

This matter comes before the Court on Defendant's motion for summary judgment. (Dkt. No. 18.) The Court has considered Defendants' motion, Plaintiff's letter (Dkt. No. 23), Defendants' reply (Dkt. No. 21), and other pertinent documents in the record. Even though Plaintiff filed an untimely response to the motion (*see* Dkt. No. 24), the Court considered it and it does not alter the Court's ruling on the matter. For the reasons stated below, the Court GRANTS Defendant's motion.

Background

On August 11, 2006, Plaintiff, an African-American, began working for Defendant Stupid Prices, Inc. ("SPI") at its Kent, Washington location. SPI, a Washington corporation, operates a chain of liquidation outlets selling merchandise acquired from, among other sources, other retailers' overstock. (Baisch Decl. at P 4.) Phil Germer, the manager at the SPI store in Kent, hired Plaintiff as a warehouse [*2] helper. (*Id.* at P 6.) Mr. Johnson worked for SPI between August 11, 2006 and August 23, 2006. (*Id.*)

During his time at SPI, Plaintiff heard his immediate supervisor, John Murphy, made a derogatory statement. (Johnson Decl. at PP 5, 8-9.) Plaintiff asserts Mr. Murphy said "how do you like the new monkey we got working here." (Johnson Decl. at P 9.) Defendant claims its investigation revealed Murphy had no intent to make a slur and that he was teasing a female Caucasian worker about the way she was walking. (Baisch Decl. at P 8.) Nevertheless, on August, 19, 2006, SPI reprimanded Murphy with an "Employee Warning Notice" for the "possible racial slur." (Baisch Decl., Ex. 2.) The warning states that Murphy was supposed to apologize to Mr. Johnson for the incident. (*Id.*) Johnson states that Murphy never apologized. (Johnson Decl. at P 18.) Mr. Johnson missed work for at least a day as a result of the incident and claims that when he spoke to Germer about the incident, he was told to "get over it." (Johnson Decl. at P 16.)

Plaintiff states he reported the incident to several store managers who failed to "effectively remedy" the situation. (*Id.* at PP 11-13.) He further states the he suffered [*3] from increased blood pressure as a result of this incident and that he had to seek medical attention. (*Id.* at P 14.) When Plaintiff returned to work, he claims Murphy made monkey sounds and gestures in the area where Plaintiff worked. (*Id.* at PP 19-20.) Plaintiff claims he reported this incident to Germer who ignored his complaints. (Dkt. No. 23.) Defendant states that there have been no other complaints of harassment or discrimination from SPI employees. (Baisch Decl. at P 14.)

In SPI's view, Johnson was unable to perform his job duties because of his high blood pressure and his employment was terminated by mutual agreement. (Baisch Decl. at P 12.) Johnson did not return to work after the second Murphy incident because he felt Murphy created a hostile work environment. (Dkt. No. 23.) He claims Germer terminated him for this failure to return to work. (*Id.*)

In April 2007, Plaintiff filed a complaint against SPI with the Equal Employment Opportunity Commission ("EEOC") and on August 9, 2007, the EEOC dismissed his charge. (Pugh Decl., Ex. 1.) After filing for leave to proceed in forma pauperis, Plaintiff filed his complaint in November, 2007. (Dkt. No. 4.) Plaintiff, proceeding pro se, [*4] asserts claims for: (1) harassment in violation of federal law, (2) harassment in violation of state law, (3) retaliation in violation of federal law, (4) retaliation in violation of state law, and (5) unlawful and wrongful discharge. (Dkt. No. 4 at 4-5.) Defendant requests the Court grant summary judgment on all of Plaintiff's claims.

Discussion

I. Summary Judgment Standard

Summary judgment is not warranted if a material issue of fact exists for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171, 116 S. Ct. 1261, 134 L. Ed. 2d 209 (1996). The underlying facts are viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "Summary judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The party moving for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). However, once the moving party has met its initial burden, the burden shifts to the nonmoving party [*5] to establish the existence of an issue of fact regarding an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). To discharge this burden, the nonmoving party cannot rely on its pleadings, but instead must have evidence showing that there is a genuine issue for trial. *Id.* at 324.

II. Harassment

Plaintiff asserts that SPI violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(a)(1) and 42 U.S.C. § 1981, by creating a racially hostile work environment. (Dkt. No. 4 at 4.) Plaintiff also argues SPI's actions violated Washington's Law Against Discrimination, *RCW 49.60.180*. Because Washington law tracks federal law on this issue, the court will analyze both harassment claims simultaneously. *See Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177, 1183 (9th Cir. 2005)(citing *Anderson v. Pac. Mar. Ass'n*, 336 F.3d 924, 925 n. 1 (9th Cir. 2003)).

To prevail on his claim of disparate treatment based on race, a plaintiff must offer direct or circumstantial proof that his employer's challenged decision was motivated by intentional discrimination. *Washington v. Garrett*, 10 F.3d 1421, 1432 (9th Cir. 1993); [*6] see also *Cannon v. New United Motors Mfg., Inc.*, 141 F.3d 1174 at *3 [published in full-text format at 1998 U.S. App. LEXIS 2115] (9th Cir. 1998). Direct evidence is evidence which "proves the fact [of discriminatory animus] without inference or presumption." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998)(quoting *Davis v. Chevron, U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir. 1994)). Unlike the statements at issue in *Godwin*, the statements and actions Johnson describes are not directly related to any adverse action by his employer (e.g. his termination). 150 F.3d. at 1221 (employer's comment was related to position plaintiff sought). Thus, Johnson has not presented any direct evidence of racial discrimination.

In the absence of direct evidence that he was the

victim of racial discrimination, Plaintiff's case must pass through the *McDonnell Douglas* burden shifting analysis. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); see also *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061-62 (9th Cir. 2002). First, Plaintiff bears the burden of establishing a prima facie case of employment discrimination based on race. *Garrett*, 10 F.3d at 1432. Second, Defendant then bears the burden of articulating a legitimate non-discriminatory [*7] reason for the adverse employment decision. *Id.* Finally, the burden shifts back to Plaintiff to show that Defendant's stated reason was merely a pretext. *Id.* (citations omitted).

To establish a prima facie case, Plaintiff must show (1) he was subject to verbal or physical conduct of racial or sexual nature, (2) that conduct was unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of his employment. *Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th Cir. 1998). Moreover, the conduct must be imputed to the employer. See *Washington v. Boeing Co.*, 105 Wn. App. 1, 13, 19 P.3d 1041 (Wn. Ct. App. 2000). Viewing the evidence presented in a light most favorable to Plaintiff, Johnson has described conduct that is of racial nature. (Johnson Decl. at P 9.) Similarly, Johnson's complaint to his superiors at SPI makes it clear the comment was unwelcome. (*Id.* at PP 11-13.)

The question then turns to whether Plaintiff has described conduct that is sufficient or pervasive enough to alter the conditions of his employment. *Gregory*, 153 F.3d at 1074. The working environment must be both objectively and subjectively perceived as abusive. *Brooks v. City of San Mateo*, 229 F.3d 917, 923-24 (9th Cir. 2000)(quotations [*8] omitted). Isolated, single incidents of harassment are generally insufficient to support a finding of objective unreasonableness. *Id.* at 924. In *Harris*, the Supreme Court listed frequency, severity, and level of interference with work performance as factors relevant to a court's inquiry on this issue. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). Here, Johnson points to two events: Murphy's original comment Johnson "overheard" and Murphy's gestures. Johnson's extremely short stay with SPI makes it somewhat difficult to assess whether his working conditions were altered. His timecard indicated he was worked at SPI on seven days over the course of two weeks. (Baisch Decl., Ex. 1.) The Court finds that the two events are more like the isolated

incident described in *Brooks* than more frequent transgressions contemplated by *Harris*. Plaintiff states he has physically disturbed by the event, but offers nothing beyond his own declaration to demonstrate distress. (See Johnson Decl.) As such, the Court cannot conclude, based on the record before it, that Plaintiff has described conduct sufficient or pervasive enough to alter the conditions of his employment.

Plaintiff has failed to [*9] present a prima facie case for a racially hostile work environment in violation of either federal or state law. Defendant is entitled to summary judgment on both claims.

III. Retaliation

A plaintiff's claim for retaliation in violation of Title VII is analyzed under the *McDonnell Douglas* framework outlined above. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987). To establish his prima facie case, Plaintiff must show (1) he engaged in statutorily protected activity, (2) SPI imposed an adverse employment action, and (3) there was a causal link between the protected activity and adverse action. *Id.* Because the test for retaliation is identical under *RCW 49.60.210 (1)*, the Court will analyze the federal claim and state claim simultaneously. See *Coville v. Cobarc Services, Inc.* 73 Wn. App. 433, 439, 869 P.2d 1103 (Wn. Ct. App. 1994) (listing the test as: "(1) he or she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) a causal link between the former and the latter"). The parties do not dispute that Johnson's complaint of discrimination was a protected activity. (Dkt. No. 18 at 11.)

An employment decision is adverse if it is based on a retaliatory [*10] motive and is likely to deter protected activity. *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000)(adopting the EEOC's interpretation of "adverse employment action"); see also *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 ("a plaintiff must show that a reasonable employee would have found the challenged action materially adverse"). Viewing the evidence in the light most favorable to Plaintiff, Johnson's termination was a decision squarely within this definition of "adverse." A causal link between protected activity and adverse action may be inferred where the two events are close in time. *Ray*, 217 F.3d at 1244. As a matter of logic, this inference may carry less force when the total length of Johnson's employment was less than

two weeks and when his timecard indicates he only worked seven days during that period. (*See* Baisch Decl., Ex. 1.) Nevertheless, the proximity is close enough in time to infer a causal link between his complaint and his termination. Under the minimal evidence standard required under this initial burden phase, Plaintiff has stated a prima facie case. *See, e.g., Coghlan v. American Seafoods Co. LLC., 413 F.3d 1090, 1094 (9th Cir. 2005)*

Pursuant [*11] to *McDonnell Douglas*, the burden shifts to SPI to articulate a non-discriminatory reason for its action. *411 U.S. at 802-805*. Here, SPI states they had a legitimate reason to his termination: he was no longer able to perform his job functions because of his high blood pressure and there were no other job openings. (Dkt. No. 18 at 11-12.) Johnson's case is bereft of any evidence that would show this justification to be a mere pretext. His own declaration, filed after Defendant's motion and reply, is silent on the cause of his termination. While he argues in his pleadings that his blood pressure did not interfere with his work, a party may not simply rely on pleadings to create a material issue of fact. *Celotex Corp., 477 U.S. at 324*. There is simply no evidence, either direct or circumstantial, in the record that would show SPI's justification to be mere pretext. *Coghlan, 413 F.3d at 1095* (noting that direct evidence need only be minimal to establish pretext but further observing that circumstantial evidence must be specific and substantial to defeat summary judgment). Plaintiff thus fails to carry his burden under *McDonnell Douglas*.

Moreover, the fact that the same decision-maker hired [*12] and fired Johnson creates a strong inference that SPI was not racially motivated. *Coghlan, 413 F.3d at 1096-97*. The inference arises where the same individual is responsible for hiring and firing a plaintiff and both actions take place in a short time frame. *Id. at 1096*. Here, Germer was responsible for hiring Johnson and had the conversation with Johnson that terminated his employment. (Baisch Decl. PP 6, 12.) Both conversations took place just weeks apart. (*Id.*) While the inference is neither a "mandatory presumption" nor a "mere possible conclusion," a district court must consider the same actor analysis when evaluating a motion for summary judgment. *Coghlan, 413 F.3d at 1097*. Plaintiff has offered no evidence to counter this inference.

Thus, because Plaintiff cannot carry his burden under *McDonnell Douglas* or rebut the same actor inference,

Defendant is entitled to summary judgment on the retaliation claims.

IV. Wrongful Discharge

Plaintiff asserts a claim for "unlawful and wrongful discharge" in violation of the common law of Washington. (Dkt. No. 4 at 5.) Defendant apparently interprets this action as a claim for constructive discharge. (*See* Dkt. No. 18 at 12-13.) Johnson's pleadings [*13] offer no clarification on this issue. (Dkt. No. 23.) The Court reads Plaintiff's complaint as asserting a claim for wrongful discharge in violation of public policy. In Washington, an employer may be liable for the tort of wrongful discharge "where employees are fired for exercising a legal right or privilege." *See Reninger v. State Dept. of Corrections, 134 Wn.2d 437, 447, 951 P.2d 782 (Wn. 1998)*. Again, Plaintiff has offered no evidence beyond his own pleadings explaining the reasons for his termination. He merely states that "Defendant has hidden the true reasons for Plaintiff's termination." (Dkt. No. 4 at 5.) Plaintiff has failed to produce any evidence that would create a material issue of fact on the cause of his discharge. *Adickes, 398 U.S. at 159*. In the absence of any such evidence, Defendant is entitled to summary judgment on Plaintiff's wrongful discharge in violation of public policy claim.

V. Motion to Continue

On September 24, 2008, five days after Defendants' motion for summary judgment came ripe for consideration, Plaintiff filed a motion for a continuance. (Dkt. No. 26.) By that date, Plaintiff had already filed a response (Dkt. No. 21) as well as a sur-reply (Dkt. No. 24) to Defendant's [*14] motion for summary judgment. In his motion for a continuance, Plaintiff asks the Court to delay the trial date so he can retain an attorney. (Dkt. No. 26.) His motion came ripe just a month and a half before his scheduled trial date and more than two years after his departure from SPI. Since he filed his complaint in November, 2007, Plaintiff has failed to serve Defendant with any discovery request or any request for a deposition. (Pugh Decl. P 12; Dkt. No. 28 at 3.) The Court's scheduling order, dated January 31, 2008, states specifically that failure to complete discovery is "not recognized as good cause" for the purposes of altering the dates. (Dkt. No. 17 at 1.) The Court is sympathetic to Johnson's attempts to retain an attorney. However, attorneys in such matters can be retained without any up-front costs to plaintiffs on a contingent fee basis.

Plaintiff has not explained whether he has attempted to contact any attorney nor has he stated if any attorneys have turned down his requests for representation in the two years since he stopped working for SPI. On this record, the Court cannot find good cause to continue the matter.

Conclusion

The Court agrees with Johnson that Murphy's [*15] conduct, if it occurred as Plaintiff described, is undoubtedly offensive. However, the standards for evaluating hostility under Title VII and other relevant statutes are demanding. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). Plaintiff's failure to provide the Court with any evidence beyond his own declaration is detrimental

to his claims. The Court hereby GRANTS Defendant's motion for summary judgment on all claims. (Dkt. No. 18.) The Court DENIES Plaintiff's motion for a continuance. (Dkt. No. 26.) Plaintiff's action is dismissed with prejudice.

The clerk is directed to send a copy of this order to counsel of record and to Plaintiff.

DATED this 6th day of November, 2008.

/s/ Marsha J. Pechman

HONORABLE MARSHA J. PECHMAN

United States District Court Judge

Appendix 5



**PATRICIA PETTIT, Plaintiff-Appellant, v. STEPPINGSTONE, CENTER FOR
THE POTENTIALLY GIFTED and KIYO MORSE, Defendants-Appellees.**

No. 09-2260

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**11a0458n.06; 429 Fed. Appx. 524; 2011 U.S. App. LEXIS 14025; 2011 FED App.
0458N (6th Cir.); 18 Wage & Hour Cas. 2d (BNA) 219**

July 7, 2011, Filed

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PRIOR HISTORY: [**1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

Pettit v. Steppingstone Ctr. for the Potentially Gifted, 2009 U.S. Dist. LEXIS 78262 (E.D. Mich., Sept. 1, 2009)

COUNSEL: For PATRICIA E. PETTIT, Plaintiff - Appellant: Barry S. Fagan, Attorney, Darcie R. Brault, Dib, Fagan & Brault, Royal Oak, MI.

For STEPPINGSTONE, CENTER FOR THE POTENTIALLY GIFTED, dba Steppingstone School for Gifted Education, a domestic non-profit organization, KIYO MORSE, Defendant - Appellees: Eric Stempien, Gregory J. Stempien, Stempien & Stempien, Northville, MI.

JUDGES: Before: MARTIN and STRANCH, Circuit

Judges, and THAPAR, District Judge. *

* The Honorable Amul Thapar, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION BY: JANE B. STRANCH

OPINION

[*526] **JANE B. STRANCH**, Circuit Judge. This is a case brought by Pettit against her prior employer, Steppingstone, and its headmistress, Morse, alleging retaliation under the Fair Labor Standards Act. The district court granted summary judgment to the defendants, and Pettit timely appealed that order. We affirm.

I. Background

A. Factual Background

Patricia Pettit began working for Steppingstone in January 2006 under a part-time barter arrangement whereby Pettit's salary was credited towards the tuition of her three sons. Her starting title was [**2] Director of Admissions, and she also began to serve as Director of Human Resources in the fall of 2006.

All employees at Steppingstone worked under one-year form letter agreements, generally spanning a

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single fiscal year (August to August). Employees were required to sign a new agreement every year, although often Steppingstone failed to provide new contracts, and employees continued to work anyway. Pettit signed her first letter agreement with Steppingstone in September 2006, which expired in December 2006. She was never presented with a written contract during the 2007 calendar year. Other non-faculty employees signed one-year contracts in August 2007, which had been revised by legal counsel and differed substantially from prior years' versions.

As Director of Human Resources, Pettit suspected two employees were misclassified under the Fair Labor Standards Act ("FLSA"), and in December 2007 she so advised her supervisor and head of the school, Kiyu Morse. Throughout December, Pettit investigated, contacted outside legal counsel for an opinion, and drafted an informative memorandum which she gave to Morse. At the same time, Morse was preoccupied with an event of major concern for Steppingstone, [**3] the relocation of the entire campus from the current donated property to a leased property. Morse worried that this relocation would harm enrollment and potentially threaten the school's existence, and so she told Pettit to concentrate on admissions, rather than human resources. In fact, as Morse reminded Pettit in an e-mail in February 2008, she had told Pettit at every meeting since returning from the New Year's break in January 2008 that "I need you to put all your time and energy into admissions."

Hourly employees at Steppingstone were required to keep a "work diary" to catalogue daily activities. In December 2007, Morse reminded Pettit that she was supposed to be keeping a work diary. Morse asked another employee, Sandra Blay, to lay out specific instructions about the diary in an e-mail to all hourly employees, including Pettit. The e-mail was sent on January 14, 2008. At about that time, Pettit began to press Morse on the perceived FLSA issue.

On January 15, 2008, Pettit brought up the FLSA issue in an office meeting. It [*527] appears that this was the only time Pettit and Morse engaged in a face-to-face conversation about her FLSA concerns, as evidenced by a later e-mail from Morse [**4] to Pettit asking why, if Pettit wanted to discuss the issue, she never raised it in any of their regular weekly meetings. Instead, Pettit pursued the issue with Morse electronically. That same day she sent the first in a series

of lengthy e-mail communications to Morse about FLSA compliance. These e-mails spanned three, four, up to seven pages, single-spaced, and took an increasingly personal and accusatory tone towards Morse.

On February 1, 2008, Pettit sent an e-mail to the Executive Committee of the Steppingstone Board of Trustees which read, in relevant part:

As your Human Resources Director as well as your Admissions Director, it is my professional opinion that Steppingstone School for Gifted Education has been and continues to be in violation of the Fair Labor Standards Act. I have notified/re-notified school administration regarding the problem numerous times in writing and verbally over the last 8 weeks. Responses indicate to me little interest in coming into compliance at this time. Further, numerous indications are that there is little understanding of the issues so I am unclear that there will ever be interest in coming into compliance.

Should Steppingstone decide to create [**5] a Wage and Hour program that is in compliance with the law by February 15, 2008, I will enthusiastically support the decision and work to meet that goal in addition to dedicating myself to our admissions goals. Should Steppingstone decide not to seek the support of professional resources to rectify the problem, as I do not want to be in a position of knowingly working in an organization that is out of legal compliance, I see no choice but to report unlawful activity to the U.S. Department of Labor.

This e-mail developed into the first of several e-mail chains between Pettit, Morse, and/or members of the Board. For three days, Pettit, Morse, and Richard Niemisto, a member of the Executive Committee, engaged in back-and-forth e-mailing about Steppingstone's FLSA compliance, in which Pettit ultimately called into question Morse's ability to make an informed decision. At the same time, Morse and Pettit

were engaged in communications on an e-mail chain about the work diary requirement, in which Pettit suggested Morse was spreading gossip about her.

On February 3, 2008, Pettit sent Morse yet another e-mail, copying the entire Executive Committee, in which Pettit complained that Morse failed [**6] to deal with all of Pettit's concerns about FLSA compliance. A back-and-forth exchange continued daily between Morse and Pettit, copying the Committee, and on February 5, 2008 Pettit asserted her own FLSA rights in her response e-mail.

And also, recently now that you've emailed to me that I am 'hourly' which was different than how we were handling what I understood to be an exempt classification and how it would be handled properly on the books . . . , you will owe me -- and this is a quick guess -- probably over \$1000 for work (2007 -- doesn't include 2006) you knew I performed but was not put down on my time sheet There is a two year statute of limitations, I believe, on issues like this.¹

¹ Pettit believed that she herself had been previously classified as exempt, but that Morse had begun treating her as an "hourly," and presumably non-exempt employee, thus entitling her to overtime pay.

[*528] Subsequent to that, Pettit again e-mailed Morse to point out the flaws and inconsistencies she found in Morse's approach to the FLSA issue and questioned Morse's honesty in relaying information to Pettit. Morse sent Pettit a final message on February 7, 2008 stating, "Dear Pat, I think we'll have [**7] to agree to disagree and move on to the issues of admissions, which I repeat, is where the focus needs to be."

However, Pettit had already made clear to Morse that she did not intend to leave the FLSA issue and focus on admissions, despite Morse's repeated instructions to do so. In a February 3 e-mail to Morse and the Executive Committee, Pettit explains why she would not work as instructed:

You have let me know that your focus

must be on the building issue -- very understandable. Unfortunately, as I have indicated to you, that won't be a good defense if a non-compliance charge comes our way Further, never have I been in a position to have to choose between following the law and following my boss' [sic] direction

I am also organizationally minded, so that my work focuses on what's right for the organization [sic] will be right for all associated in the long run. In weighing everything out, I came to the very difficult decision to push this issue to the board level.

I have never entertained an 'end run' with any other manager in my career. The communication problems have reared up so strongly externally and internally in the last nine months, that I have felt compelled not [**8] once but twice in the last two months.

This is an extremely unpleasant position for me. And an unnecessary waste of time and resources, from my point of view.

Overall, Pettit's e-mails show that rather than focusing on admissions now as instructed and returning to the FLSA issue at a later date, Pettit was spending her work time on a campaign to institutionalize her view of the FLSA and to force the immediate creation of a wage and hour policy in accord with her expectations. Her lengthy communications also extended beyond that purpose to include comments on Morse's capabilities as a supervisor, such as: "Your investment of time in back and forth emails when I am right down the hall is a strong indicator of a problem beyond wage and hour compliance;" and "[T]he information here clearly indicates avoidance, conflict, poor communication and the absence of teamwork at the minimum." Pettit presented this stream of complaint and comment to and about Morse before members of the governing Board.

On February 5, 2008, during this period of debate, Morse presented Pettit with a contract for the remainder of the 2007-2008 year that included new provisions. In

August 2007, other non-faculty employees [**9] had signed a new contract that had been revised by counsel. The contract proposed to Pettit contained provisions that were unfavorable to her: her human resources duties were removed; it expired on June 20, 2008 rather than at the end of the fiscal year; her schedule was set to specific hours on certain days; and her salary could not be credited towards non-tuition expenses. Pettit did not sign the contract.

On March 11, Morse presented Pettit with a revised contract including additional provisions added by the school's attorney. The new provisions included: a requirement that Pettit report only to Morse; a limitation of Pettit's hours to 20 per week [*529] unless "specifically authorized in writing by the Head of School"; a termination clause allowing termination by either party for any reason given 30 days' written notice; a confidentiality provision; a non-compete provision; an arbitration provision; and a provision limiting Pettit's right to sue to 180 days after any actionable event.

Pettit hired her own attorney to negotiate the contract terms, and a number of contract drafts were exchanged. Morse yielded in changing the contract to expire on December 31, 2008 but refused other changes. [**10] She gave Pettit a "final" contract on May 5, 2008, and Pettit declined to sign it, instead insisting upon further negotiation.

On May 9, 2008, Pettit showed up for work, but Morse sent two other employees outside to tell Pettit either to sign her contract or turn in her keys. Pettit refused to do either, instead telling her co-workers that she would discuss her contract with Morse. Morse refused to come out to speak with Pettit, and instead contacted a Board member who sent two uniformed police officers to escort Pettit from the premises.

B. Procedural Background

At the conclusion of discovery, Defendants moved for summary judgment. On September 1, 2009, the district court granted summary judgment to the Defendants, finding that Pettit had made her prima facie case of retaliation but failed to prove pretext. Specifically, the court found that Pettit had not presented sufficient evidence to rebut Defendants' legitimate business explanations for the adverse actions taken against her. The district court also found Pettit not to be credible. She timely filed this appeal.

II. Analysis

A. Standard of Review

This Court reviews a district court's grant of summary judgment *de novo*. *Staunch v. Cont'l Airlines, Inc.*, 511 F.3d 625, 628 (6th Cir. 2008). [**11] Summary judgment is appropriate if the record shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. The moving party has the burden of proving the absence of a genuine issue of material fact and its entitlement to summary judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). This burden can be discharged by showing that the nonmoving party has failed to establish an essential element of his case, for which he bears the ultimate burden of proof at trial. *Id.* To refute such a showing, the nonmoving party must present some significant, probative evidence indicating the necessity of a trial for resolving a material, factual dispute. *Id.* at 322. A mere scintilla of evidence is not enough. *Anderson v. Liberty Lobby*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202. All facts, including inferences, are viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

B. The Sufficiency of Pettit's Evidence under the Burden-Shifting Analysis

The Fair Labor Standards Act proscribes retaliation by "discharg[ing]" or otherwise "discriminat[ing]" [**12] against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act." 29 U.S.C. § 215(a)(3) (2010). Claims of FLSA retaliation are subject to [*530] the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See *Adair v. Charter Cnty. of Wayne*, 452 F.3d 482, 483, 489 (6th Cir. 2006).

On a motion for summary judgment, the district court considers whether there is sufficient evidence to create a genuine dispute at each stage of the *McDonnell Douglas* inquiry. Thus, the plaintiff must first submit evidence from which a reasonable jury could conclude that a prima facie case of discrimination has

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been established. The defendant must then offer sufficient evidence of a legitimate, nondiscriminatory reason for its action. If the defendant does so, the plaintiff must identify evidence from which a reasonable jury could conclude that the proffered reason is actually a pretext for unlawful discrimination.

Macy v. Hopkins County Sch. Bd. of Educ., 484 F.3d 357, 364 (6th Cir. 2007) (internal citations and quotation marks omitted). Pettit asserts error by the district court at every stage of the *McDonnell* [**13] *Douglas* inquiry.

C. Plaintiff's Four-Part Prima Facie Case

To make her prima facie case of retaliation, the plaintiff must prove that (1) she engaged in protected activity under the FLSA; (2) her exercise of this right was known by the employer; (3) the employer took an employment action adverse to her; and (4) there was a causal connection between the protected activity and the adverse employment action. *Adair*, 452 F.3d at 489.

1. Protected Activity

A prototypical claim of FLSA retaliation involves a complaint of FLSA violation made in the interest of employee(s), generally regarding some aspect of one's own pay or the pay of other employees. Under FLSA retaliation law, Pettit's situation is different because her complaints were made in her capacity as Director of Human Resources, alleging misclassification of other employees and lack of a company-wide wage and hour policy. To the degree that Pettit's FLSA complaints were made in the course of performance of human resource job duties assigned to her and undertaken for the purpose of protecting the interests of the employer, they do not constitute protected activity under § 215(a)(3).²

² While the Sixth Circuit has not addressed the issue [**14] of distinguishing job performance from protected activity, district courts within the Circuit have come to the conclusion that complaints within the scope of one's job duties cannot be protected activity. *See, e.g., Pettit v. Steppingstone Ctr. for the Potentially Gifted*, No. 08-12205, 2009 U.S. Dist. LEXIS 78262 (E.D. Mich. Sept. 1, 2009); *Samons v. Cardington Yutaka Techs, Inc.*, No. 2:08-cv-988, 2009 U.S. Dist. LEXIS 30398, *15-16 (S.D. Ohio April 7,

2009); *Robinson v. Wal-Mart Stores, Inc.*, 341 F. Supp. 2d 759 (W.D. Mich. 2004). The other Circuits that have addressed the issue have reached the same conclusion. *See, e.g., Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 627-28 (5th Cir. 2008); *Claudio-Gotay v. Becton Dickinson Caribe, Ltd.*, 375 F.3d 99, 102 (1st Cir. 2004); *EEOC v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir. 1998); *McKenzie v. Renberg's Inc.*, 94 F.3d 1478, 1486-87 (10th Cir. 1996).

Under FLSA retaliation law, there is a legally cognizable distinction between the performance of job duties and the assertion of one's own FLSA rights or the rights of others. For an employee specifically tasked with personnel or human resources duties, dealing with FLSA compliance is part of [**15] the job, to be undertaken with the interests of the employing company in mind. An assertion of FLSA rights, on the other hand, will normally be specific [*531] to one or more employee(s) or a class of employees and will usually be made in the interests of that employee, group or class of employees and, thus, may be adverse to the employer's interests.

In this case, Pettit brought her concerns about Steppingstone's FLSA compliance to Morse's attention on several occasions, primarily in January and February 2008. Pettit argues that her repeated disclosures to Morse and the Steppingstone Board *all* constitute protected activity under § 215(a)(3). However, the district court determined that only one of Pettit's complaints, the February 1, 2008 e-mail to the Executive Committee, constituted protected activity. We agree that Pettit's invocation of threatening language took her February 1 complaint outside the realm of job performance. Although she suggests she is acting in her official capacity ("As your Human Resources Director . . . , it is my professional opinion that . . ."), she is clearly stepping outside her official capacity, as any action resulting from this complaint would be adverse to [**16] Steppingstone.

Additionally, we find Pettit's February 5 e-mail to Morse and the Executive Committee also constitutes protected activity because Pettit asserts a violation of her own FLSA rights, namely Steppingstone's failure to pay her approximately \$1,000 in overtime pay. Pettit also implies she could institute legal action, an act clearly in her own interest and, thus, outside her job duties.

The complaints made by Pettit prior to the February

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1 e-mail are not protected activity, as they were undertaken on behalf of the interests of the school and neither assert individual or group rights nor threaten action adverse to the school. Instead, Pettit's requests were for Steppingstone to change its wage and hour policy, one of her responsibilities as Human Resources Director. Pettit now argues that she was not responsible for Steppingstone's FLSA compliance while employed with the school. However, Pettit's basis for bringing this issue to the school's attention was her insistence, in her stated capacity as Human Resources Director, that Steppingstone immediately comply with her determinations regarding application of the FLSA.

Finally, the Defendants argue that even if Pettit's threat [**17] to report violations would ordinarily constitute protected activity, in this case the threat is not protected by the FLSA anti-retaliation provision because Morse had already remedied the violation by consulting outside counsel. It is unnecessary to address that issue here. As this Court has stated previously, corrective action is appropriately considered under the causal connection element of the plaintiff's prima facie case and is not relevant to the issue of whether the plaintiff engaged in protected activity. *Moore v. Freeman*, 355 F.3d 558, 562-63 (6th Cir. 2004).

Pettit satisfied step one of her prima facie case: she engaged in protected activity under the FLSA in her February 1 and 5 emails.

2. Exercise of Right

The parties agree that Steppingstone was aware Pettit claimed to be exercising her rights under the FLSA. Pettit established step two.

3. Adverse Action

"The antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 67, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). "[A] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context [**18] means it [*532] well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal citations and quotation marks omitted). To be materially adverse, an adverse action "must be more disruptive than a mere inconvenience or an

alteration of job responsibilities." *Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876, 886 (6th Cir. 1996) (internal citations and quotation marks omitted). Though not by way of limitation, this Circuit has enumerated certain employment actions that are usually indicative of material adversity, including "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461-62 (6th Cir. 2000) (internal quotation marks omitted).³

3 However, as the Court held in *Burlington*, for the purpose of retaliation, adverse actions are not limited to employment actions, but encompass a broader range of actions, even outside the employment context, that harm an employee. 548 U.S. at 61-67.

Pettit argues that Defendants [**19] took a number of adverse actions against her. Specifically, she points to: (1) termination; (2) her children's "de facto expulsion" from school; (3) Steppingstone's insistence on a revised contract with adverse conditions, including removal of human resources duties; (4) denial of a raise; (5) reduction in number of work hours unless authorized; (6) removal of children from enrichment classes; (7) disallowing Pettit to barter for enrichment classes; (8) imposing new timekeeping requirements; and (9) elimination of a just cause provision in her employment contract. On appeal, Defendants concede that two of the actions taken against Pettit were materially adverse: (1) the removal of Pettit's human resources duties, and (2) the contract term prohibiting Pettit from bartering for extended day service for her children.

Termination is a materially adverse action against an employee. *See, e.g., Bowman*, 220 F.3d at 462. Defendants' argument that they never terminated Pettit, that she voluntarily quit by not signing her new contract, is unconvincing. A significant change in the terms of employment imposed by an employer may constitute a constructive discharge. However, requiring an employee [**20] to sign an employment agreement is not actionable if there are no materially adverse changes to the terms of the employment in the agreement. *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987). Because certain terms of the various contracts presented to Pettit

in 2008 differed materially and adversely from her prior agreements with Steppingstone, the insistence that Pettit sign the contract constitutes an adverse employment action.⁴

4 We consider Pettit's argument that the elimination of the just-cause provision of her contract constitutes an adverse action to be subsumed in the requirement that Pettit sign a contract.

While Defendants have conceded the adverse nature of disallowing Pettit to barter for extended day care services, they do not concede adversity with regard to Pettit's claim that she was no longer allowed to barter for after-school enrichment classes. The evidence demonstrates that the ability to barter for these classes was never part of Pettit's arrangement with Steppingstone. Pettit alleges that, prior to her February 1 e-mail, her children were routinely allowed to take these classes by offsetting the cost against her hours. However, the Defendants have offered [**21] invoices and canceled checks indicating [**533] that Pettit paid for the classes in 2006 and 2007. Morse states that one class was mistakenly credited against Pettit's earnings in 2008 due to error by the office administrator. Because Pettit did not have the ability to barter for enrichment classes before her protected activity, Defendants' refusal to allow her to barter after her complaints cannot constitute adverse action.⁵

5 We treat Pettit's argument that Defendants' pulling her children from their enrichment classes is an adverse action as being part and parcel of this argument that the loss of the enrichment classes as a benefit of employment is an adverse action.

The remainder of the adverse actions alleged by Pettit on appeal - the reduction of her hours and the imposition of time-keeping requirements - do not qualify as materially adverse. First, we are not convinced that the 20-hour-per-week restriction constitutes a change at all. Pettit's 2006 contract set her hours at less than 10 per week, specifically on Tuesdays, Wednesdays, and Thursdays from 9:00 until 11:30 a.m., "to be expanded by mutual agreement as needs dictate." The new contract stated that Pettit's work hours were to [**22] be limited to 20 per week unless Morse gave approval to exceed that number. Pettit's relationship with the school had always required agreement of the school for expansion of hours

over a minimal number. Therefore, the contract provision does not qualify as a new materially adverse condition imposed by the employer.

The time-keeping diary requirements fail also. They were requested prior to Pettit's undertaking protected activity and were required of other employees. Even if time keeping were considered a new condition, it affected neither Pettit's position nor compensation and is the type of inconvenience that falls short of an actionable level of material adversity.

Because Pettit has established some of her allegations of adverse action, she satisfies step three of her prima facie case.

4. Causal Connection

"[T]o establish the element of causal link a plaintiff is required to proffer evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action." *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997) (internal quotation marks and citation omitted). At this stage, the plaintiff's burden to show causation entails "requiring [**23] the plaintiff to put forth some evidence to deduce a causal connection between the retaliatory action and the protected activity and requiring the court to draw reasonable inferences from that evidence, providing it is credible." *Id.* The burden is easily met.

Closeness in time between the protected activity and the adverse action is strong evidence, but "temporal proximity, standing alone, is not enough to establish a causal connection for a retaliation claim." *Spengler v. Worthington Cylinders*, 615 F.3d 481, 494 (6th Cir. 2010). However, temporal proximity combined with other evidence of "retaliatory conduct" can be enough to prove this element of a plaintiff's prima facie case. *Id.* One example of such sufficient, additional evidence is evidence of disparate treatment. *See Cantrell v. Nissan N. Am. Inc.*, 145 F. App'x 99, 105-06 (6th Cir. 2005).

Pettit has met her burden to prove causal connection.⁶ She was given an employment [**534] contract containing a number of unfavorable terms only 4 days after her February 1 e-mail and on the same day as her February 5 e-mail, thus creating an inference of retaliation through temporal proximity. Additionally, the parties agree that the contracts presented [**24] to Pettit differed materially from those presented to Pettit in

previous years and to other employees the same year. Thus, Pettit has presented sufficient proof of causation to satisfy the fourth step of her prima facie case.

6 Defendants argue that they took action to correct any FLSA problem, negating Pettit's showing of causal connection. The corrective action asserted is a conversation between Morse and one member of the Board, Nancy Furman, who has a master's degree in human resources. According to Furman's deposition, Morse asked Furman if she knew the laws for overtime. Furman responded that anything over forty hours a week was time and a half by law unless the employee is exempt. Furman could not remember the month or year this conversation took place. Because there are genuine factual issues as to when this conversation took place and whether it constituted "corrective action," granting summary judgment on this ground would be inappropriate.

5. Direct Evidence as Alternative to Inferential Evidence of Retaliation

In addition to arguing that she has offered sufficient evidence of prima facie retaliation to shift the burden to the Defendants under *McDonnell Douglas*, Pettit alternatively [**25] argues the district court erred in applying the *McDonnell Douglas* framework to her claim. She alleges she provided direct evidence of retaliation, which removes her claim from the burden-shifting framework. The evidence presented by Pettit, while applicable to her prima facie case, is not direct evidence of retaliation or retaliatory motive.

"Direct evidence is evidence, which if believed, does not require an inference to conclude that unlawful retaliation motivated an employer's action." *Spengler*, 615 F.3d at 491. In other words, direct evidence requires the drawing of the conclusion that the defendant retaliated against the plaintiff. *Id.* In this case, Pettit points to an e-mail from Morse in which she tells Pettit that her hours will be capped at 20 per week "until the FLSA issues have been resolved." ⁷

7 Pettit also points to four other examples of what she calls "the lead up" to this e-mail. However, none are direct evidence.

This e-mail is germane to proving Pettit's prima facie case and does raise questions; however, it is insufficient

to constitute direct evidence of retaliatory intent because, standing alone, it requires an inference of intent to reach the conclusion of unlawful [**26] motive. Pettit infers that Morse was impermissibly motivated by Pettit's prior complaints in restricting her hours. It could also be inferred that Defendants were restricting her hours to enforce her part-time status for budgetary reasons and to enforce Morse's prior requests that Pettit spend all her time on admissions. The fact that an inference is required to get from the e-mail to Morse's motive disqualifies it as direct evidence.

D. Defendants' Legitimate Reasons for their Adverse Actions

Once plaintiff has established her prima facie case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's [discharge]." *McDonnell Douglas*, 411 U.S. at 802.

Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone [*535] else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the [**27] defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.

Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-255, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) (citations omitted). The employer's burden at this stage is one of production, not persuasion. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

The adverse action established by Pettit is, at its core, a claim based on the contract required by Steppingstone. The gravamen of her argument is that she was required to sign a contract with terms so adverse and onerous that it effectively ended her employment, whether that end is

defined as a termination or a constructive termination.

Defendants proffer a legitimate, non-retaliatory explanation for their insistence on the adverse provisions of Pettit's contract. First, Defendants argue that Pettit was stripped of her human resources duties because the school was in an enrollment crisis due to the relocation and needed her to focus on admissions, which would determine whether the school could survive in its new location. Morse also stated in her deposition that Pettit was not particularly skilled at human resources tasks. Second, Defendants assert that they [**28] limited Pettit's hours to twenty per week absent approval due to budget concerns related to the relocation. Third, Defendants contend that they prohibited Pettit from bartering for time in the extended day program because Pettit abused her ability to use the program free of charge by gradually working later and longer hours. Finally, to the extent Pettit's contract differed from those presented to other non-faculty employees, Defendants assert that they based those changes on the advice of counsel and such clauses were necessitated by Pettit's position, responsibilities and behavior.

At this stage, Defendants have the burden of production. They have satisfied that burden by presenting legitimate business reasons that raise a genuine issue of fact as to whether they discriminated against Pettit.

E. Pretext

At the final stage of the *McDonnell Douglas* inquiry, the burden of production requires the plaintiff to prove the employer's proffered reasons for its adverse actions against the employee were, in fact, pretext for retaliation. "To raise a genuine issue of fact as to pretext and defeat a summary judgment motion under this position, the Plaintiffs must show that (1) the proffered reason [**29] had no factual basis, (2) the proffered reason did not actually motivate Defendants' action, or (3) the proffered reason was insufficient to motivate the action." *Adair*, 452 F.3d at 491 (citations omitted).

This Court recognizes the appropriateness of plaintiff's presentation of overlapping evidence in support of both the causal connection element of the prima facie case and the pretext stage of inquiry. While evidence of causal connection at the prima facie stage is often probative of pretext also, the plaintiff's burden at the prima facie stage is easily met. However, that evidence may be insufficient, standing alone, to raise a genuine

issue as to pretext. *See, e.g., Blair v. Henry Filters, Inc.*, 505 F.3d 517, 533 (6th Cir. 2007) ("[T]he evidence that [the plaintiff] produce[s] in support of his prima facie case may, but will not necessarily, suffice to [*536] show a genuine issue of material fact concerning pretext and thus to survive summary judgment.") (overruled on other grounds). Importantly, any requirement of additional evidence "is limited to the production of evidence rebutting the defendant's proffered legitimate, nondiscriminatory reason for taking the challenged action." *Id.* at 533 [**30] (discussing *Reeves*, 530 U.S. at 149).

In satisfying the prima facie, causal-connection requirement, Pettit presented evidence of both temporal proximity and disparate treatment in the terms of her contract. In support of her burden to show pretext, Pettit relies on this same evidence with additional responses to Defendants' claimed legitimate reasons for their actions. The district court granted summary judgment to Defendants on the basis that Pettit had not proven pretext. Its decision was based, in part, on an adverse credibility determination - that Pettit's behavior cast doubt on her credibility. It is not proper to weigh credibility against the non-movant on a motion for summary judgment. *See Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005) ("In reviewing a summary judgment motion, credibility judgments and weighing the evidence are prohibited. Rather, the evidence should be viewed in the light most favorable to the non-moving party." (citing *Anderson*, 477 U.S. at 255)).

However, this Court may affirm a trial court decision on alternative grounds that support the decision on the record. *Murphy v. Nat'l City Bank*, 560 F.3d 530, 535 (6th Cir. 2009). We find that the [**31] record, as well as the district court's rationale not based on Pettit's credibility, support affirmance. Pettit has not rebutted Defendants' proffered, legitimate reasons for their actions. Pettit never specifies which of the three pretext factors applies to her situation, but it appears she seeks to show that the "proffered reason[s] did not actually motivate Defendants' action." To do so, Pettit must present some evidence rebutting each of those proffered reasons. Temporal proximity is insufficient to carry this burden. An examination of Plaintiff's pretext evidence shows it to be insufficient as well.

The removal of Pettit's human resources duties. As a legitimate reason for this action, Defendants proffered

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that Pettit's attention was needed in admissions due to the school's relocation crisis and the fact that she was not particularly skilled in the area of human resources. To show that these reasons are pretextual, Pettit states that she was available to work more hours to complete both the admissions and human resources duties. But that does not tend to rebut Defendants' rationale nor address the stated concerns. Pettit fails to dispute the real issues: that Steppingstone was [**32] facing an enrollment crisis that threatened the existence of the school; that based on the school budget and this crisis, she had been requested since January to concentrate all her efforts on admissions; that she was asked to "agree to disagree" on the human resources issue until after the crisis; and, that Pettit refused to do so. Further, Pettit makes no attempt to show that she was, in fact, skilled in human resources. Thus, we are left with the conclusion that Pettit failed to show Defendants' legitimate reason for the removal of her human resources duties was pretext.

No bartering for extended day care. As legitimate reasons for this action, Defendants proffered that: Pettit abused her limited ability to use the program without charge; because she was supposed to be part-time, it was never intended that she could use the program extensively; and, another employee who overused the program [*537] was also charged. To show pretext, Pettit states that she was never asked to reduce her use of the program. While this may raise a question, it is insufficient to create a genuine issue as to pretext. Defendants showed that Pettit was not actually charged for much of her use of the program in [**33] March, April, and May 2008, and that another employee was charged for excess use of the program in the same way Pettit was. Further, because Pettit was hired as a part-time employee limited to a set schedule during school hours, Defendants' explanation that it never intended for Pettit to use the day care program extensively is certainly legitimate. Defendants' failure to request that Pettit reduce her use of the program is not sufficient to rebut the evidence and reasoning proffered by Defendants, and thus no genuine issue of fact exists as to this term.

Termination and Insistence that Pettit sign the new, adverse employment contract. As discussed earlier, Defendants allege Pettit was not terminated but was no longer employed because she failed to sign her employment contract, which was required of all employees for continued employment. Pettit alleges termination and, to show pretext, states that Morse lied to

other employees about the termination, saying that Pettit had quit to devote more time to her sons and to scrapbooking. We view this issue as akin to constructive discharge. Thus, the adverse action that resulted in Pettit's loss of employment is more appropriately addressed [**34] under Steppingstone's insistence on an employment contract with new and adverse terms. To show pretext regarding that action, Pettit argues she was the only employee required to sign a contract so favorable to Steppingstone's interests. Pettit is correct that disparate treatment is probative of retaliatory intent. *See, e.g., Tinker v. Sears, Roebuck & Co., 127 F.3d 519, 524 (6th Cir. 1997); Reynolds v. Humko Prod., 756 F.2d 469, 472-73 (6th Cir. 1985).* However, Pettit has failed to show that she is similarly situated to the employees whose contracts were different. We do not require an exact match in a comparator, but our comparison must nonetheless take into account Pettit's burden to rebut the legitimacy of Defendants' proffered reasons.

As the nondiscriminatory basis for the differences between Pettit's contract and that of other Steppingstone employees, Defendants note that the school crisis, Pettit's unique position as Director of Admissions and her actions are legitimate reasons for making the changes to Pettit's contract upon the advice of counsel. In regard to the charge that Pettit's contract was different from those of other employees and from her own prior contract, it is [**35] also important to note that: Pettit's original contract was merely a form; it included language negotiated by Pettit that differed from the contracts signed by other employees; Defendants had the form contract revised in the summer of 2007 to better safeguard the school's interests,⁸ and that revised contract was presented to, and signed by, all other Steppingstone employees.

8 For example, the revised contract included a liquidated damages clause for breach by the employee.

Though all employment contracts were changed in Steppingstone's favor in 2007, it is true that Pettit's contract also differed in its terms from those of other employees. While this is not an easy case, the record supports a finding that Pettit's behavior, bordering on insubordination, was a reasonable basis for inserting into her contract certain terms drafted by counsel to safeguard Steppingstone's interests. Pettit's [*538] position, contract negotiations and her actions make her dissimilar

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from the other employees. No other employee had retained legal counsel to negotiate the particulars of an employment contract that had and would contain provisions different from those of other employees. More telling is the lack [**36] of similarity based on Pettit's actions. No other employee had attacked Morse's character and abilities or aired grievances in lengthy series of e-mails that copied and sought to engage the Board of Trustees. Perhaps most importantly, no other employee was ignoring Morse's instructions calculated to guide the school through the enrollment crisis created by the forced location change. Pettit was the Director of Admissions. Morse anticipated lower enrollment and extra expenses for the school in the upcoming year and thereafter. It was not illegitimate for Defendants to seek to obtain contractually that which they had been requesting for some time: Pettit's sole focus on admissions and cessation of expending school resources

and time outside that needed focus. Pettit has not presented evidence showing these actions were pretext for retaliation. Therefore, even assuming Pettit has proven disparate treatment, as we did at the prima facie stage, she has failed to rebut Defendants' legitimate reasons for changing the terms of her contract.

III. Conclusion

Defendants proffered legitimate reasons for their actions as to Pettit. Pettit has failed to identify evidence from which a reasonable jury [**37] could conclude that the legitimate reasons given by the Defendants were actually a pretext for unlawful discrimination. She has failed to present probative evidence indicating the necessity of a trial for resolving a material factual dispute. Therefore, the district court's grant of summary judgment to the Defendants is AFFIRMED.

Appendix 6



3 of 3 DOCUMENTS

**GEORGE PRUE, Plaintiff, v. UNIVERSITY OF WASHINGTON, et al.,
Defendants.**

Case No. C07-1859RSL

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SEATTLE DIVISION**

2008 U.S. Dist. LEXIS 67341

**August 19, 2008, Decided
August 19, 2008, Filed**

SUBSEQUENT HISTORY: Summary judgment granted, in part, summary judgment denied, in part by *Prue v. Univ. of Wash.*, 2009 U.S. Dist. LEXIS 13085 (W.D. Wash., Feb. 5, 2009)

COUNSEL: [*1] For George Prue, Plaintiff: Michael C Subit, LEAD ATTORNEY, Jillian M. Cutler, FRANK FREED SUBIT & THOMAS, SEATTLE, WA.

For University of Washington, Rachael Hogan, Joanne Suffis, Defendants: Jayne Lyn Freeman, KEATING BUCKLIN & MCCORMACK, SEATTLE, WA.

JUDGES: Robert S. Lasnik, United States District Judge.

OPINION BY: Robert S. Lasnik

OPINION

ORDER GRANTING MOTION TO COMPEL

I. INTRODUCTION

This matter comes before the Court on defendants' motion to compel plaintiff to identify the medical and mental health providers he has seen for the past ten years, to identify the nature of treatment and approximate dates

thereof, and to compel him to sign stipulations to release the records directly from those providers to defendants. Defendants also seek an award of fees and costs for having to bring this motion.

For the reasons set forth below, the Court grants the motion to compel.

II. DISCUSSION

Plaintiff, who is African American, alleges that the University of Washington and two individual defendants discriminated against him based on his race and age when they failed to hire him for an open position in September 2005. Plaintiff seeks emotional distress damages. He contends that he suffers from depression and post traumatic [*2] stress disorder ("PTSD") as a result of defendants' conduct.

Plaintiff has agreed to provide medical records regarding his mental, emotional, or psychological health, and has provided the names of people who have treated him for those issues. He has refused to provide any other information in response to the interrogatory. The parties met and conferred prior to defendants' filing this motion but were unable to resolve the matter.

A. The Discovery Requests.

Defendants are entitled to information relevant to "any party's claim or defense" and to broad discovery of information "reasonably calculated to lead to the discovery of admissible evidence." *Fed. R. Civ. P. 26(b)(1)*. Plaintiff does not argue that he has seen an inordinate number of providers or that it would be otherwise burdensome to respond. Plaintiff concedes that defendants are entitled to information from the past ten years regarding his mental, emotional, or psychological health. He argues that because he is not alleging that defendants caused him any physical harm, any information related to his physical health is privileged and irrelevant. Although plaintiff relies on Washington's physician-patient privilege, it does not appear [*3] to apply in this case.¹ Plaintiff has asserted only federal claims, and the federal law of privilege governs federal question cases. *See, e.g., Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367 n.10 (9th Cir. 1992)*. Although the Supreme Court has recognized a federal psychotherapist-patient privilege, it has not approved of a broader federal privilege. Accordingly, the information is not privileged.

1 Even if the privilege applied, it is likely that plaintiff has waived it. *RCW 5.60.060(4)(b)* ("Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions.").

To support plaintiff's relevancy argument, he cites two published cases from California courts that have limited the scope of similar discovery requests. Although a defendant would not automatically be entitled to review all of a plaintiff's medical records every time an emotional distress claim is made, three points persuade the Court that broad disclosure is appropriate in this case. First, unlike in one of the cases plaintiff cites, he has alleged damages well beyond "garden variety" emotional distress. *See, e.g., Fitzgerald v. Cassil, 216 F.R.D. 632, 637 (N.D. Cal. 2003)* [*4] (explaining that courts have found a waiver of the privilege "when the plaintiff has done more than allege 'garden variety' emotional distress"). Second, plaintiff has not been forthcoming in his discovery responses in two areas. Supplemental Declaration of Jayne Freeman (Dkt. # 27) at PP 10, 11 (explaining that plaintiff subsequently stated that he had applied for positions with several employers not previously identified, and seen at least one other medical provider since moving to Seattle who he had not

previously identified). Regardless of whether the omissions were intentional or the result of memory lapses, they show that defendants may not obtain complete information about plaintiff's emotional distress unless they are able to review the medical records themselves. Third, defendants have engaged a physician to perform an independent medical examination of plaintiff who has opined that he needs to review plaintiff's medical records from the last ten years to complete his evaluation:

[V]alid application of diagnostic criteria in the DSM IV requires direct access to collateral information such as medical history. Complete and accurate information regarding medical as well as mental [*5] health history can be important in not only determining prior functional abilities or impairments, but also evaluating alternate causes of symptoms that meet diagnostic criteria of mental disorders, such as medical conditions, side effects of medication, or substance abuse.

Declaration of Dr. John Hamm, (Dkt. # 17) at P 9. Dr. Hamm's declaration shows that defendants are not merely conducting a "fishing expedition" as plaintiff alleges. Plaintiff has not offered a competing medical opinion. Accordingly, defendants are entitled to information about plaintiff's medical history beyond his mental health records.

The Court considers whether a narrowing of the request would be appropriate. Plaintiff invited defendants to narrow the scope "to inquire about serious health conditions that might have an impact on Mr. Prue's current emotional distress damages." Plaintiff's Opposition at p. 5. However, defendants are not required to rely on plaintiff's determination of what information might be relevant or his determination, in his lay opinion, of what might have caused his symptoms. Rather, defendants are entitled to review the records themselves to evaluate issues of causation, including whether [*6] any of plaintiff's other ailments or medications might have caused his symptoms and whether any of the symptoms predated defendants' actions. Similarly, the records could lead to information regarding whether plaintiff has mitigated his damages, by, for example, following up on previous recommendations by health

care providers.

Plaintiff also offered to narrow the request to records created after plaintiff moved to Washington in May 2005. However, the relevant employment decision was made just a few months later, in September 2005. Defendants are entitled to information prior to that date to evaluate plaintiff's condition before and after the decision.

Accordingly, plaintiff shall be required to provide a complete response to the challenged interrogatory. As for the medical records, the Court will not require plaintiff to sign stipulations for their release. Although the collegial practice of doing so is fairly routine in this district, it is not set forth in the Rules. Defendants can seek the records either through requests for production or subpoenas. If defendants choose to issue requests for production, plaintiff must use his best efforts to secure the records. The Court acknowledges [*7] that plaintiff's foreign residences and multiple state moves may make it very difficult to obtain all of his medical records even with his best efforts in this area. Plaintiff will not be required to use extraordinary efforts to obtain the records.

B. Fees and Costs.

Defendants request an award of its fees and costs in bringing this motion pursuant to *Federal Rule of Civil Procedure 37(a)(4)(A)* which permits an award unless the party's failure to disclose was "substantially justified." In this case, plaintiff's opposition to the discovery request was substantially justified. He has a legitimate privacy interest in his medical records. Also, he had a good faith

basis to argue that defendants should not be entitled to records other than from his mental health physicians. Accordingly, the Court will not require him to pay defendants' fees and costs.

C. Document Filed Under Seal.

Defendants have filed a document under seal without filing a motion to do so as required by Local Rule 5(g). *See* Declaration of Jayne Freeman, (Dkt. # 19), Exhibit C. Because the document contains plaintiff's social security number, the Court will not order it unsealed. Rather, within ten days of the date of this [*8] order, defendants must either (1) file a redacted copy of the document in the docket, or (2) file a motion or stipulation and proposed order to maintain the document under seal. If the parties seek to file any additional documents under seal in this case, they must comply with Local Rule 5(g).

III. CONCLUSION

For all of the foregoing reasons, defendants' motion to compel (Dkt. # 16) is GRANTED. Plaintiff must provide a complete response to Interrogatory No. 5 within ten days of the date of this order.

DATED this 19th day of August, 2008.

/s/ Robert S Lasnik

Robert S. Lasnik

United States District Judge

Appendix 7



MARTHA RANGEL, Plaintiff, v. OMNI HOTEL MANAGEMENT CORPORATION a/k/a OHMC, Defendant.

CIVIL ACTION NO. SA-09-CV-0811 OG (NN)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

2010 U.S. Dist. LEXIS 105400

October 4, 2010, Decided

October 4, 2010, Filed

COUNSEL: [*1] For Martha Rangel, Plaintiff: Dwight E. Jefferson, LEAD ATTORNEY, Dwight E. Jefferson, Attorney at Law. P.L.L.C., Houston, TX.

For TRT Holdings, Inc., individually and doing business as Omni Hotels, Omni Hotels, Omni San Antonio Hotel at the Colonnade, Defendants: Bruce A. Griggs, LEAD ATTORNEY, Ogletree Deakins Nash Smoak & Stewart, PC, Austin, TX.

For Omni Hotels Management Corporation, also known as OHMC, Defendant: Angela N. Marshall, LEAD ATTORNEY, Ogletree Deakins Law Firm, Austin, TX; Bruce A. Griggs, LEAD ATTORNEY, Ogletree Deakins Nash Smoak & Stewart, PC, Austin, TX.

JUDGES: NANCY STEIN NOWAK, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: NANCY STEIN NOWAK

OPINION

REPORT AND RECOMMENDATION

TO: Honorable Orlando Garcia United States District Judge

This report and recommendation addresses the pending motion for summary judgment. ¹After considering the motion, ² the response, ³ the reply, ⁴ the sur-reply, ⁵ and the documentary evidence, ⁶ I recommend granting the motion and entering summary judgment in favor of the defendant.

- 1 Docket entry # 26.
- 2 Docket entry # 26.
- 3 Docket entry # 49.
- 4 Docket entry # 52.
- 5 Docket entry # 60.
- 6 Docket entry #s 26 & 52-55.

Nature of the case. In this lawsuit, plaintiff Martha Rangel sued [*2] her former employer Omni Hotels Management Corporation (Omni) for employment discrimination and retaliation under Title VII of the Civil Rights Acts of 1964. Rangel worked as the human resources director for the Omni Hotel at the Colonnade in San Antonio. Rangel alleges she was terminated based on gender. ⁷ She also alleges she was terminated in retaliation for counseling her male supervisor about inappropriate behavior toward a young female employee. ⁸ Omni moved for summary judgment on both of Rangel's claims.

- 7 Docket entry # 14, P 33.
- 8 *Id.* at 33 & 37-38.

Rangel's gender discrimination claim. Rangel's termination resulted from her involvement in an incident that occurred at the hotel on March 11, 2009. Rangel received a tip from a hotel employee that a hotel steward was selling illegal drugs on hotel premises. Rangel instructed the hotel's loss prevention officer to conduct a baggage check of hotel employees. During the baggage check, the loss prevention officer found cocaine in the steward's bag. The steward provided the names of 10 other hotel employees who used drugs. Rangel gave the ten employees a choice: voluntarily resign or take a drug test. Eight of the ten resigned; two tested [*3] positive for illegal drugs. Neither party disputes these facts.

The dispute centers on who made the decision not to call the police after the loss prevention officer found the cocaine in the steward's baggage. According to Rangel, her supervisor--the hotel general manager--instructed her not to call the police, but to use the steward to obtain the names of other employees using drugs. Omni maintains that Rangel made the decision not to call the police, as a deal with the steward to obtain the names of other drug users.

The next day, Rangel reported the incident to Omni's regional human resources director, who in turn reported the matter to the regional vice-president. After learning about the matter, the regional vice-president investigated what occurred and determined that Rangel was not truthful about who made the decision about calling the police. The vice-president also learned that the steward was hired despite having a criminal background that included convictions for unlawful carrying of a weapon and possession of marijuana. The regional vice-president terminated Rangel on March 16, 2009. Rangel maintains she was terminated based on gender.

Rangel's prima facie case on her gender-discrimination [*4] claim. Omni's first argument for summary judgment is that Rangel cannot establish a prima facie case of employment discrimination because no evidence exists that she was replaced by a male or treated less favorably than similarly-situated male employees.⁹ Under the *McDonnell Douglas* burden-shifting framework that applies to employment discrimination cases, a plaintiff must first establish a prima facie case of gender discrimination.¹⁰ To establish a prima facie case, the plaintiff must show that "(1) she belongs to a protected group, (2) she was qualified for her position, (3) she

suffered an adverse employment action; and (4) she was replaced with a similarly qualified person who was not a member of her protected group, or in the case of disparate treatment, that similarly situated employees were treated more favorably."¹¹ Omni challenges the fourth element.

⁹ Docket entry # 26, p. 7.

¹⁰ See *Nasti v. CIBA Specialty Chemicals Corp.*, 492 F.3d 589, 593 (5th Cir. 2007).

¹¹ *Nasti*, 492 F.3d at 593. See also *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 512-13 (5th Cir. 2001); *Davis v. Chevron U.S.A.*, 14 F.3d 1082, 1087 (5th Cir. 1994).

To show that Rangel cannot establish [*5] a prima facie case of gender discrimination, Omni presented a declaration by Michelle Smith, Omni's regional human resources director. Smith attested that Rangel was replaced seven months after the incident by a female human resources director.¹² Smith's affidavit negates the fourth element of Rangel's prima facie case because it shows that Rangel was replaced by someone within her protected class. Making this showing shifted the burden to Rangel to raise a fact question about whether she was replaced by a woman.

¹² Docket entry # 26, exh. C, P 15.

Rangel presented no summary-judgment contradicting Smith's affidavit or showing that she was replaced by a man. Rangel, however, can establish the fourth element of a prima facie case by presenting summary-judgment evidence that a similarly-situated male was treated more favorably.¹³ To do so, Rangel must show that Omni gave preferential treatment to a male employee under nearly identical circumstances--that is, the misconduct for which Rangel was discharged must be nearly identical to that engaged in by a male employee.¹⁴ Rangel relies on her job relative to the job of hotel general manager to raise a fact question about whether a similarly-situated [*6] male was treated differently. Rangel maintains she and the general manager were similarly situated because they were both members of the hotel executive committee. Rangel complains that the general manager was not terminated for his role in the incident, but she was terminated.

¹³ See *Okoye*, 245 F.3d at 512-13.

¹⁴ *Okoye*, 245 F.3d at 514.

Rangel's membership on the executive committee

does not make her similarly situated to the general manager; however, her involvement in the incident relative to the general manager's involvement may. The parties do not dispute that two persons had the authority to control the March 11, 2009 incident--Rangel and the hotel general manager. The summary-judgment evidence shows that Rangel was terminated, but the general manager received a written warning. Although Omni relies on how Rangel responded during the ensuing investigation--rather than how she handled the incident--as the basis for discharge, the incident and the investigation are intertwined. The general manager was counseled for a lack of leadership during the drug investigation, making inappropriate comments to Rangel during the investigation, and failing to act on a known violation of Omni's nepotism [*7] policy.¹⁵ Omni purportedly terminated Rangel for being untruthful about the decision not to call the police and for violating company policy by hiring employees with known and relevant criminal backgrounds. Omni's reasons for counseling the general manager and terminating Rangel are very similar: each was disciplined for conduct during the post-incident investigation and for violating company employment policy. These reasons indicate that Omni viewed Rangel and the general manager as similarly situated. Under these facts, the similarity in the disciplined conduct is sufficient to establish the fourth element of Rangel's prima facie case.

¹⁵ Docket entry # 55, exh. J (written warning by regional vice-president to hotel general manager).

Omni's nondiscriminatory reason for terminating Rangel. "If a plaintiff is successful in establishing a prima facie case of discrimination, the employer must rebut a presumption of discrimination by articulating a legitimate, nondiscriminatory reason for the adverse employment action.¹⁶ Omni met that burden by offering the following explanation for terminating Rangel: Rangel was not forthcoming during the investigation about calling the police and Rangel [*8] was responsible for hiring employees with known and relevant criminal records.¹⁷ These reasons are legitimate, nondiscriminatory reasons for terminating Rangel.

¹⁶ *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 345 (5th Cir. 2007) (internal citations omitted).

¹⁷ Docket entry # 26, pp. 6-7.

Whether Rangel can present evidence of pretext.

If the employer meets its burden to articulate a legitimate, nondiscriminatory reason for the adverse employment action, the burden "shifts back to the plaintiff to present substantial evidence that the employer's reason was pretext for discrimination. If the plaintiff can show that the proffered explanation is merely pretextual, that showing, when coupled with the prima facie case, will usually be sufficient to survive summary judgment."¹⁸

¹⁸ *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 345 (5th Cir. 2007) (internal citations omitted).

Rangel attempted to raise a fact question about whether Omni's reasons for terminating her were a pretext for gender discrimination in three ways. First, Rangel argued that both the male hotel general manager and the male loss prevention manager failed in their respective duties to call the police.¹⁹ Rangel relies [*9] on Smith's deposition testimony that Omni does not have a policy that requires calling the police when an employee is found with drugs. Rangel also relies on Smith's testimony that the loss prevention manager did not violate company policy when he failed to call the police. Rangel argued that Smith's testimony constitutes evidence of gender discrimination because although Rangel was terminated for not calling the police, neither male employee--the general manager and the loss prevention officer--were terminated for not calling the police.

¹⁹ Docket entry # 49, pp. 15-16.

This evidence does not raise a fact question about whether Omni's reasons for terminating Rangel were a pretext for discrimination because Omni did not state that it terminated Rangel for failing to call the police. Instead, one of the reasons Omni identified for terminating Rangel was because Rangel was not forthcoming during the post-incident investigation--specifically, about who decided not to call the police. The regional vice-president testified that he made the decision to terminate Rangel after determining Rangel lied about who decided not to call the police.²⁰ He did not testify that he made the decision to terminate [*10] Rangel because she did not call the police.

²⁰ Docket entry # 54, exh. E, pp. 17-18 & 40; docket entry # 26, exh. D, pp. 17-19 & 24-25.

Rangel also attempted to raise a fact question about

pretext by challenging the regional vice-president's belief that Rangel had lied during the post-incident investigation.²¹ Rangel relied on deposition testimony by Smith and the regional vice-president about Rangel's reputation for truthfulness.²² Rangel's characterization of the testimony, however, is overstated. Smith testified that when Rangel complained that the general manager was scrutinizing her work--after Rangel had counseled the general manager about inappropriate comments to a female employees--she knew Rangel to be honest.²³ That conversation occurred many months before the drug investigation occurred. The regional vice-president testified that he had never considered Rangel to be a liar, but he also stated that he did not believe Rangel about who decided not to call the police. The regional vice-president testified that he did not believe Rangel because the general manager's story and the loss prevention officer's story matched about who decided not to call the police.²⁴

21 Docket entry [*11] # 49, pp. 16-17.

22 Docket entry # 54, exh. D, p. 28; *id.*, exh. E, p. 25.

23 Docket entry # 54, exh. D, pp. 27-28.

24 Docket entry # 26, exh. D, pp. 24-25 & 43-44.

Rangel presented nothing that raises a fact question about whether the regional vice-president belief was reasonable. Rangel simply disputes the vice-president's conclusion. "Simply disputing the underlying facts of an employer's decision is not sufficient to create an issue of pretext."²⁵ Even if the vice-president's conclusion was wrong, his incorrect conclusion would not raise a fact question, in the absence of evidence that the regional vice-president did not really believe the general manager or the loss prevention manager. That is, it does not matter whether Rangel made the decision not to call the police; what matters is whether the regional vice-president reasonably believed Rangel lied about who made the decision during the post-incident investigation.²⁶ If the general manager and the loss prevention officer lied about who made the decision not to call the police, the ultimate falseness of the vice-president's determination that Rangel lied proves nothing as to Omni; it proves only that the general manager and the loss [*12] prevention officer lied.

25 *LeMaire v. Louisiana*, 480 F.3d 383, 391 (5th Cir. 2007).

26 *Waggoner v. City of Garland, Tex.*, 987 F.2d 1160, 1165-66 (5th Cir. 1993) ("[T]he validity of the initial complaint is not the central issue, because the ultimate falseness of the complaint proves nothing as to the employer, only as to the complaining employee. The real issue is whether the employer reasonably believed the employee's allegation and acted on it in good faith, or to the contrary, the employer did not actually believe the co-employee's allegation but instead used it as a pretext for an otherwise discriminatory dismissal. Thus, the inquiry is limited to whether the employer believed the allegation in good faith and whether the decision to discharge the employee was based on that belief."). See *Amezquita v. Beneficial Tex.*, 264 Fed. Appx. 379, 2008 WL 276279, at * 5 (5th Cir. 2008) (explaining that whether the supervisors were wrong to believe that the plaintiff had lied was irrelevant because "an employer's incorrect belief in the underlying facts--or an improper decision based on those facts--can constitute a legitimate, non-discriminatory reason for termination").

Lastly, [*13] Rangel attempted to raise a fact question by denying that she made the decisions to hire the hotel steward and other employees with significant criminal histories.²⁷ Rangel maintains her subordinate--the human resources manager--hired the employees. Even if the human resources manager made the actual employment offers, the human resources director would bear ultimate responsibility for the human resources manager's decision. Rangel also complained that Omni did not have a policy against hiring persons with certain criminal histories. Rangel relies on Smith's testimony that Omni hires persons with criminal convictions. That testimony, however, recognizes that criminal history does not necessarily implicate conduct that could subject Omni to civil liability for the actions of its employees. Smith's testimony clearly indicated that it was the particular criminal history that made the steward ineligible for employment. Even if Omni used Rangel as a scapegoat in the aftermath of discovering a drug-selling operation on hotel premises, Title VII does not preclude Omni from doing so. It only precludes Omni from making Rangel a scapegoat on the basis of gender. Rangel's summary-judgment evidence [*14] does not raise a fact question about pretext. Consequently, Omni is entitled to summary judgment on Rangel's gender discrimination claim.

27 Docket entry # 49, pp. 18-20.

Rangel's retaliation claim. Rangel alleges she was retaliated against after she reported her male supervisor's inappropriate behavior with a young female employee.²⁸ As retaliation, she maintains she was blamed for inconsistencies in Omni's chain of command and she was terminated even though she acted at the direction of her male supervisor. Omni argued that it is entitled to summary judgment on the retaliation claim because Rangel did not engage in protected activity.²⁹

28 Docket entry # 14, pp. 8-9.

29 Docket entry # 26, pp. 14-15.

"A plaintiff establishes a prima facie case for unlawful retaliation by proving (1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action."³⁰ Omni challenges the first element of Rangel's prima facie showing. Omni maintains Rangel did not engage in protected activity when she reported her male supervisor's inappropriate behavior. Although such conduct [*15] ordinarily constitutes protected activity under Title VII, Omni maintains Rangel's report does not constitute protected activity because Rangel did not step outside her role as human resources director. Omni relies on the Fifth Circuit's decision in *Hagan v. Echostar Satellite, L.L.C.*³¹

30 *Long v. Eastfield Coll.*, 88 F.3d 300, 304 (5th Cir. 1996).

31 529 F.3d 617 (5th Cir. 2008).

In *Hagan*, the Fifth Circuit considered a field service manager's claim that he was terminated "in violation of the anti-retaliation provisions of the [Fair Labor and Standards Act (FLSA)] for personally objecting to the field technicians' schedule change because of a potential decrease in overtime pay and for passing along his technicians' question regarding the legality of the change to the Human Resources department."³² In considering this claim, the Fifth Circuit adopted the following Tenth Circuit rule:

In order to engage in protected activity under [the FLSA], the employee must step outside his or her role of representing the company and either file (or threaten to file) an action adverse to the employer,

actively assist other employees in asserting FLSA rights, or otherwise engage in activities that reasonably [*16] could be perceived as directed towards the assertion of rights protected by the FLSA.

33

The Fifth Circuit characterized the rule as "eminently sensible for management employees . . . because a part of any management position often is acting as an intermediary between the manager's subordinates and the manager's own superiors."³⁴ The Fifth Circuit reasoned as follows

If we did not require an employee to "step outside the role" or otherwise make clear to the employer that the employee was taking a position adverse to the employer, nearly every activity in the normal course of a manager's job would potentially be protected activity under [the FLSA]. An otherwise typical at-will employment relationship could quickly degrade into a litigation minefield, with whole groups of employees--management employees, human resources employees, and legal employees, to name a few--being difficult to discharge without fear of a lawsuit. For those reasons, we agree that an employee must do something outside of his or her job role in order to signal to the employer that he or she is engaging protected activity under [the FLSA].³⁵

The Fifth Circuit has not applied the rule to employment discrimination claims [*17] under Title VII. While adopting the reasoning in a Title VII case may benefit employers like Omni, extending the rule would strip Title VII protection from "whole groups of employees-- management employees, human resources employees, and legal employees, to name a few"--employees who are in the best positions to advise employers about compliance. Because no authority extends the *Hagan* rule to Title VII, Omni is not entitled to summary judgment on the retaliation claim on the basis of *Hagan*.

32 *Hagan*, 529 F.3d at 623.

33 *Hagan*, 529 F.3d at 627 (quoting *McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir.1996)).

34 *Hagan*, 529 F.3d at 628.

35 *Hagan*, 529 F.3d at 628.

Omni also maintains Rangel cannot present evidence supporting the third element of her prima facie case--that a causal link existed between the protected activity and the adverse employment action. Omni argued that no evidence exists establishing a causal connection between Rangel's report about the general manager's conduct and Rangel's discharge eight months later.³⁶ In response, Rangel relies on testimony by Omni employees establishing that Rangel was terminated based on the general manager's version of the March 11, 2009 incident. [*18] Rangel maintains that the evidence strongly suggests the general manager exercised significant influence over the decision to terminate her.³⁷ Rangel relies on the Fifth Circuit's instruction in *Russell v. McKinney Hospital* that "it is appropriate to tag the employer with an employee's [unlawful] animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decisionmaker."³⁸

36 Docket entry # 26, pp. 16-17.

37 Docket entry # 60, p. 6.

38 *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000).

In *Russell*, the plaintiff presented evidence at trial about a colleague's age-related remarks and threats to quit if the decisionmaker did not fire the plaintiff. The Fifth Circuit explained that, "[i]f the employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker."³⁹ In *Russell*, the colleague who made the age-related remarks and threatened to quit was the son of the CEO of the parent corporation. The Fifth Circuit explained that the jury could have found that the colleague exercised [*19] greater influence over the decisionmaker than that of the ordinary worker at his level due to his father's position as CEO of the parent corporation, that the colleague took advantage of that power, and that the decisionmaker faced limited options about whether to fire the plaintiff.⁴⁰

39 *Russell*, 235 F.3d at 226.

40 *Russell*, 235 F.3d at 228.

Rangel's reliance on *Russell* fails because no evidence suggests the general manager exercised influence or leverage over the official decisionmaker--the regional vice-president. If the general manager lied about calling the police, he likely lied to protect his own job. The regional vice-president was so concerned about the general manager's role in the March 11, 2009 incident that he formally counseled the general manager for failing to take a more direct leadership role in the initial handling of the incident and the subsequent investigation. In deciding to terminate Rangel, the regional vice-president may have believed a person who lied, but "anti-discrimination laws do not require an employer to make proper decisions, only non-retaliatory ones."⁴¹ There is no evidence linking Rangel's termination to her earlier report about the general manager. [*20] Thus, no evidence raises a fact question about whether the vice-president made a retaliatory decision. Consequently, Omni is entitled to summary judgment on Rangel's retaliation claim.

41 *LeMaire*, 480 F.3d at 391.

Recommendation. Rangel insists the summary-judgment evidence raises numerous fact questions precluding summary judgment.⁴² To the extent fact questions exist, those questions are immaterial to Rangel's prima facie showings. That the general manager may have lied about calling the police does not equate to gender-based discharge or retaliatory discharge. If the ultimate decisionmaker believed the wrong person during the investigation, that fact shows only that the decisionmaker acted on inaccurate information--not that the decisionmaker acted based on gender or retaliation. At most, the summary-judgment evidence shows that Rangel was treated unfairly, but the evidence does not raise a fact question about whether she was subjected to unlawful discrimination. I recommend granting Omni's motion (docket entry # 26) and entering summary judgment in favor of Omni on all claims.

42 Docket entry # 49, p. 23.

Instructions for Service and Notice of Right to Object/Appeal. The United States [*21] District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this report and recommendation

must be filed within 14 days after being served with a copy of same, unless this time period is modified by the district court.⁴³ Such party shall file the objections with the clerk of the court, and serve the objections on all other parties and the magistrate judge. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court.⁴⁴ Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations [*22] contained in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual

findings and legal conclusions accepted by the district court.⁴⁵

⁴³ 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72(b).

⁴⁴ *Thomas v. Arn*, 474 U.S. 140, 149-52, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Acuña v. Brown & Root*, 200 F.3d 335, 340 (5th Cir. 2000).

⁴⁵ *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

SIGNED on October 4, 2010.

/s/ Nancy Stein Nowak

NANCY STEIN NOWAK

UNITED STATES MAGISTRATE JUDGE

Appendix 8

Not Reported in F.Supp.2d, 2007 WL 4358315 (W.D.Wash.)
 (Cite as: 2007 WL 4358315 (W.D.Wash.))

C

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
 at Seattle.

Carl **UZZELL**, Plaintiff,

v.

TELETECH HOLDINGS, INC., a Delaware corporation; and **Teletech** Customer Care Management (Colorado), Inc., a Colorado corporation, Defendants.

No. C07-0232MJP.

Dec. 7, 2007.

Greg Alan Wolk, Scott Crispin Greco Blankenship, Blankenship Law Firm, Seattle, WA, for Plaintiff.

Eric MeckleyEric Meckley, Morgan Lewis & Bockius, San Francisco, CA, Donald W. Heyrich, Law Office of Donald W. Heyrich, Seattle, WA, for Defendants.

ORDER DENYING PROTECTIVE ORDER

MARSHA J. PECHMAN, District Judge.

*1 This matter comes before the Court on Plaintiff Uzzell's motion for a protective order and for the return of his medical and psychiatric records. (Dkt. No. 20.) Defendants oppose the motion. (Dkt. No. 25.) Having considered the motion and response, Plaintiff's reply (Dkt. No. 27), all documents submitted in support thereof and the record herein, the Court DENIES Plaintiff's motion.

Background

Plaintiff Carl Uzzell is suing Defendants Teletech Holdings and Teletech Customer Care Management (collectively "Teletech") for alleged retaliation and wrongful termination. Plaintiff alleges that Teletech took adverse employment action against him in re-

taliation for his protected activity opposing Defendants' alleged efforts to force employees to work off-the-clock and without overtime payments. Plaintiff alleges claims under the Fair Labor Standards Act, the Washington Minimum Wage Act, and Washington statutory, common law, and public policy. Plaintiff alleges that Defendants caused Plaintiff damages, including lost wages and benefits; emotional upset, stress, and anxiety; and "out-of-pocket expenses" including attorneys' fees, litigation costs, and medical expenses. (Compl. ¶¶ 20-25.)

In July 2007, Defendants served Interrogatories and Requests for Production on Plaintiff, requesting, among other things, that Plaintiff identify all medical treatment providers from whom Plaintiff sought treatment for any medical condition "caused or exacerbated" by Defendants' conduct, and produce documents related to such treatment or any prior or subsequent treatment. Plaintiff objected on the grounds that the requests invaded Plaintiff's expectations of privacy and the patient-provider privilege. (Meckley Decl. ¶ 2.) Nevertheless, Plaintiff provided the name and contact information for four medical treatment providers.^{FN1} (*Id.*, Ex. 1.)

FN1. On November 7, 2007, one day before Defendants' opposition to this motion was to be filed, Plaintiff served supplemental answers to Defendants' interrogatories, in which Plaintiff responded with only objections and without the information about the medical providers. (Meckley Decl. ¶ 17.) The Court will not consider the supplemental response for purposes of this motion.

On August 30, 2007, Defendants served Plaintiff with subpoenas seeking Plaintiff's medical records from the four medical service providers identified in Plaintiff's answer to Defendants' interrogatories. On October 4, Defendants served Plaintiff with a subpoena seeking medical records from an additional provider based on information discovered in

Not Reported in F.Supp.2d, 2007 WL 4358315 (W.D.Wash.)
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the earlier subpoenaed records. (Meckley Decl., Ex. 4.) Plaintiff never indicated that any of these subpoenas were objectionable, never asked Defendants' counsel to meet and confer regarding the subpoenas, and never filed a motion to quash or modify the subpoenas. (Meckley Decl. ¶ 4.) Some, but not all, of the providers produced Plaintiff's medical records. (Meckley Decl. ¶¶ 6, 7, 8, 10.)

On November 1, Plaintiff filed this motion for a protective order and for the return of the produced medical records. Plaintiff argues that the medical records produced are protected by the psychotherapist-patient privilege and that Plaintiff has not waived that privilege by placing his mental health at issue.

Discussion

Federal Rule of Civil Procedure 45 governs subpoenas. Subsection (c)(3) provides that “[o]n timely motion, the issuing court must quash or modify the subpoena that ... (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies.” Fed.R.Civ.P. 45(c)(3) (emphasis added).^{FN2} A party who does not timely object to a Rule 45 subpoena waives any objection to the subpoena. *Millenium Holding Group, Inc. v. Sutura, Inc.*, 2007 WL 121567, *3 (D.Nev. Jan.11, 2007). Because Plaintiff never objected, filed a motion to quash, or filed a motion for a protective order until more than two months after the subpoenas were issued, he has waived all objections to the subpoenas.

FN2. The Court refers to the amended Federal Rules, which became effective on December 1, 2007. The changes were intended to be stylistic only. 2007 Advisory Committee Notes.

*2 Plaintiff argues that Defendants' failure to provide fourteen-days advance notice to Plaintiff and the health care providers violates RCW 70.02.060 and resulted in the inadvertent disclosure of the medical records. But RCW 70.02.060 is a

state procedural rule. Plaintiff cites no persuasive authority for his assertion that RCW 70.02.060 applies to subpoenas issued by the federal district court in a case in which the federal court has original jurisdiction.^{FN3} Absent contrary authority, the Court applies the Federal Rules of Civil Procedure, and not Washington State procedural rules to civil actions over which the Court has original jurisdiction. *See* Fed.R.Civ.P. 1; *see also* *U.S. v. Orr Water Ditch Co.*, 391 F.3d 1077, 1082 (9th Cir.2004) (noting that when a situation is covered by both state and federal procedural rules, federal courts generally apply federal procedural rules).

FN3. To the extent that they conflict with the Court's conclusion, the two district court cases cited by Plaintiff- *Lloyd v. Valley Forge Life Ins. Co.*, 2007 U.S. Dist. LEXIS 40526, *9, 2007 WL 2138756 (W.D.Wa.2007) and *Hankins v. City of Tacoma*, 2007 U.S. Dist. LEXIS 5209, *6-7, 2007 WL 208419 (W.D.Wa.2007)-are not binding on this Court.

In “unusual circumstances and for good cause,” the failure to timely act will not bar consideration of objections to a Rule 45 subpoena. *McCoy v. Southwest Airlines Co., Inc.*, 211 F.R.D. 381, 385 (C.D.Cal.2002). “Courts have found unusual circumstances where: (1) the subpoena is overbroad on its face and exceeds the bounds of fair discovery; (2) the subpoenaed witness is a non-party acting in good faith; and (3) counsel for the witness and counsel for the subpoenaing party were in contact concerning the witness' compliance prior to the time the witness challenged the legal basis for the subpoena.” *Id.* Here, the Court does not find good cause to excuse the untimely objection because the subpoenas were not overbroad or outside the bounds of fair discovery. To the contrary, the subpoenas seek relevant information. Mr. Uzzell put his mental health at issue by alleging that his damages include “emotional upset, stress, and anxiety” and by requesting compensation for his “out-of-pocket expenses” including medical ex-

Not Reported in F.Supp.2d, 2007 WL 4358315 (W.D.Wash.)

(Cite as: 2007 WL 4358315 (W.D.Wash.))

penses. His medical records, before, during, and after his termination are relevant to the question of whether Defendants caused his mental distress and the amount of damage caused.

Mr. Uzzell argues that he has only alleged “garden variety” emotional distress claims and therefore has not put his mental health at issue. He cites several district court cases in which the courts concluded that “garden variety” emotional distress claims do not constitute a waiver of the psychotherapy privilege. *See, e.g., EEOC v. Lexus Serramonte*, 237 F.R.D. 220, 223-24 (N.D.Cal.2006) (where plaintiff brought only “garden-variety” claim for emotional distress damages and did not intend to rely on medical records or medical expert testimony, she did not waive the privilege); *Fitzgerald v. Cassil*, 216 F.R.D. 632, 639 (N.D.Cal.2003) (holding that plaintiffs did not waive the privilege because they did not allege any “specific psychiatric injury or disorder or unusually severe emotional distress extraordinary in light of the allegations”). The federal courts are split on the issue of whether a party waives the psychotherapist-patient privilege, and more specifically, whether a “garden variety” claim of emotional distress damages waives the privilege. *See Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 474 (N.D.Tex.2005) (collecting cases); 25 Charles Alan Wright & Kenneth Graham, *Federal Practice & Procedure* § 5543 (2007). The Ninth Circuit has not decided the issue, and the cases cited by Plaintiff are not binding on this Court. Moreover, it does not appear that Mr. Uzzell has only alleged a “garden variety” emotional distress claim. In addition to alleging damages for “emotional upset, stress, and anxiety,” he seeks compensation for “out-of-pocket expenses” including “medical expenses.” By asking the Court to award medical expenses, Mr. Uzzell has put his medical status and history at issue. *See Fritsch v. City of Chula Vista*, 196 F.R.D. 562, 568-69 (S.D.Cal.1999) (“Defendants must be free to test the truth of Fritsch's contention that she is emotionally upset because of the defendants' conduct. Once Fritsch has elected to seek such damages, she cannot fairly

prevent discovery into evidence relating to the element of her claim.”). Therefore, Mr. Uzzell has waived the privilege and this case does not present unusual circumstances or good cause warranting late implementation of a protective order.

*3 Although tangential to the issue of the merits of Plaintiff's motion, the Court notes that both parties here failed to follow the applicable procedural rules in bringing and responding to this motion. In addition to Plaintiff failing to timely move to quash the subpoenas, Defendants filed an overlength brief that was not signed by local counsel in violation of Local Civil Rule 7(e) and Local General Rule 2(d). The Court expects counsel to make themselves aware of and to follow all applicable local and federal procedural rules for the remainder of this litigation.

Conclusion

For the above stated reasons, the motion for protective order and for return of medical documents is DENIED.

W.D.Wash.,2007.

Uzzell v. Teletech Holdings, Inc.

Not Reported in F.Supp.2d, 2007 WL 4358315 (W.D.Wash.)

END OF DOCUMENT

Appendix 9



13 of 38 DOCUMENTS

**KATHY-ANN VAUGHN, et al., Plaintiffs, -against- CITY OF NEW YORK, et al.,
Defendants.**

06-CV-6547 (ILG)

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW
YORK**

2010 U.S. Dist. LEXIS 50791

May 24, 2010, Decided

May 24, 2010, Filed

SUBSEQUENT HISTORY: Motion denied by *Vaughn v. City of New York*, 2010 U.S. Dist. LEXIS 90944 (E.D.N.Y., Sept. 2, 2010)

COUNSEL: [*1] For Kathy-Ann Vaughn, Plaintiff: Ambrose W. Wotorson, Jr., LEAD ATTORNEY, Law Offices of Ambrose Wotorson, Brooklyn, NY.

For Angela Cammarata, Christelene Henry, Emily Francis, Carol Davis, Plaintiffs: Ambrose W. Wotorson, Jr., Law Offices of Ambrose Wotorson, Brooklyn, NY.

For City of New York, New York City Department of Education, Denise Jennings, individually, Michele Williams, individually, Defendants: Isaac Klepfish, LEAD ATTORNEY, NYC Law Department Office of Corp Counsel, New York, NY.

JUDGES: I. Leo Glasser, United States Senior District Judge.

OPINION BY: I. Leo Glasser

OPINION

MEMORANDUM AND ORDER

GLASSER, United States Senior District Judge:

Plaintiffs Kathy-Ann Vaughn ("Vaughn"), Angela Cammarata ("Cammarata"), Christelene Henry ("Henry"), Emily Francis ("Francis"), and Carol Davis ("Davis") have brought an action against defendants the City of New York ("City"), the New York City Department of Education ("DOE"), Denise Jennings ("Jennings"), and Michele Williams ("Williams") under 42 U.S.C. §§ 1981, 1983, and 2000e, alleging discrimination on the basis of Caribbean national origin, as to plaintiffs Henry and Davis, discrimination on the basis of alienage, and, except as to plaintiff Davis, retaliation [*2] for engaging in protected activities. Defendants move for summary judgment. ¹ The Court finds that, except as to Vaughn's retaliation claim, plaintiffs have been unable to make a *prima facie* showing of either discrimination or retaliation. Accordingly, the Court grants the motion for summary judgment as to all Title VII, § 1981, and § 1983 equal protection claims of Cammarata, Henry, Francis, and Davis, and Vaughn's Title VII and § 1983 discrimination claims, finding that, on the basis of the undisputed facts, defendants are entitled to judgment as a matter of law.

¹ Although defendants ask for summary judgment as to "all of plaintiffs' claims," Defs.' Br. 2, their memorandum of law is completely

devoid of argument as to defendants' § 1983 claims. Because of the substantial overlap between plaintiffs' § 1983 equal protection claims and their discrimination claims under Title VII and § 1981, these claims are fairly within defendants' motion for summary judgment. Plaintiffs' § 1983 due process claims, however, are not addressed by this ruling.

BACKGROUND

1. School Administration

Prior to September 2003, the Principal at Science Skills Center High School ("SSCHS") was Robert Sinclair ("Sinclair"), [*3] who is of Caribbean national origin. Defendants' Local Rule 56.1 Statement ("Defs.' 56.1 Statement"), dated September 17, 2008, at P 6; Plaintiffs' Local Rule 56.1 Statement ("Pls.' 56.1 Statement"), dated July 2, 2009, at P 6. Defendant Jennings, whose grandfather was of Caribbean national origin, was appointed Assistant Principal of SSCHS in September 2001 and, in September 2003, took over from Sinclair as Principal. Defs.' 56.1 Statement PP 4-5; Pls.' 56.1 Statement PP 4-5. Defendant Williams was the Assistant Principal of Science and Mathematics at SSCHS from 2000 until 2008. Defs.' 56.1 Statement P 7; Pls.' 56.1 Statement P 7. Nancy Baldwin ("Baldwin"), Colette Caesar ("Caesar")², Gil Cornell ("Cornell"), and Zuri Jackson-Woods ("Jackson-Woods") also served as Assistant Principals at SSCHS during some or all of the relevant time period. See Defs.' 56.1 Statement P 80.

² Caesar is the complainant in another discrimination complaint filed in the Equal Employment Opportunity Commission ("EEOC") against the City of New York and the DOE which alleges, *inter alia*, discrimination on the basis of Caribbean national origin.

2. Kathy-Ann Vaughn

Vaughn was born in Barbados. Defs.' 56.1 Statement [*4] P 30; Pls.' 56.1 Statement P 30. She began working at SSCHS as a math teacher in 2001. Defs.' 56.1 Statement P 31; Pls.' 56.1 Statement P 31. During the course of her employment, Vaughn has been subject to a number of negative evaluations, letters, and memoranda written by members of the SSCHS administration, including: notices concerning absences and lateness; unsatisfactory lesson evaluations; an accusation of

insubordination; and notices of failure to submit lesson plans and other paperwork. Defs.' 56.1 Statement P 37, 41-42, 44, 46-48, 51, 53, 58-59, 61, 63-64, 75; Pls.' 56.1 Statement PP 37, 41-42, 44, 46-48, 51, 53, 58-59, 61, 63-64, 75. Finally, Vaughn received an unsatisfactory rating for the 2006-2007 school year which cited deficiencies in a number of evaluative categories. Defs.' 56.1 Statement PP 76-77; Pls.' 56.1 Statement PP 76-77. In addition, Vaughn has been subject on multiple occasions to student and parent complaints over alleged verbal abuse, which have led to multiple reports to the DOE's Office of Special Investigations. Defs.' 56.1 Statement PP 32-36, 66-67, 70-72; Pls.' 56.1 Statement PP 32-36, 66-67, 70-72. Vaughn also received several satisfactory lesson evaluations [*5] during this time period, received satisfactory ratings for 2003-2004, 2004-2005, and 2005-2006 school years, and became tenured on September 12, 2004. Defs.' 56.1 Statement PP 38-39, 43, 45, 50, 52, 54, 60, 74; Pls.' 56.1 Statement P 38-39, 43, 45, 50, 52, 54, 60, 74.

3. Angela Cammarata

Cammarata was born in Trinidad and Tobago. Defs.' 56.1 Statement P 152; Pls.' 56.1 Statement P 152. She was a tenured guidance counselor at SSCHS. Defs.' 56.1 Statement P 153; Pls.' 56.1 Statement P 153. During the course of her employment at SSCHS, Cammarata was subject to a number of negative evaluations, letters, and memoranda written by members of the SSCHS administration, including: reprimands for various forms of misbehavior including unprofessional conduct, distributing materials without approval, failure to follow school directives, conducting an unauthorized investigation of students, and making a threat against an administrator; notices of parent complaints regarding provision of incorrect information and unprofessional behavior; an unsatisfactory lesson evaluation; and notices of school absences and lateness. Defs.' 56.1 Statement P 155, 157-159, 161-162, 164-168, 171-174, 177, 179-182, 184-187; [*6] Pls.' 56.1 Statement P 155, 157-159, 161-162, 164-168, 171-174, 177, 179-182, 184-187. Cammarata received unsatisfactory ratings for the 2004-2005 and 2005-2006 school years, which included unsatisfactory ratings in multiple evaluative categories. Defs.' 56.1 Statement PP 169-170, 189-190; Pls.' 56.1 Statement PP 169-170, 189-190. On August 31, 2006, Cammarata was advised by letter that she had been reassigned to Region 8 Human Resources pending the outcome of disciplinary charges, and on May 8, 2007,

Cammarata was advised by letter that she had been suspended with pay. Defs.' 56.1 Statement P 191, 197; Pls.' 56.1 Statement P 191, 197. Cammarata also received several satisfactory lesson evaluations during her employment at SSCHS and received a satisfactory rating for 2003-2004 school year. Defs.' 56.1 Statement P 154, 163, 176, 183, 188; Pls.' 56.1 Statement P 154, 163, 176, 183, 188.

4. Christelene Henry

Henry was born in Granada. Defs.' 56.1 Statement P 85; Pls.' 56.1 Statement P 85. She began working at SSCHS as an English teacher in 2001. Defs.' 56.1 Statement P 86; Pls.' 56.1 Statement P 86. During the course of her employment, Henry has been subject to a number of negative evaluations, [*7] letters, and memoranda written by members of the SSCHS administration, including: a request for an OSI investigation regarding alleged verbal abuse of two students; reprimands for distributing inappropriate materials to students, for moving her classroom without authorization, for inadequate classroom management, for failure to post student work, and for insubordination; notices of absences and lateness; and unsatisfactory lesson evaluations. Defs.' 56.1 Statement PP 88-91, 93-94, 99-101, 108, 110-116, 118, 120; Pls.' 56.1 Statement PP 88-91, 93-94, 99-101, 108, 110-116, 118, 120. Henry received an unsatisfactory rating for the 2006-2007 school year. Defs.' 56.1 Statement P 122; Pls.' 56.1 Statement P 122. Henry had earlier received a satisfactory lesson evaluation, satisfactory ratings for the 2003-2004, 2004-2005, and 2005-2006 school years, and became tenured on September 11, 2004. Defs.' 56.1 Statement PP 97-98, 103-104, 106; Pls.' 56.1 Statement P 97-98, 103-104, 106.

5. Emily Francis

Francis was born in Jamaica. Defs.' 56.1 Statement P 131; Pls.' 56.1 Statement P 131. She began working at SSCHS as a Library Science Teacher in the 1990s. Defs.' 56.1 Statement P 132; Pls.' 56.1 Statement [*8] P 132. During her employment, Francis has received several warnings regarding her absences and lateness. Defs.' 56.1 Statement P 135, 140-141, 143; Pls.' 56.1 Statement P 135, 140-141, 143. On June 14, 2005, Jennings denied a request by Francis to excuse several days' absence as due to a line of duty injury. Defs.' 56.1 Statement P 136; Pls.' 56.1 Statement P 136. Jennings subsequently approved the request on June 27, 2005. Defs.' 56.1 Statement P

137; Pls.' 56.1 Statement P 137. Francis received several satisfactory lesson evaluations during this period and satisfactory ratings for the 2003-2004, 2004-2005, 2005-2006, and 2006-2007 school years. Defs.' 56.1 Statement P 133, 138, 142, 144-146; Pls.' 56.1 Statement P 133, 138, 142, 144-146.

6. Carol Davis

Davis was born in Jamaica. Defs.' 56.1 Statement P 2; Pls.' 56.1 Statement P 2. In 2002, she was assigned to SSCHS as a probationary chemistry teacher. Defs.' 56.1 Statement P 3; Pls.' 56.1 Statement P 3. Davis received a several reprimands during her one year at SSCHS, including warnings for: unsafe conditions in Davis's laboratory classes; failure to submit grades on time; and excessive lateness to school. Defs.' 56.1 Statement PP [*9] 9-10, 12-14, 16, 19, 22; Pls.' 56.1 Statement PP 9-10, 12-14, 16, 19, 22. Williams observed Davis's class several times and in each instance gave her an unsatisfactory lesson evaluation. Defs.' 56.1 Statement P 11, 15, 18, 20-21; Pls.' 56.1 Statement P 11, 15, 18, 20-21. On one occasion, Sinclair observed Davis's class and gave her a satisfactory evaluation. Defs.' 56.1 Statement P 17; Pls.' 56.1 Statement P 17. At the completion of the 2002-2003 school year, Davis received an unsatisfactory rating. Defs.' 56.1 Statement P 23; Pls.' 56.1 Statement P 23. The discontinuation of her probationary service was recommended, and Davis was subsequently terminated. Defs.' 56.1 Statement PP 24-25; Pls.' 56.1 Statement PP 24-25.

PROCEDURAL HISTORY

On April 20, 2006, Plaintiffs filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination on the basis of Caribbean national origin. Defs.' 56.1 Statement P 28, 83, 123, 147, 198; Pls.' 56.1 Statement P 28, 83, 123, 147, 198. On September 11, 2006, the EEOC issued right-to-sue letters to each of the plaintiffs informing them that their EEOC cases had been closed. Defs.' 56.1 Statement P 29, 84, 124, 148, 199; Pls.' [*10] 56.1 Statement P 29, 84, 124, 148, 199. Plaintiffs filed the instant complaint in this Court on December 8, 2006. On September 18, 2008, Defendants filed a motion for summary judgment. Oral argument was heard on October 16, 2009.

DISCUSSION

1. Statutes of Limitations

a. Title VII

Title VII requires, as a prerequisite to filing suit, the exhaustion of administrative remedies. Specifically, before filing suit, a plaintiff must have "filed a timely complaint with the EEOC and obtained a right-to-sue letter." *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001) ("Exhaustion of administrative remedies through the EEOC is 'an essential element' of the Title VII . . . statutory scheme[] and, as such, a precondition to bringing such claims in federal court."); see also *Deravin v. Kerik*, 335 F.3d 195, 200 (2d Cir. 2003) ("As a precondition to filing a Title VII claim in federal court, a plaintiff must first pursue available administrative remedies and file a timely complaint with the EEOC."). If the EEOC complaint is not timely filed, a civil action is similarly time-barred. *Butts v. City of New York Dept. of Hous. Pres. & Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993), superseded [*11] by statute on other grounds, Civ. Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1071; *Flaherty v. Metromail Corp.*, 235 F.3d 133, 136 n.1 (2d Cir. 2000) ("To sustain a claim for unlawful discrimination under Title VII . . . a plaintiff must file administrative charges with the EEOC within 300 days of the alleged discriminatory acts."); *Benjamin v. Brookhaven Sci. Assocs., LLC*, 387 F. Supp. 2d 146, 152 (E.D.N.Y. 2005).

"Generally, a claim must be filed within 180 days of the alleged discriminatory act. However, if the act occurs in a state which has laws prohibiting the type of discrimination of which a plaintiff complains and an agency to enforce such laws, then the claimant must file with the EEOC within 300 days." *Subramanian v. Prudential Sec., Inc., No. CV016500 (SJF) (RLM)*, 2003 U.S. Dist. LEXIS 23231, 2003 WL 23340865, at *3 (E.D.N.Y. Nov. 20, 2003) (noting that the 300 day limit applies in New York, "which has anti-discrimination laws and an enforcement agency"). "New York is a so-called 'deferral state.' Under 42 U.S.C. § 2000e-5(e)(1), plaintiff has 300 days from the act complained of to file an administrative charge with the state deferral agency of the EEOC." *Canales-Jacobs v. New York State Office of Court Admin.*, 640 F. Supp. 2d 482, 501 (S.D.N.Y. 2009); [*12] see also *Butts*, 990 F.2d at 1401. The Court now considers whether plaintiffs have complied with this administrative exhaustion requirement.³

³ Title VII administrative exhaustion typically

also requires that the defendants were named in the EEOC complaint. *Johnson v. Palma*, 931 F.2d 203, 209 (2d Cir. 1991). There is an exception, however, when there is "a clear identity of interest between the unnamed defendant and the party named in the administrative charge." *Id.* In this case, plaintiffs' EEOC complaint names only the DOE as a respondent to its charges. Klepfish Decl., Ex. QQQQQQ, EEOC Complaint. The City, Jennings, and Williams have not raised any argument regarding their absence as defendants in the EEOC complaint, and thus any such argument is waived and the Court will assume a sufficient identity of interest exists.

Defendants argue that the Title VII claims of Henry, Francis, and Davis are barred because they did not timely file complaints with the EEOC. On September 11, 2006, the EEOC issued letters to Henry, Francis, and Davis, informing each of them that their cases had been closed as untimely filed. Plaintiffs in this case filed their EEOC complaint on April 20, 2006. In [*13] order to be timely, the alleged discriminatory conduct must have occurred within 300 days of the filing--that is, on or after June 24, 2005.

The last specific instance of discriminatory conduct alleged by Henry in the EEOC complaint was an incident in or around March 2004, in which Henry alleged that she was reprimanded for distributing inappropriate classroom materials while a non-Caribbean teacher who distributed similarly inappropriate materials was not. Declaration of Isaac Klepfish ("Klepfish Decl."), dated September 25, 2008, Ex. QQQQQQ, EEOC Complaint P 11(C)(o)-(s). This is well outside the 300-day limitation period and is thus time-barred. Henry also complained that she "began to receive write-ups in her mail box almost every week during the period of September 2004 to June 2005." *Id.* P 11(C)(v). The vague phrasing of this allegation ("almost every week") and the failure to specify an end date does not allow this Court to conclude that the EEOC complaint alleges conduct on or after June 24, 2005. The last incident alleged by Francis in the EEOC complaint was the denial of injury-in-the-line-of-duty leave days on June 7, 2005, *id.* PP 11(D)(q)-(r), and the final act complained [*14] of by Davis was her termination on or about September 2, 2003, *id.* P 11(E)(g). Thus, the EEOC complaint was untimely as to Henry, Francis, and Davis. None of these plaintiffs has argued that any legal justification for the late filing, such as waiver or equitable

tolling, applies, and they are thus barred from bringing their Title VII claims in this Court.

The EEOC complaints of Vaughn and Cammarata, unlike those of Henry, Francis, and Davis, were not found by the EEOC to be untimely. Rather, on September 11, 2006, the EEOC issued right-to-sue letters to Vaughn and Cammarata, indicating that their claims had been closed because the EEOC was unable to conclude that a statutory violation had occurred. Although the EEOC did not find Vaughn's and Cammarata's complaints untimely and defendants have not challenged the timeliness here, because the complaints allege a series of events occurring over a period of several years, this Court must determine which of the alleged acts in the complaint are in fact timely. Because timeliness must be determined as to each discriminatory act alleged in the complaint, generally only those acts alleged to have occurred within the limitations period are timely. [*15] "Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice,' and each discriminatory act starts a new clock for filing charges alleging that act." *Benjamin*, 387 F. Supp. 2d at 152-53 (internal quotes omitted).

The only act in Cammarata's EEOC complaint that could potentially have been timely was the year-end unsatisfactory rating that she received in June 2005. Klepfish Decl., Ex. QQQQQQ, EEOC Complaint P 11(B)(k). The undisputed facts in evidence before this Court, however, make clear that this unsatisfactory rating was received on June 15, 2005, more than 300 days prior to the filing of the EEOC complaint. Defs.' 56.1 Statement P 169; Pls.' 56.1 Statement P 169. See *Butts*, 990 F.2d at 1403-04 (holding that when EEOC complaint is timely only on the basis of vague dates, "the district court only may hear the [] claims insofar as they relate to acts occurring on or after [300 days prior to the EEOC filing]"). Because Cammarata's complaint to the EEOC was thus untimely, her Title VII claim cannot be maintained in this Court.

The only act alleged in Vaughn's complaint subsequent to June 24, 2005 is the [*16] reassignment of Vaughn's classroom in September 2005. Klepfish Decl., Ex. QQQQQQ, EEOC Complaint P 11(A)(z). Having established, however, that at least one act was alleged within the limitations period, the Court must consider whether other allegations in the complaint may also be considered. There are two exceptions to the general

exhaustion requirement which might allow the consideration of additional allegations. First, allegations in the EEOC complaint that would be otherwise time-barred may be considered if they form part of a "continuing violation" with timely alleged acts. *Benjamin*, 387 F. Supp. 2d at 153. Second, allegations not made in the EEOC complaint, including actions alleged to have occurred subsequent to the filing with the EEOC, may be considered if they are "reasonably related" to the timely allegations in the EEOC complaint. *Butts*, 990 F.2d at 1402. Each of these exceptions will be considered in turn.

"The continuing violation doctrine extends the limitations period for all claims of discriminatory acts committed under an ongoing policy of discrimination even if those acts, standing alone, would have been barred by the statute of limitations. *Benjamin*, 387 F. Supp. 2d at 153 [*17] (internal quotes omitted). This doctrine recognizes that an individual discriminatory act "may not be actionable on its own" and that when multiple acts "are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 118, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). The continuing violation doctrine does not allow the indiscriminate revival of time-barred allegations. "[D]iscrete acts cannot be transformed into a single unlawful practice for the purposes of timely filing." *Benjamin*, 387 F. Supp. 2d at 153 (internal quotes omitted); see also *id.* ("[A]lleged adverse employment practices such as failure to promote, failure to compensate adequately, undesirable work transfers, and denial of preferred job assignments are considered discrete acts.").

The relevant question, then, is whether the timely act in Vaughn's complaint alleges a discrete act or one of a series of separate acts that collectively constitute a single unlawful employment practice. The EEOC Complaint describes Vaughn's reassignment as an act of retaliation for participating in a demonstration alleging anti-Caribbean discrimination by SSCHS. A [*18] retaliatory adverse employment action is a discrete act, *Nat'l R.R. Passenger Corp.*, 536 U.S. at 114, and as such would not be part of a continuing violation with other acts outside the limitations period. On the other hand, Vaughn's complaint does characterize the purpose of the reassignment as placing her under the "constant supervision and scrutiny" of Williams. Klepfish Decl.,

Ex. QQQQQQ, EEOC Complaint P 11(A)(z). Because the complaint contained multiple allegations of ongoing harassment, including allegations of discriminatory excessive scrutiny, *id.* P 11(A)(j)-(o), (s), this could be construed as part of a continuing hostile work environment claim. See *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 568-569 (2d Cir. 2000) (court can construe complaint as raising hostile work environment claim, even when not explicitly alleged); cf. *Benson v. North Shore-Long Island Jewish Health Sys.*, 482 F. Supp. 2d 320, 330 (E.D.N.Y. 2007) ("claims of harassment, such as yelling at the Plaintiff, making derogatory comments to the Plaintiff and issuing performance warnings" are not discrete acts). Vaughn's EEOC complaint, however, fails to allege any specific timely instances of discriminatory scrutiny, [*19] and thus there can be no timely hostile work environment claim.

"[A] plaintiff typically may raise in a district court complaint only those claims that either were included in or are 'reasonably related to' the allegations contained in her EEOC charge." *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 83 (2d Cir. 2001). The Second Circuit has recognized three categories of claims that meet the "reasonably related" test: (1) claims which "would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination"; (2) claims "alleging retaliation by an employer against an employee for filing an EEOC charge"; and (3) claims alleging "further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge." *Butts*, 990 F.2d at 1402-03 (internal quotations omitted).

"In determining whether claims are reasonably related, the focus should be on the factual allegations made in the EEOC charge itself, describing the discriminatory conduct about which a plaintiff is grieving." *Deravin*, 335 F.3d at 201 (quotation and alteration omitted). The only timely alleged act in Vaughn's EEOC complaint is the alleged retaliatory [*20] room reassignment, so the Court must thus address what would fall within the scope of an EEOC investigation of this allegation. Because this is an allegation of retaliation for the demonstration in which Vaughn and others participated, an EEOC investigation would reasonably be expected to extend to additional alleged retaliatory acts following Vaughn's room reassignment. See *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 178 (2d Cir. 2005) ("A complaint of

retaliation could reasonably be expected to inquire into other instances of alleged retaliation by the same actor." (internal quotation and alteration omitted)). Thus, any allegations in Vaughn's complaint that can reasonably be construed as alleging retaliation for Vaughn's participation in the demonstration are reasonably related to Vaughn's timely EEOC allegation, and thus are timely in this Court under Title VII.

Finally, an action for violation of Title VII must be filed within 90 days of receipt of a right-to-sue letter from the EEOC. 42 U.S.C. § 2000e-5(f)(1). The complaint in this Court was filed on December 8, 2006, fewer than 90 days after the issuance of the right-to-sue letters on September 11, 2006, and the action is [*21] thus timely.

b. § 1981

"[C]laims under 42 U.S.C. §§ 1981 and 1983 need not be asserted within the 180- or 300-day period applicable to Title VII claims." *Patterson v. County of Oneida, N.Y.*, 375 F.3d 206, 225 (2d Cir. 2004). Discrimination and retaliation claims under § 1981 are governed by the general four year statute of limitations found in 28 U.S.C. § 1658. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 383, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004). Because the complaint was filed in this Court on December 8, 2006, events on or after December 8, 2002 are within the limitations period. Thus, both Davis's discrimination claim, which is based on her September 2, 2003 termination, Compl. P 9(E), and Henry's discrimination and retaliation claims, which allege acts of discrimination beginning in 2003, Compl. P 9(C), are timely.

c. § 1983

Although Title VII covers some conduct which, when committed by a public employer, would violate the constitutional guarantee of equal protection, it does not displace the analogous cause of action under § 1983. *Annis v. County of Westchester, N.Y.*, 36 F.3d 251, 254 (2d Cir. 1994) ("[I]t is clear that Congress did not intend to make Title VII the exclusive remedy for employment discrimination [*22] claims, at least not those claims cognizable under the Constitution.").

"The statute of limitations applicable to claims brought under . . . [§] 1983 in New York is three years." *Patterson*, 375 F.3d at 225. Plaintiff Davis's termination from SSCHS, the last wrongful act she alleges in the

complaint, occurred on September 2, 2003. Defs.' 56.1 Statement P 25; Pls.' 56.1 Statement P 25. This is more than three years prior to the filing of the complaint in this case and thus Davis's § 1983 claims are time-barred. At oral argument, Davis argued that because the appeal of her termination was not resolved until October 2004, Compl. P 9(E)(i), this brings it within the statute of limitations. It is well settled, however, that the statute of limitations begins to run on a claim of wrongful termination at the time the notice of termination is given. *Chardon v. Fernandez*, 454 U.S. 6, 8, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981) ("[T]he proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful."); *Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 23 (2d Cir. 1985). The allegations of all other plaintiffs occurred within three years prior to the filing date of this lawsuit, [*23] and are thus timely.

d. Summary

In summary, the statute of limitations bars the Title VII discrimination claims of all plaintiffs and the Title VII retaliation claims of all plaintiffs except Vaughn. Vaughn, Cammarata, Henry, and Francis may bring discrimination claims under § 1983, but Davis's § 1983 claims are time-barred. Henry may bring her discrimination and retaliation claims, and Davis may bring her discrimination claims under § 1981.

2. Legal Standard

a. Summary Judgment

A party will be granted summary judgment when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The moving party bears the burden of demonstrating that there exists no genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). If the moving party meets this burden, then it falls to the opposing party to "set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)(2)*. The non-moving party "may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version [*24] of the events is not wholly fanciful." *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998). Furthermore, new facts adduced by the non-moving party will not

prevent summary judgment unless they contradict the facts supporting the movant's case for summary judgment. *Beal v. Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972).

In addition, it is important to clarify the burden of production in this case. The basic framework for discrimination and retaliation cases, established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims under Title VII, § 1981, and § 1983. *Id. at 802-07* (describing burden shifting framework for Title VII discrimination claims); *Mathirampuzha v. Potter*, 548 F.3d 70, 78 (2d Cir. 2008) (applying McDonnell Douglas burden-shifting framework to Title VII retaliation claim); *Hudson v. Int'l Bus. Machs. Corp.*, 620 F.2d 351, 354 (2d Cir. 1980) (applying McDonnell Douglas burden-shifting framework to § 1981 discrimination claims).

Under the McDonnell Douglas test, the initial burden is on the plaintiff to present a *prima facie* case of discrimination or retaliation. *McDonnell Douglas*, 411 U.S. at 802. The precise nature of the evidence [*25] that needs to be presented at this stage depends on the nature of the misconduct being alleged. See *id. at 802 n.13*. Plaintiff's burden at this stage has been described as *de minimis*. *Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir. 2000). "Nevertheless, this burden is not inconsequential." *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 127 (2d Cir. 2004). Once the plaintiff has made this showing, the burden shifts to the defendant to put forth some legitimate justification for the challenged action. *McDonnell Douglas*, 411 U.S. at 802-03. Once this showing is made, the burden falls once again to the plaintiff to demonstrate that the defendant's proffered reason is pretextual. *Id. at 807*.

Thus, in the context of a motion for summary judgment, the defendant can prevail under the *McDonnell Douglas* standard either by demonstrating that the plaintiff cannot make the necessary *prima facie* showing, or by demonstrating that the plaintiff cannot rebut the defendant's proffered legitimate justification. "Summary judgment is appropriate even in discrimination cases" and "trial courts should not treat discrimination differently from other ultimate questions of fact." *Weinstock*, 224 F.3d at 41 [*26] (internal quotes omitted). Although the moving party bears the burden, a motion for summary judgment cannot be defeated "by offering purely

conclusory allegations of discrimination, absent any concrete particulars." *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985).

b. Discrimination Under Title VII, § 1981, and § 1983

The basic analytical framework for making a *prima facie* case under Title VII, § 1981, or § 1983 is the same. A plaintiff can make a *prima facie* showing by demonstrating that "(1) she is a member of a protected class; (2) she is qualified for her position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination." *Weinstock*, 224 F.3d at 42 (*prima facie* case under Title VII); *Paulino v. New York Printing Pressman's Union, Local Two*, 301 F. App'x 34, 37 (2d Cir. 2008) (applying identical standard for *prima facie* discrimination case under § 1981 and Title VII); *Cunningham v. New York State Dept. of Labor*, 326 F. App'x 617, 620 (2d Cir. 2009) ("[T]he analytical framework of a workplace equal protection claim[] parallels that of a discrimination claim under Title VII."). "The elements of one are generally the same as [*27] the elements of the other and the two must stand or fall together." *Feingold v. New York*, 366 F.3d 138, 159 (2d Cir. 2004).

Although the standard to establish a *prima facie* case is not high, conclusory allegations alone are insufficient to support an inference of discrimination. *Sharif v. Buck*, 152 F. App'x 43, 44 (2d Cir. 2005); *Meiri*, 759 F.2d at 998. Furthermore, a *prima facie* case of discriminatory intent may be undercut by evidence which would counsel against such an inference. For example, "when the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire." *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997).

Assuming that plaintiffs can establish a *prima facie* case of discrimination, defendants can prevail by proffering legitimate business reasons for any adverse actions and showing that plaintiffs are unable to show that these reasons are pretextual. "[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) [*28] (emphasis in original); *McCarthy v. New York City Technical Coll. of City Univ.*

of New York, 202 F.3d 161, 166 (2d Cir. 2000) ("[T]he mere fact of a pretext will not support a verdict of discrimination unless the circumstances make the finding reasonable."); *Slattery v. Swiss Reins. Am. Corp.*, 248 F.3d 87, 94 (2d Cir. 2001) (even if reasons are pretextual, plaintiff bears burden of showing actual discriminatory intent); *James v. New York Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000) ("[O]nce the employer has proffered its nondiscriminatory reason, the employer will be entitled to summary judgment (or to the overturning of a plaintiff's verdict) unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination."); *Schnabel*, 232 F.3d at 89-90 (evidence of pretext may also allow drawing of inference of discrimination).

Finally, unlike Title VII and § 1983, § 1981 does not address discrimination on the basis of national origin. *Anderson v. Conboy*, 156 F.3d 167, 170 (2d Cir. 1998). It does, however, apply to discrimination on the basis of alienage, *i.e.* non-U.S. citizenship. *Id.* at 171. Thus, as plaintiffs implicitly concede in their brief in opposition, [*29] only the two non-citizen plaintiffs, Davis and Henry, can bring a claim under § 1981. Pls.' Br. 29-31. It is critical to note that alienage discrimination is discrimination on the basis of citizenship status, not immigrant status. Discrimination on the basis of a person's status as an immigrant to the United States is not alienage discrimination unless it is also motivated by the lack of U.S. citizenship. See *Ayiloge v. City of New York*, No. 00 CIV. 5051(THK), 2002 U.S. Dist. LEXIS 11807, 2002 WL 1424589, at *16 (S.D.N.Y. June 28, 2002) ("Alienage discrimination must be distinguished from national origin discrimination, which is based solely an individual's birthplace or nation of origin, and is not prohibited by § 1981."). Although it may be difficult to disentangle in practice, the limited reach of § 1981 makes this distinction crucial.

c. Retaliation Under Title VII and § 1981

In a retaliation case under Title VII or § 1981, ⁴ the plaintiff must establish a *prima facie* case by showing "(1) participation in a protected activity; ⁵ (2) that the defendant knew of the protected activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action." [*30] *Jute*, 420 F.3d at 173 (*prima facie* standard for Title VII, quoting *McMenemy v. City of Rochester*, 241 F.3d 279, 282-83 (2d Cir. 2001));

Paulino, 301 F. App'x at 37 (same standard for *prima facie* case of retaliation under § 1981 and Title VII). The fourth prong may be satisfied either through direct evidence of animus, or "indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct." *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000); *Sumner v. U.S. Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990).

4 Courts have generally found that claims alleging retaliation for opposing discriminatory practices are not cognizable under § 1983. See *Bernheim v. Litt*, 79 F.3d 318, 323 (2d Cir. 1996) ("[W]e know of no court that has recognized a claim under the *equal protection clause* for retaliation following complaints of racial discrimination."); see also *Gray v. Lacke*, 885 F.2d 399, 414 (7th Cir. 1989) ("[Plaintiff's] right to be free from retaliation for protesting . . . discrimination is a right created by Title VII, not [*31] the *equal protection clause*. Section 1983 provides a remedy for deprivation of constitutional rights. It supplies no remedy for violations of rights created by Title VII." (citations omitted)). But see *Hicks v. Baines*, 593 F.3d 159, 171 (2d Cir. 2010) ("The premise of this lawsuit is that plaintiffs were treated differently - that is, they suffered retaliation - on the basis of their participation in discrimination investigations and proceedings. That participation obviously constitutes an 'impermissible' reason to treat an employee differently."); cf. *Choudhury v. Polytechnic Institute of New York*, 735 F.2d 38, 43 (2d Cir. 1984) ("When a complainant experiences retaliation for the assertion of a claim to even-handed treatment, he remains under a handicap not faced by his colleagues.").

Because *Hicks* suggests that claims of retaliation for opposing national origin discrimination might, in fact, be cognizable under § 1983, the Court will address the retaliation claims of Cammarata, Henry, and Francis on the merits, even though their Title VII claims are time-barred.

5 Importantly, "an employment practice need not actually violate Title VII for the protected activities element of a retaliation [*32] claim to

be satisfied." *McMenemy*, 241 F.3d at 285. Rather, provided the plaintiff had a good faith, reasonable belief that he or she was opposing an unlawful employment practice, a claim for retaliation can be maintained. *Id.* Here, defendants have not disputed that plaintiffs engaged in protected activities.

In order to draw an inference based solely on timing, the temporal proximity of the protected acts and the alleged retaliation must be "very close." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001). The Second Circuit has found a three-month gap between an employee's protected activity and the employer's alleged retaliation to be too distant to establish a causal nexus. *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85-86 (2d Cir. 1990); but see *Gorman-Bakos v. Cornell Co-op Extension of Schenectady County*, 252 F.3d 545, 555 (2d Cir. 2001) (reviewing cases and finding no bright-line rule). Furthermore, "[w]here timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise." *Slattery*, 248 F.3d at 95. An inference of causation based [*33] on timing is undercut if the plaintiff is also subject to favorable actions after engaging in the protected activity. See *Payton v. City Univ. of New York*, 453 F. Supp. 2d 775, 786 (S.D.N.Y. 2006).

3. Plaintiffs' Claims

a. Pattern or Practice of Discrimination

Plaintiffs argue that under *Federal Rule of Evidence 404(b)*, which governs the admission of evidence of past acts by defendants,⁶ the treatment of other foreign-born employees can be used as evidence of defendants' discriminatory intent.⁷ The problem with plaintiffs' argument is that discriminatory intent is no more apparent from the unsatisfactory ratings given to other foreign born employees than it is from the treatment of the plaintiffs themselves. Plaintiffs allege that a number of foreign-born teachers received unsatisfactory ratings and other negative treatment from defendants. Plaintiffs name a total of four foreign-born teachers (Zafar, Garcia, Manzanares, and Adebowli) who received unsatisfactory ratings, one additional foreign born teacher (Kotenizansky) who did not received an unsatisfactory rating, but was excused, *i.e.* laid off, and one foreign born teacher (Morin) who received a neutral (neither

good nor bad) rating. [*34] Pls.' 56.1 Statement P 201, 202; Pls.' Br. 3-4. Plaintiffs, however, fail to demonstrate why a valid inference of discrimination can be drawn from these acts, none of which was accompanied by overt evidence of discrimination.

6 "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, *intent*, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." *Fed. R. Evid. 404(b)* (emphasis added).

7 It is worth noting that plaintiffs' reference here to the treatment of non-Caribbean foreign born teachers casts some doubt on their repeated allegations of a specifically anti-Caribbean campaign on the part of Jennings and Williams.

The only actual evidence cited by plaintiffs to support the inference that these teachers were discriminated [*35] against on the basis of their national origin was the fact that Jennings commented on Mr. Morin's diction. Affirmation of Ambrose Wotorson ("Wotorson Aff."), dated July 1, 2009, Ex. 196, Deposition of Denise Jennings ("Jennings Dep."), dated January 15, 2008, at 86:17-21. Plaintiffs interpret this as a reference to his accent and then further argue that it supports an inference of discriminatory animus. A single remark concerning a teacher's intelligibility to his students, a matter of legitimate concern to the school administrators, is plainly insufficient to draw an inference of discriminatory animus toward all foreign born teachers generally. Plaintiffs also assert that another teacher, Mr. Zafar, believed that he was being harassed because he was foreign born. But a conclusory allegation is no more evidence when it purportedly comes from a third party⁸ than when it comes from plaintiffs themselves.⁹

8 This allegation is introduced through deposition testimony affirming knowledge of hearsay from an unidentified source.

Q: Do you recall if Mr. Zafar

ever said or suggested he felt he was being harassed because he was not American born or because he was originally an Iranian?

A: No.

Q: [*36] Are you saying that he never said that?

A: Not to me.

Q: Had you heard that before I asked this question?

A: I would say yes

Wotorson Aff. Ex. 196, Jennings Dep. 74:16-75:2.

9 In addition to Zafar's supposed allegation, plaintiffs note that Assistant Principal Caesar has filed a separate complaint alleging discrimination on the basis of Caribbean national origin. Wotorson Aff. Ex. 203, EEOC Complaint of Colette Caesar. But although Caesar's complaint alleges disparate treatment of Caribbean and non-Caribbean teachers, it does not allege any knowledge of direct animus. Plaintiffs have provided no admissible evidence to accompany the complaint. If conclusory statements by plaintiffs are not sufficient to raise an inference of discrimination, then *a fortiori*, conclusory statements by a third party are not.

The only further relevance that the treatment of foreign teachers might have would be to establish a general pattern of treatment of foreign born teachers. Evidence that is essentially statistical in nature, for example, evidence of disproportionate treatment of members of different groups, may be sufficient to support an inference of discriminatory intent. *Krieger v. Gold Bond Bldg. Prods., a Div. of Nat'l Gypsum Co.*, 863 F.2d 1091, 1096-97 (2d Cir. 1988) [*37] (allowing evidence of other acts to prove discriminatory intent); cf. *Gaffney v. Dep't of Info. Tech. & Telecomms.*, 579 F. Supp. 2d 455, 460 (S.D.N.Y. 2008) ("[I]t is well established in the Second Circuit that one way to establish retaliation is to demonstrate that other people who have participated in protected activity have been treated adversely and similarly to plaintiffs.").

In this case, however, the evidence proffered by plaintiffs is simply not sufficient as a matter of law to warrant such an inference to be drawn. Although plaintiffs name several foreign-born teachers who they allege were subject to adverse treatment, they provide no context within which to evaluate this evidence. What is the ratio of foreign-born to native-born teachers at SSCHS? How many native-born teachers received unsatisfactory ratings or negative treatment comparable to that alleged of the foreign-born group? Without such context, plaintiffs have not even established that there is a "pattern," much less shown that a significant inference can fairly be drawn from such a pattern.¹⁰ *Dorfman v. Doar Commc'ns, Inc.*, 314 Fed. Appx. 389, 391 (2d Cir. 2009) ("With respect to Appellant's generalized allegations [*38] about other individuals in the protected age group being fired, he fails to provide demographic and other information necessary to analyze this data, without which his allegations ha[ve] no logical tendency to show that discrimination was present." (quotations omitted)); see also *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 121 (2d Cir. 1997) ("Pollis's statistical evidence suffers from several serious flaws that render it insufficient to sustain a reasonable inference that her treatment by the New School was motivated by discriminatory intent."). Accordingly, the alleged pattern of treatment of foreign-born teachers is insufficient as a matter of law to support an inference of discrimination.

¹⁰ Even evidence of disparities between groups will not necessarily support an inference of discrimination if the sample size is so small that disparities could as readily be attributed to chance. *McCarthy*, 202 F.3d at 165 ("[C]onsidered as statistical evidence, plaintiff's 'sample' of two was clearly insufficient to sustain a reasonable inference that [McCarthy's] treatment by the [college] was motivated by discriminatory intent." (quotations omitted)); *Haskell v. Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984) [*39] ("The sample in the present case of ten terminations over an 11-year period is not statistically significant.").

b. Kathy-Ann Vaughn

i. Discrimination

Vaughn alleges that she has been subject to ongoing discriminatory treatment which has included negative lesson evaluations, unwarranted write-ups, a regime of

micromanagement by Williams, and an unsatisfactory year-end rating. Defendants argue that Vaughn's claim must fail because she cannot show circumstances that would give rise to an inference of discriminatory intent, and thus cannot establish a *prima facie* case of discrimination.¹¹

¹¹ Defendants also argue that Vaughn cannot show that she has suffered any adverse employment action. Because Vaughn cannot show circumstances giving rise to an inference of discrimination, the Court need not reach the adverse employment action question.

The clearest means of demonstrating discriminatory intent is through direct evidence of discriminatory animus. In this case, Vaughn has no such evidence. Vaughn is unable to identify statements from Jennings, Williams, or any other member of the SSCHS administration that reveal anti-Caribbean bias. Of course, this is not fatal to her case, and she could [*40] still prevail if she is able to present such indirect or circumstantial evidence as would allow a reasonable inference of discriminatory intent. Such evidence, however, is similarly lacking.

Vaughn strangely argues that an inference of discriminatory intent can be drawn from the fact that she herself was perceived as being anti-American or anti-African-American. Vaughn speculates that Jennings and Williams, both of whom are African-American, "learned about the allegations [of Vaughn's animus], became highly offended, and as a result, began to openly display animus towards Vaughn." Pls.' Br. 25-26. This argument is nonsensical. Jennings and Williams received complaints from parents and students characterizing Vaughn as anti-African-American. Defs.' 56.1 Statement PP 33-35; Pls.' 56.1 Statement P 33-35. It might be a reasonable inference that Jennings and Williams, if they credited the accusations against Vaughn, might have developed a personal animus against Vaughn. But what Vaughn describes here is not animus on the basis of her national origin, but rather animus on the basis of Vaughn's perceived bigotry. And personal animus not on account of national origin does not implicate the [*41] anti-discrimination laws. *Reece v. New York State Dep't of Taxation and Fin.*, 104 F.3d 354 (Table), 1996 WL 665625, at *3 (2d Cir. 1996) (summary judgment granted because plaintiff "has offered no facts that would support an inference of racial, rather than personal, animus.").

This Court cannot credit as reasonable the assumption that Jennings and Williams, believing themselves subject to anti-African-American animus from Vaughn, would naturally be expected develop a reciprocal animus against persons of Caribbean national origin.

Having failed to show circumstances giving rise to an inference of discrimination, Vaughn's discrimination claim must fail and defendants are entitled to summary judgment.

ii. Retaliation

Vaughn has engaged in several actions that could qualify as activities protected against retaliation by the anti-discrimination laws.¹² First, in April 2004, Vaughn, along with other teachers, attended a meeting with members of the administration, including Jennings and Williams, at which they expressed their belief that the administration was engaging in anti-Caribbean discrimination. Compl. P 9(A)(o); Pls.' Br. 6. Later, on June 21, 2005, Vaughn participated in a demonstration [*42] accusing SSCHS of anti-Caribbean discrimination. Wotorson Aff. Ex. 191, Deposition of Kathy-Ann Vaughn ("Vaughn Dep."), dated January 31, 2008, at 129:1-3. The following day, she sent a letter to Williams in which she referenced the alleged campaign of discrimination against teachers of Caribbean national origin. Wotorson Aff. Ex. 104. In September 2005, Vaughn was reassigned to a different classroom, directly across from Williams's office. She alleges that this was the beginning of a "regimen of micromanagement," under which she was subjected to intensive and excessive scrutiny from Williams, leading to numerous disciplinary write-ups. Compl. P 9(A)(y).

¹² The Supreme Court has held that some speech between government employees and supervisors is outside the protection of the *First Amendment*, and thus there is no constitutional protection against retaliation. *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for *First Amendment* purposes, and the Constitution does not insulate their communications from employer discipline."). Even under *Garcetti*, however, Vaughn's activities [*43] would likely be fully protected. See *Weintraub v. Bd. of Educ. of City School Dist. of N.Y.*, 593 F.3d 196, 203

(2d Cir. 2010) (arguing, in *dicta*, that a teacher's internal grievances regarding a school's alleged racial discriminatory policies are protected by the *First Amendment* because they are "not in furtherance of the execution of one of her core duties as an English teacher"). In any event, because plaintiffs' bring retaliation claims under Title VII and not the *First Amendment*, *Garcetti* does not apply.

Defendants argue that Vaughn cannot demonstrate a causal connection between the alleged adverse actions and her protected activities. "A causal connection may be established either indirectly by showing that the protected activity was followed closely by discriminatory treatment, or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or directly through evidence of retaliatory animus directed against a plaintiff by the defendant." *Johnson v. Palma*, 931 F.2d 203, 207 (2d Cir. 1991) (internal quotations omitted). Vaughn has provided no direct evidence of retaliatory animus. No member of the school administration threatened retaliation [*44] or indicated explicitly to Vaughn that actions were being taken as a result of her protected activities.

Vaughn must thus rely on indirect evidence of retaliatory animus. Vaughn has not identified any other employees who engaged in similar protected conduct and were treated differently, therefore Vaughn cannot argue for an inference of discrimination on the basis of disparate treatment. She does argue that because her picture appeared in the newspaper in relation to the demonstration, she became "an inevitable and obvious target of retribution," Pls.' Br. 32, but such conclusory statements cannot support the causal inference Vaughn seeks to draw.

Vaughn thus relies on the chronology of events in order to establish a causal connection. The meeting between teachers and the administration occurred in April 2004, while the first action characterized by Vaughn as retaliatory occurred in September 2005. This gap is far too long, as a matter of law, to support an inference of retaliation. See *Miller v. Kempthorne*, No. 08-2466-cv, 357 Fed. Appx. 384, 2009 U.S. App. LEXIS 27952, 2009 WL 4893670, at *2 (2d Cir. Dec. 21, 2009) ("[T]he [*45] one-year time frame here falls well beyond that contemplated by this Court as giving rise to such an inference."). In addition, Vaughn became tenured on

September 12, 2004, Defs.' 56.1 Statement P 39; Pls.' 56.1 Statement P 39, which undercuts an inference that she was being retaliated against for her participation in the April 2004 meeting.

On the other hand, the gap between the June 21, 2005 demonstration and the alleged retaliatory room reassignment in September 2005 was less than three months. Furthermore, the demonstration occurred near the conclusion of the 2004-2005 school year, and the reassignment took effect at the start of the following school year. This lends some weight to the argument that the alleged retaliatory act followed the protected activity closely in time. See *Mandell v. County of Suffolk*, 316 F.3d 368, 384 (2d Cir. 2003) (longer gap in time doesn't preclude causal nexus if there is a reason for delay). The close temporal connection between the demonstration and the alleged retaliatory reassignment is therefore enough to satisfy the causal connection prong of the *prima facie* showing under the *McDonnell Douglas* framework.

Defendants additionally argue that Vaughn's [*46] retaliation claim cannot succeed because she has not been subject to an adverse employment action. Defendants argue that, as a matter of law, being subject to increased scrutiny cannot be an adverse employment action. The Supreme Court made clear in *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), that the standard for an adverse employment action in retaliation claims is considerably broader than the standard for discrimination claims under Title VII. Unlike the discrimination provision of Title VII, which applies only to adverse actions affecting the terms and conditions of employment, the retaliation provision applies to actions "likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers." *Id.* at 68. The Court further explained that a reassignment of job duties might qualify as an adverse employment action, "depend[ing] upon the circumstances of the particular case." *Id.* at 71.

The Second Circuit has held that actions such as "negative evaluation letters, express accusations of lying, assignment of lunchroom duty, reduction of class preparation periods, failure to process teacher's insurance forms, transfer from library [*47] to classroom teaching as an alleged demotion, and assignment to classroom on fifth floor which aggravated teacher's physical disabilities" may qualify as adverse employment actions for purposes of a retaliation claim. *Zelnik v. Fashion Inst.*

of Tech., 464 F.3d 217, 226 (2d Cir. 2006) (quoting *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir.1999)). Vaughn has alleged that her classroom was reassigned for the purpose of placing her under the direct and constant scrutiny of Williams and that this reassignment marked the beginning of a series of acts of retaliatory harassment. Compl. P 9(A)(y). These allegations, if true, would be enough to amount to an adverse employment action. The defendants, as moving parties, bear the burden of demonstrating the contrary by undisputed evidence, and they have not done so.

Even if defendants have not met their burden of demonstrating that Vaughn cannot satisfy the *de minimis* burden required for a *prima facie* case of retaliation, they could yet prevail if they can show legitimate business reasons for their allegedly retaliatory actions that Vaughn is unable to rebut. Defendants have in fact created a voluminous record, providing explanations for many of the [*48] actions Vaughn characterizes as retaliatory. Nowhere in this record, however, have defendants provided an explanation for the reassignment of Vaughn's classroom. While this Court can easily imagine any number of legitimate reasons why a teacher's classroom might be reassigned, under the *McDonnell Douglas* framework it is the defendants' burden to present evidence of such a legitimate reason. Defendants have not done so, and thus, they have not met their burden and are not entitled to summary judgment on Vaughn's Title VII retaliation claim.

c. Angela Cammarata

i. Discrimination

Cammarata alleges that she was subject to a series of discriminatory acts,¹³ including unsatisfactory year-end ratings, culminating in her reassignment to Region 8 Human Resources¹⁴ on August 31, 2006. Like Vaughn, Cammarata is unable to present any direct evidence of discriminatory animus. Nor has she been able to cite specific circumstances surrounding her treatment which would justify an inference of discrimination. Rather, her claim is entirely dependent on an inference drawn from an alleged pattern or practice of discrimination against teachers of Caribbean national origin. For reasons already discussed, [*49] this claim must fail and defendants are entitled to summary judgment.

¹³ In October 2003, Cammarata filed an earlier complaint against the Board of Education alleging

violations of due process. On April 5, 2005, Cammarata executed a release, which released the Board of Education and "all respective successors, or assigns, and any and all past or present officials, employees, representatives and agents of the DOE, or the City of New York, as well as their respective successors or assigns" from all claims resulting from anything occurring on or before April 5, 2005. Klepfish Decl. Ex OOOOOO, Waiver and Release, dated April 5, 2005. To the extent that Cammarata alleges discriminatory actions prior to April 5, 2005, these allegations will be disregarded.

14 Region 8 Human Resources is informally known as the "rubber room." See Steven Brill, *The Rubber Room: The Battle Over New York City's Worst Teachers*, New Yorker, Aug. 31, 2009, available at http://www.newyorker.com/reporting/2009/08/31/090831fa_fact_brill.

ii. Retaliation

Cammarata participated in the June 21, 2005 demonstration protesting alleged anti-Caribbean discrimination. She alleges that she suffered retaliation as a result of this [*50] protected activity. In support of this allegation, Cammarata notes that during her deposition, Jennings specifically recalled Cammarata's presence at the demonstration. Wotorson Aff. Ex 196, Jennings Dep. 154:10-14. The recollection of her participation in the demonstration, according to Cammarata, supports an inference of retaliation by Jennings. Pls.' Br. 33. The defendant's knowledge of the plaintiff's participation in a protected activity, however, is a separate element of the *prima facie* showing of retaliation. *Jute*, 420 F.3d at 173. If an inference of retaliation were to be drawn solely from this knowledge, the causal connection element would be entirely superfluous. Further, the Court does not find it reasonable to infer that retaliation naturally follows from an employer's awareness of an employee's protected activity.

Cammarata must thus rely on an inference of retaliation drawn from the temporal connection between the demonstration and the alleged retaliatory acts. Defendants argue that because Cammarata's reassignment to Region 8 Human Resources occurred more than a year after the demonstration, no inference of retaliation can be drawn based on timing. This would be a strong [*51]

argument were the reassignment the only basis for the retaliation claim, but Cammarata was also subject to a series of reprimands and disciplinary actions beginning as early as September 8, 2005 and continuing throughout the school year. Defs.' 56.1 Statement PP 173-175, 177, 179, 184-187, 189; Pls.' 56.1 Statement PP 173-175, 177, 179, 184-187, 189. A gap of only a few months (especially when those months include the summer break) would not preclude an inference of retaliation. In this case, however, any attempt to draw such an inference based solely on chronology is defeated by the fact that Cammarata was subject to a number of similar reprimands and disciplinary actions in the school year *prior to* her participation in the demonstration. Defs.' 56.1 Statement PP 155-162, 164, 166-169; Pls.' 56.1 Statement P 155-162, 164, 166-169. In other words, Cammarata had already been subject to reprimands and disciplinary actions similar to those she characterizes as retaliatory before her participation in any protected activities. See *Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 95 (2d Cir. 2001) ("Where timing is the only basis for a claim of retaliation, and gradual adverse job [*52] actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise."). Because Cammarata cannot make a *prima facie* showing of retaliation, defendants are entitled to summary judgment on this claim.

d. Christelene Henry

i. Discrimination

Henry alleges that she has been subject to ongoing discriminatory treatment which has included negative lesson evaluations, reprimands, and an unsatisfactory year-end rating. Henry has no direct evidence of anti-Caribbean bias on the part of Jennings, Williams, or other SSCHS administrators, and thus must rely on indirect evidence to support an inference of discriminatory intent.

In her complaint, Henry sought to raise such an inference by showing that a similarly situated non-Caribbean teacher received more favorable treatment than she did. Compl. PP 9 (C) (n)-(r). See *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) ("A plaintiff may raise such an inference by showing that the employer subjected him to disparate treatment, that is, treated him less favorably than a similarly situated employee outside his protected group."). Henry alleged that she was admonished by Jennings for providing [*53]

inappropriate teaching materials to students, while a non-Caribbean teacher accused of similar conduct was not disciplined. In fact, as Henry no longer disputes, the non-Caribbean teacher was reprimanded by Jennings. (Defs.' 56.1 Statement P 96; Pls.' 56.1 Statement P 96).

Henry also argues, like Vaughn, that she was perceived as harboring an anti-American or anti-African-American animus, and that this supports an inference that the administrators developed a reciprocal discriminatory animus against her. Pls.' Br. 26-27. For reasons already discussed, this argument is entirely without merit, and no such inference can be drawn.

Finally, Henry has argued that an inference of discrimination can be drawn from the fact that during the time Henry has been at SSCHS no Caribbean born English teacher has been allowed to read the dictation portion of the English Regents Exam.¹⁵ But this argument must fail for the same reason plaintiffs' pattern or practice argument failed - Henry provides no context within which to evaluate this allegation. How many teachers are there in the SSCHS English department? How many are of Caribbean national origin? How many read the Regents Exam dictation each year? [*54] Without at least this information it is impossible to evaluate this alleged disparate treatment of English teachers of Caribbean national origin.

15 Curiously, Henry's EEOC complaint alleges that she was allowed to read for the Regents Exam in 2005. This fact is absent from the complaint in this Court, which maintains only that "since Plaintiff has been employed at Science Skills no Caribbean born English teacher has been allowed to read the questions and instructions and dictation at the English Regents Exam." Compl. P 9(C)(y).

Because Henry cannot demonstrate circumstances giving rise to an inference of discrimination, her national origin discrimination claim must fail. An inference of discrimination on the basis of alienage is equally unavailable, and Henry's claim under § 1981 must also fail. Henry's claim for alienage discrimination is further undermined by the fact that plaintiffs' complaint alleges similar treatment of citizen and non-citizen teachers. For example, plaintiffs allege that both Henry and Vaughn were perceived as being anti-American, and that as a result, Williams and Jennings discriminated against them reciprocally. It is difficult to see how this alleged animus

[*55] could be directed against Henry due to her lack of citizenship, while at the same time directed at Vaughn, a U.S. citizen, on the basis of her national origin. Defendants are entitled to summary judgment on these claims.¹⁶

16 Defendants also argue that Henry cannot show that she has suffered any adverse employment action. Because Henry cannot show circumstances giving rise to an inference of discrimination, the Court need not reach the adverse employment action question.

ii. Retaliation

Henry alleges that she was retaliated against after participating in the June 21, 2005 demonstration. In her case, however, there was a substantial gap between the demonstration and any allegedly retaliatory actions. Henry complains that on September 22, 2006, she reported to Jennings that a student had threatened her, and that no investigation followed this report. This alleged incident is fully fifteen months after the demonstration. No reasonable inference of a causal connection can be drawn from events separated by such a large period of time.¹⁷

17 Defendants' submissions also reveal that Henry's class was observed and reported on negatively twice in this time period, on March 8, 2006 and September [*56] 14, 2006 by a Regional Instructional Specialist ("RIS"). Defs.' 56.1 Statement PP 105, 107; Pls.' 56.1 Statement PP 105, 107. First, it is not clear from the record whether these reports, which contained observations of multiple teachers, were actually shown to Henry. If they were not, then they certainly cannot be adverse employment actions. Second, there is no evidence in the record that the RIS was aware of Henry's participation in the demonstration. Finally, even assuming the prior two points, the earlier of the two observations was more than seven months removed from the demonstration - too distant to draw a reasonable inference of causation.

Henry's § 1981 retaliation claim must also fail. As an initial matter, it is necessary to consider when Henry engaged in protected activities under § 1981. Henry has alleged no facts which would support this claim. Prior to the complaint in this Court, none of the potentially

protected activities engaged in by Henry - the meeting between teachers and administrators,¹⁸ the demonstration, the EEOC complaint - involved complaints of discrimination on the basis of alienage. On the contrary, Henry alleged only discrimination on the basis of Caribbean [*57] national origin, and participated alongside U.S. citizens raising the same complaint. Because Henry did not engage in activity on the basis of a class protected by § 1981, there can be no valid § 1981 retaliation claim. See *Choudhury v. Polytechnic Inst. of N.Y.*, 735 F.2d 38, 43 n.6 (2d. Cir. 1984) (distinguishing a case in which "§ 1981 is being used to proscribe retaliation for asserting rights protected by § 1981 itself" from one in which "a pre-existing statute [is used] to support a retaliation claim based on a subsequently enacted statute").

18 It is unclear which teachers were present for this meeting. On the basis of the record, only Vaughn and Francis can be identified as alleging attendance. Compl. P 9(A)(o); Pls.' Br. 28.

Henry's retaliation claims must fail, and defendants are entitled to summary judgment on these claims.¹⁹

19 Defendants also argue that Henry cannot show that she has suffered any adverse employment action. Because Henry cannot show circumstances giving rise to a causal connection, the Court need not reach the adverse employment action question.

e. Emily Francis

i. Discrimination

Francis alleges that she has been subject to ongoing discriminatory treatment in [*58] the form of allegations of lateness and excessive absences and denial of leave. Francis has been unable to identify any direct evidence of discriminatory animus on the part of Jennings, Williams, or other members of the school administration, and thus must rely on indirect evidence to raise an inference of discrimination. Francis alleges that in her role as union representative she has written letters and filed grievances on behalf of teachers, and that these teachers have been "mainly Caribbean-born." Wotorson Aff. Ex. 94, June 2005 Report, at 2. This allegation is insufficient to support an inference of discrimination for the same reason the pattern or practice argument fails. Not only is the allegation made in vague terms, but no numerical

context is provided in which it can be evaluated. It is not possible to draw a reasonable inference of discrimination on the basis of such an impressionistic allegation. Francis's discrimination claim must thus fail, and defendants are entitled to summary judgment.²⁰

20 Defendants also argue that Francis cannot show that she has suffered any adverse employment action. Because Francis cannot show circumstances giving rise to an inference of discrimination, [*59] the Court need not reach the adverse employment action question.

ii. Retaliation

In April 2004, Francis, along with other teachers, allegedly attended a meeting with members of the administration, including Jennings and Williams, at which they expressed their belief that the administration was engaging in anti-Caribbean discrimination. Pls.' Br. 28. Later, on June 21, 2005, Francis participated in a demonstration accusing SSCHS of anti-Caribbean discrimination. Wotorson Aff. Ex. 194, Deposition of Emily Francis, dated January 23, 2008, at 93:20-24. Francis alleges that she was retaliated against for engaging in protected activities.

Because Francis has no direct evidence of a causal connection between her protected activities and the alleged retaliatory acts, she must rely on timing to raise an inference of causation. No such inference may reasonably be drawn. The first negative action received by Francis following the April 2004 meeting was reprimand from Jennings alleging interference in supervisory duties on November 5, 2004, some four or five months after the meeting. Defs.' 56.1 Statement P 134; Pls.' 56.1 Statement P 134. There were no further negative actions until six months later [*60] when Francis received a notice concerning her attendance dated May 5, 2005. Defs.' 56.1 Statement P 135; Pls.' 56.1 Statement P 135. Following the June 21, 2005 demonstration, the first negative action toward Francis in the record was a notice related to attendance in April 2006. Defs.' 56.1 Statement P 140; Pls.' 56.1 Statement P 140. Notably, Francis received satisfactory year-end ratings in June 2004, June 2005, and June 2006. Defs.' 56.1 Statement PP 133, 138, 142; Pls.' 56.1 Statement P 133, 138, 142. Under the circumstances, the long gaps in time between the protected activities and any negative actions toward Francis do not suggest any reasonable inference of causal connection. Defendants are entitled to

summary judgment on this claim.²¹

21 Defendants also argue that Francis cannot show that she has suffered any adverse employment action. Because Francis cannot show circumstances giving rise to a causal connection, the Court need not reach the adverse employment action question.

f. Carol Davis

Davis alleges that she was subject to discriminatory treatment which ultimately culminated in her termination from SSCHS. Davis, unlike the other plaintiffs, has a viable claim only under [*61] § 1981, and thus in order to make her *prima facie* case, she must demonstrate that a reasonable inference can be drawn of discrimination on the basis of alienage.

In support of such an inference, Davis cites deposition testimony by Williams in which she confirms recording in a memorandum a conversation with Davis in which statements were made concerning differences between how things are done in the U.S. and Jamaica. Wotorson Aff. Ex. 197, Deposition of Michele Williams, dated January 30, 2008, at 56:16-22. The memorandum in question, dated September 17, 2002, is a communication from Williams to Sinclair titled "UNSAFE LAB CONDITIONS," in which Williams reported unsafe conditions in Davis's lab classes. Klepfish Decl. Ex. B, Memorandum from Michele Williams to Robert Sinclair. According to the memorandum, when Williams informed Davis that the students were working with Bunsen burner flames at unsafe levels, Davis "explained that in her country, the students worked with flames that high and it had never been a problem for them." *Id.* at 2. Contrary to the impression given in Davis's brief, Pls.' Br. 28, in the only account of this conversation in the record, it was Davis, not Williams, [*62] who raised the issue of how things are done in Jamaica. Even assuming that it was Williams who raised the issue of differences between American and Jamaican classroom practices, this statement in isolation is not enough to draw an inference of discrimination. Davis was a recent arrival to the United States, and her teaching experience prior to her employment at SSCHS was almost entirely in Jamaica. Wotorson Aff. Ex. 195, Deposition of Carol Davis ("Davis Dep."), dated January 23, 2008, at 29:8-21. Curricula, pedagogical methods, and teacher-student interactions may vary greatly between different schools,

and this would be especially true across different countries. At this point, only weeks into the school year, Williams had already expressed concerns about Davis's teaching, Defs.' 56.1 Statement P 9; Pls.' 56.1 Statement P 9, and it doesn't seem unreasonable to suggest that unfamiliarity with the American school system and educational methods might be contributing to the problem.

Second, Davis argues that comments regarding her accent are evidence of discriminatory animus. Williams related to Davis that some students were complaining of difficulties understanding her. Wotorson Aff. [*63] Ex. 195, Davis Dep. 54:17-55:10. But communication difficulties between students and teacher are certainly a legitimate area of concern for an administrator, and if an accent is causing or contributing to such a problem, then it is undoubtedly legitimate for an administrator to raise it with the teacher. Plaintiffs themselves describe Davis as "heavily-accented." Pls.' Br. 28. Without more, it is hardly sufficient to create an inference of discriminatory intent. See *Thelusma v. N.Y.C. Bd. of Educ.*, No. 02-CV-4446, 2006 U.S. Dist. LEXIS 64855, 2006 WL 2620396 (E.D.N.Y. Sept. 13, 2006) (when there was no language used indicative of racial animosity, advice to take an accent reduction class is "consistent with a beneficent design to afford him the opportunity to improve his communication skills").

Finally, Davis reports that some students taunted her, saying that Williams would "send [her] back to [her] country." Wotorson Aff. Ex. 195, Davis Dep. 43:3-9. This statement, however, comes from students, not from any of the defendants. Davis urges the drawing of an inference of discriminatory intent only on the basis of another inference that the students' comments were made at the behest of, or at least with the approval [*64] of, Williams. Pls.' Br. 29. Davis's argument for this inference, however, is entirely speculative.

Even assuming these statements could be attributed to Williams, and that they were sufficient to allow an inference of discrimination, this merely shifts the burden of proof to defendants to show legitimate business reasons for Davis's termination. Defendants have provided a series of reports of unsafe laboratory conditions, documentation of her repeated lateness, negative lesson evaluations, and her year-end evaluation which rates her punctuality unsatisfactory. Defs.' 56.1 Statement P 9-16, 18-23; Pls.' 56.1 Statement PP 9-16,

18-23; Klepfish Decl. Ex. N, Annual Professional Performance Review. Notably, both Nancy Baldwin, the Assistant Principal in charge of attendance, and Principal Sinclair who recommended Davis's termination are of Caribbean national origin. Defs.' 56.1 Statement P 6, 8; Pls.' 56.1 Statement P 6, 8. Because the defendants have provided a legitimate business reason for her termination, the burden rests on Davis to demonstrate that it is pretextual. She has not done so, and thus her claim must fail. See *Woroski v. Nashua Corp.*, 31 F.3d 105, 109-10 (2d Cir. 1994) (stray [*65] remarks, in isolation, are not enough to undermine legitimate business reasons). Defendants are entitled to summary judgment on this claim.

CONCLUSION

For the aforementioned reasons, Defendants' motion for summary judgment is GRANTED as to all plaintiffs' discrimination and retaliation claims, except plaintiff Vaughn's claim for retaliation.

SO ORDERED.

Dated: Brooklyn, New York

May 24, 2010

/s/

I. Leo Glasser

United States Senior District Judge