(SPACE BELOW FOR FILING STAMP ONLY)

LINDA MILLER SAVITT, SBN 094164
CHRISTINE T. HOEFFNER, SBN 100874
BALLARD ROSENBERG GOLPER & SAVITT, LLP
500 North Brand Boulevard
Twentieth Floor
Glendale, CA 91203-9946
Telephone: 818-508-3700; Facsimile: 818-506-4827

LAWRENCE A. MICHAELS, SBN: 107260
MITCHELL SILBERBERG & KNUPP
11377 W. Olympic Blvd.
Los Angeles, CA 90064
Telephone: (310) 312-2000; Facsimile: (310) 312-3100

CAROL A. HUMISTON, SBN 115592
Senior Assistant City Attorney, City of Burbank
275 E. Olive Avenue
Burbank, CA 91510
Telephone: (818) 238-5707; Facsmile: (818) 238-5724

Attorneys for Defendant
CITY OF BURBANK, including the Police
Department of the City of Burbank

RECEIVED
MAY 0 7 2010
Mitchell Silberberg & Knupp LLP

BALLARD ROSENBERG GOLPER & SAVITT LLP
500 N. BRAND BLVD., TWENTIETH FLOOR
GLENDALE, CA 91203

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

OMAR RODRIGUEZ; CINDY GUILLEN-GOMEZ; STEVE KARAGIOSIAN; ELFEGO RODRIGUEZ; AND JAMAL CHILDS, Plaintiffs, -vs- BURBANK POLICE DEPARTMENT; CITY OF BURBANK; TIM STEHR; KERRY SCHILF; JAMIE "J.J." PUGLISI; DAN YADON; KELLY FRANK; PAT LYNCH; MIKE PARRINELLO; AARON KENDRICK; DARIN RYBURN; AND DOES 1 THROUGH 100, INCLUSIVE. Defendants.	CASE NO: BC 414602 [Hon. Joanne O'Donnell, Dept. 37] **DEFENDANTS' APPENDIX OF NON-CALIFORNIA AUTHORITY RE: MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF STEVE KARAGIOSIAN** Date: July 20, 2010 [Date reserved] Time: 9:00 Dept.: 37 Trial: Aug. 25, 2010 Action filed: May 28, 2009

Defendant CITY OF BURBANK, including THE POLICE DEPARTMENT OF THE CITY OF BURBANK submits the following Appendix of Non-California Authority re Defendant's Motion for Summary Judgment Against Plaintiff Steve Karagiosian.

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BALLARD ROSENBERG GOLPER & SAVITT LLP
500 N. BRAND BLVD., TWENTIETH FLOOR
GLENDALE, CA 91203

LEXSEE

Caution
As of: May 06, 2010

Indira Adusumilli, Plaintiff-Appellant, v. City of Chicago, Defendant-Appellee.

No. 98-1019

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

164 F.3d 353; 1998 U.S. App. LEXIS 32500; 78 Fair Empl. Prac. Cas. (BNA) 1669; 74 Empl. Prac. Dec. (CCH) P45,698

September 11, 1998, Argued
December 28, 1998, Decided

SUBSEQUENT HISTORY: [**1] Certiorari Denied November 8, 1999, Reported at: 1999 U.S. LEXIS 7449.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 95 C 7680. Paul E. Plunkett, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff former employee appealed from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, granting summary judgment for defendant former employer in plaintiff's action alleging sexual discrimination, sexual harassment, and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq.

OVERVIEW: Plaintiff former employee brought an action against defendant former employer alleging sexual discrimination, sexual harassment, and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., following her termination. The district court granted summary judgment for defendant, holding that plaintiff failed to create factual issues regarding the objective test for harassment, or the negligence test for employer liability. Plaintiff appealed, claiming that summary judgment was inappropriate with respect to her sexual harassment and retaliation claims because she created factual issues regarding both. The court affirmed, holding that the incidents alleged by plaintiff did not constitute sexual harassment, and that plaintiff failed to show that defendant's stated reason for firing her, poor performance, was insincere.

OUTCOME: Judgment affirmed because the incidents alleged by plaintiff former employee did not constitute sexual harassment, and plaintiff failed to show that defendant former employer's stated reason for firing her, poor performance, was insincere.

CORE TERMS: harassment, summary judgment, hostile, retaliation, adverse action, sexual harassment, fired, genuine issue, notification, national origin, protected expression, supervisor, deposition, eye contact, personal knowledge, deposition testimony, discriminatory, contradict, co-worker, harassed, rating, breasts, performance evaluations, causal link, unsatisfactory, inappropriate, performing, pervasive, stricken, staring

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > General Overview
Civil Procedure > Appeals > Standards of Review
[HN1]Where the district court grants summary judgment in favor of the defendant, the appellate court takes the facts alleged by the plaintiff to be true.

Civil Procedure > Summary Judgment > Appellate Review > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview

Civil Procedure > Summary Judgment > Supporting Materials > General Overview
[HN2]The appellate court reviews a trial judge's decision to strike parts of an affidavit in opposition to a motion for summary judgment for abuse of discretion. Under this standard, decisions that are reasonable, i.e., not arbitrary, will not be questioned.

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Supporting Materials > Affidavits
[HN3]Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Fed. R. Civ. P. 56(e). On a motion for summary judgment, a court must not consider those parts of an affidavit that are insufficient under Rule 56(e).

Civil Procedure > Summary Judgment > Supporting Materials > Affidavits
[HN4]A party cannot prevail on a motion for summary judgment by submitting an affidavit containing conclusory allegations which contradict plain admissions in prior deposition or otherwise sworn testimony. Therefore, where deposition and affidavit are in conflict, the affidavit is to be disregarded unless it is demonstrable that the statement in the deposition was mistaken.

Civil Procedure > Summary Judgment > Standards > General Overview
Labor & Employment Law > Discrimination
[HN5]Summary judgment must only be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The courts apply this standard with particular care in employment discrimination cases, where intent and credibility are critical.

Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality
[HN6]An adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). Furthermore, a party needs more than a scintilla of evidence to defeat summary judgment.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN7]The appellate court reviews the district court's grant of summary judgment de novo.

Labor & Employment Law > Discrimination > Actionable Discrimination
[HN8]Under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., it is unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C.S. § 2000e2(a)(1).

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Burdens of Proof > Severe & Pervasive Standards
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > Sexual Harassment
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN9]An employer violates Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e et seq., when discrimination based on sex creates a hostile or abusive work environment. However, not all workplace conduct that may be described as harassment affects a term, condition, or privilege of employment within the meaning of Title VII. Rather, for sexual harassment to be actionable, it must be sufficiently severe or pervasive.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employer Liability > Coworkers
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employer Liability > Supervisors
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment

[HN10]In order to prevail on a hostile environment sexual harassment claim, a plaintiff must show that his or her work environment was both subjectively and objectively hostile. Furthermore, while employers are vicariously liable for hostile environment sexual harassment by supervisors subject to certain defenses, a plaintiff must show negligence in order to hold an employer liable for co-worker harassment.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment

[HN11]An objectively hostile environment is one that a reasonable person would find hostile or abusive. In determining whether a plaintiff has met this standard, courts must consider all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Labor & Employment Law > Discrimination > Actionable Discrimination

[HN12]Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > Elements
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > General Overview

[HN13]There is a safe harbor for employers in cases in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex.

Labor & Employment Law > Discrimination

[HN14]Under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., it is an unlawful employment practice for an employer to discriminate against any of his employees because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C.S. § 2000e-3(a).

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Interference With Protected Activities
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Employment Practices > General Overview

[HN15]Under the McDonnell Douglas burden shifting method of proving discrimination, a plaintiff must first establish a prima facie case of retaliation. In order to do so, she must show that (1) she engaged in statutorily protected expression; (2) she suffered an adverse action by her employer; and (3) there is a causal link between the protected expression and the adverse action. Once a plaintiff makes this showing, the burden shifts to the defendant to state a legitimate, nondiscriminatory reason for the adverse action. If the defendant is able to state such a reason, the burden shifts back to the plaintiff to show that the proffered reasons are pretextual and that the actual reason was discriminatory. Although the burden of production shifts under this method, the burden of persuasion rests at all times on the plaintiff.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Employment Practices > General Overview
Labor & Employment Law > Discrimination > Retaliation > General Overview

[HN16]A plaintiff may establish a causal link between protected expression and adverse action through evidence that the discharge took place on the heels of protected activity.

Labor & Employment Law > Discrimination > Retaliation > General Overview

[HN17]In order to meet the causal link requirement for establishing a prima facie case of retaliation, a plaintiff must demonstrate that the defendant would not have taken the adverse action but for the protected expression.

Labor & Employment Law > Discrimination > Retaliation > General Overview

[HN18]An employee's self-serving statements about her ability are insufficient to contradict an employer's negative assessment of that ability. Self-serving statements do not shed any light on whether the employer honestly based its employment decision on performance-related considerations, which is the focus of our inquiry in these cases.

Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN19]Similar performance evaluations are makeweight evidence, and such evaluations have little significance in a case in which there is so dramatic a discrepancy between evaluation and performance.

Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN20]Pretext can be demonstrated either by showing that a discriminatory reason more likely motivated the employer or by showing that the employer's proffered explanation is unworthy of credence.

COUNSEL: For INDIRA ADUSUMILLI, Plaintiff - Appellant: Michael J. Merrick, WITWER, POLTROCK & GIAMPIETRO, Chicago, IL.

For CITY OF CHICAGO, DEPARTMENT OF POLICE, Defendants - Appellees: Ruth F. Masters, OFFICE OF THE CORPORATION COUNSEL, Appeals Division, Chicago, IL USA.

JUDGES: Before Posner, Chief Judge, and Bauer and Easterbrook, Circuit Judges.

OPINION BY: BAUER

OPINION

[*357] Bauer, Circuit Judge. Indira Adusumilli ("Adusumilli") was fired from her position as an Administrative Assistant for the City of Chicago, Department of Police ("City"). She subsequently brought suit for discrimination, harassment, and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e)-2(a)(1). After striking portions of Adusumilli's affidavit, the district court granted the City's motion for summary judgment on all claims. Adusumilli now appeals, arguing that several statements in her affidavit should not have [**2] been stricken, and that summary judgment was inappropriate with respect to her claims of sexual harassment and retaliation. We affirm.

I. Background

[HN1]Because the district court granted summary judgment in favor of the defendant, we take the facts alleged by the plaintiff to be true. *See* Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257, 2262 (1998).

The City hired Adusumilli as an Administrative Assistant for the Twenty-Fourth District on January 16, 1992. She was fired on September 6, 1994. Adusumilli claims that while she worked at the Twenty-Fourth District, she encountered many instances of sexual harassment. Of these, Adusumilli recalls several incidents that occurred between December 1993 and September 1994, for which period her filing with the Equal Employment Opportunity Commission was timely. [1]

1 Adusumilli does not appeal the trial court's determination that her EEOC filing was untimely with respect to events that occurred prior to November 12, 1993.

[**3] Adusumilli objects to a number of comments that were made to her. Civilian District Manager Zenia Zeliasz ("Zeliasz"), Adusumilli's immediate supervisor, told Adusumilli that to avoid being laughed at, she should break her banana in the middle rather than eating it whole. Officer Phyllis Muzupappa ("Muzupappa") told Adusumilli to wash a banana before she ate it. On another day, Muzupappa asked Adusumilli what putting one rubber band on top and another on the bottom means. On another occasion, Officer Joe Cannon told Adusumilli that she should not wave at squad cars in front of the police station because people would think she was a prostitute.

Adusumilli also complains of several incidents involving staring and unwanted physical contact. One day, Officer Joseph O'Connor tried to make eye contact with Adusumilli and stared at her breasts. Another day, Officer James Lupi stared at Adusumilli's breasts and, during computer training, he touched her left arm between the elbow and shoulder.

Adusumilli was particularly disturbed by the conduct of Officer Paul Gray ("Gray"), a coworker with whom she had minimal contact. One day, she overheard Gray ask Muzupappa if Muzupappa had worn a low-neck [**4] top the night before. Another day, Gray tried to make eye contact with Adusumilli and stared at her breasts. On two occasions, Gray poked at Adusumilli's fingers. Finally, Adusumilli believes that Gray poked her buttocks, though she admits that she was in a public area and failed to see him make physical contact.

In January of 1994, a few days after it happened, Adusumilli reported the buttocks-poking incident to Zeliasz. Zeliasz immediately reported Adusumilli's complaint to the watch lieutenant, who initiated an Internal Affairs Department ("IAD") investigation. Officer Putney, from the IAD, interviewed Adusumilli, Gray, Zeliasz, and Sergeant Bruce Rottner (Adusumilli's supervisor). Officer Putney concluded that Adusumilli's allegations of sexual harassment could not be sustained. After her complaint to the IAD, Adusumilli stopped reporting incidents to anyone in the police department.

In the spring of 1994, after the IAD investigation had concluded, the City assigned Gray to prepare arrest

reports at a computer terminal five to ten feet away from Adusumilli's desk. Gray used the computer two or three days a week for a few hours at a time. The City explains that it made this assignment [**5] because Gray had computer knowledge and knew arrest procedures. The computer that Gray used was one of only a few at the Twenty-Fourth District, and was the only [*358] computer with the database that both Adusumilli and Gray needed. Adusumilli complains that at one point after Gray began working on the computer, she observed him staring at her breasts, smiling, and trying to make eye contact with her.

The City has its own complaints. It documented a number of mistakes made by Adusumilli during her tenure. For example, in 1992, Commander Kenneth Alexander ("Alexander") wrote a letter to the Deputy Chief, informing him that Adusumilli had processed some traffic reports incorrectly, that Adusumilli's learning process was slow, and that she required a lot of help.

In 1993, District Officer Beth Atkins ("Atkins") wrote a memo to Alexander to inform him that Adusumilli had mistyped the address on a notification for a meeting between a police officer and the Corporation Counsel's office, causing the officer to miss the appointment. When Atkins confronted Adusumilli about the missing notification, Adusumilli complained that people were conspiring against her and that someone had taken [**6] the notification from the file. When Atkins asked her to look again, Adusumilli found the notification, which had been misfiled. Also in 1993, Atkins wrote a letter to Alexander, documenting the fact that Adusumilli had mishandled a Mayor's License Commission notification, despite detailed written instructions.

On January 9, 1994, Lieutenant Torres reported to Atkins that Adusumilli had made errors in the court notifications. When Atkins looked into the matter, she found that Adusumilli had used 1993 schedules instead of 1994 schedules to write up the notifications. On March 31, 1994, Atkins sent a memo to Commander Thomas Byrne ("Byrne") [2] indicating errors made by Adusumilli in preparing requisitions. In April, May, and June 1994, Zeliasz documented Adusumilli's errors in several memos to Byrne. On May 12, and June 30, 1994, Byrne sent memos to Sergeant Brad Woods at the Police Personnel Department, listing examples of Adusumilli's performance errors. Byrne's comments were based, in part, on his own experience of having to do damage control when officers were reprimanded for not appearing in court due to Adusumilli's errors.

2 On February 18, 1994, Byrne replaced Alexander, who had retired.

[**7] At first, Adusumilli's errors did not affect her performance evaluations. Between January 1992 and December 1993, Adusumilli received four performance evaluations. On all four evaluations, she was rated "good" on a scale of "unsatisfactory," "marginal," "good," and "excellent." However, Adusumilli was not satisfied. After she received her February 1993 evaluation, Adusumilli looked at the evaluations for all five hundred employees in the district. She then complained to Sergeant Rottner because she felt that, comparatively, she deserved a rating of excellent. Adusumilli was upset when Sergeant Rottner and Commander Alexander told her that they agreed with the original rating.

On her June 1994 evaluation, Adusumilli received an overall rating of "unsatisfactory." The evaluation stated that Adusumilli was "careless in her work, unable to engage in cooperative effort with coworkers, slow to learn, required repeated instructions, required follow-up even on routine duties, had difficulty maintaining supply orders, and had great difficulty adjusting to new work or changed conditions." (Defendant's Statement of Undisputed Facts P 161).

In March 1994, Byrne placed Adusumilli in the Behavior [**8] Alert program, a program for employees with performance problems. The program is meant to retrain the employee as well as to document performance problems. In May, Byrne recommended that Adusumilli be transferred to a position with less responsibility. Finally, on September 1, 1994, Adusumilli was notified that she was being terminated as of September 6, 1994.

Adusumilli admits to making some mistakes during her time at the Twenty-Fourth District. However, she believes that she "was performing up to the legitimate expectations of [her] employer," and that she "was performing just as well as [her] co-workers." (Adusumilli Aff. P 3). In addition, Adusumilli asserts that she "had no performance problems that would justify placing [her] into the [*359] Behavioral Alert Program" and discharging her. (Adusumilli Aff. P 3). She believes that she "was placed in the Behavioral Alert Program, received a final performance evaluation rating of "unsatisfactory," and ultimately was discharged in retaliation . . . for lodging . . . complaints." (Adusumilli Aff. P 14).

On September 7, 1994, Adusumilli filed a charge with the Equal Employment Opportunity Commission ("EEOC"). On September 29, 1995, the [**9] EEOC issued a right to sue letter. On December 28, 1995, Adusumilli filed a complaint against the City, alleging discrimination based on race, color, and national origin; harassment based on race, color, national origin, and gender; and retaliation based on race, color, national origin, and gender.

In a Memorandum Order and Opinion dated December 5, 1997, the district court ordered several statements in Adusumilli's affidavit stricken. The court also granted the City's motion for summary judgment on all of Adusumilli's claims. On appeal, Adusumilli challenges the district court's decision to strike three statements from her affidavit, and argues that the court's grant of summary judgment was inappropriate with respect to her claims of sexual harassment and retaliation.

II. Discussion

A. Adusumilli's Affidavit

As a preliminary matter, we must address Adusumilli's appeal of the lower court's order striking portions of her affidavit. [HN2]We review a trial judge's decision to strike parts of an affidavit in opposition to a motion for summary judgment for abuse of discretion. *See Whitted v. General Motors Corp.*, 58 F.3d 1200, 1203 (7th Cir. 1995). Under this standard, [**10] "decisions that are reasonable, i.e., not arbitrary, will not be questioned. . . ." *Id.*

According to the Federal Rules of Civil Procedure, "[HN3]supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). On a motion for summary judgment, a court must not consider those parts of an affidavit that are insufficient under Rule 56(e). *Friedel v. City of Madison*, 832 F.2d 965, 970 (7th Cir. 1987).

The district court held that three statements in Adusumilli's affidavit lack foundation and concern matters not within her personal knowledge, and that one statement contradicts Adusumilli's prior testimony under oath at her deposition. *Adusumilli v. City of Chicago*, 1997 U.S. Dist. LEXIS 19625, 1997 WL 769457 at *3 (N.D. Ill. 1997). For these reasons, the court ordered all four statements stricken. *Id.* Adusumilli challenges the district judge's order with respect to three of the four stricken statements. We consider each of these in turn.

First, Adusumilli [**11] challenges the lower court's decision to strike the following sentence from her affidavit: "However, as time passed, it became apparent to me that the harassment was based upon my gender and national origin." (Adusumilli Aff. P 2). The district court held that this statement lacks foundation and is not within Adusumilli's personal knowledge because it addresses the reasons that co-workers allegedly harassed her. This determination was eminently reasonable and safely within the district judge's discretion.

Next, Adusumilli argues that the lower court erred in striking the second sentence of the following paragraph: "The presence of Paul Gray in my work area seriously affected my ability to carry out my job responsibilities. My superiors knew of my discomfort, but did nothing to alleviate it." (Adusumilli Aff. P 6). Concluding that this second sentence contains speculation about what Adusumilli's superiors knew, the district court held that the statement lacks foundation and is not within Adusumilli's personal knowledge.

Adusumilli argues that she has personal knowledge of what her superiors knew because she informed Zeliasz of her discomfort. In support of this argument, Adusumilli [**12] cites paragraphs 19 and 20 of her Local Rule 12(N) Statement of Additional Facts. Paragraph [*360] 19 is irrelevant. [3] Paragraph 20 states: "Gray's presence in Plaintiff's work area interfered with Plaintiff's performance. Plaintiff complained to her supervisor, Zeliasz, but nothing was done to remedy the situation." (Adusumilli 12(N) Statement P 20 (emphasis added)). Although it is possible to interpret this paragraph to imply that Adusumilli complained that Gray's presence interfered with her performance because he made her uncomfortable, paragraph 20's cross-references to Adusumilli's deposition belie this interpretation. The cross-referenced pages show only that Adusumilli complained to Zeliasz about the fact that Gray often used the computer when she needed it, making it difficult for her to get her work done on time. (Adusumilli Dep. at 82-83). They do not show that Adusumilli told Zeliasz that Gray's presence made her uncomfortable. For this reason, the district judge did not abuse his discretion.

3 Paragraph 19 states: "After Plaintiff reported the three incidents involving Paul Gray, he began using the computer located behind Plaintiff's desk to enter arrest reports. During that time, he continued to engage in inappropriate conduct, including staring at Plaintiff's breasts and attempting to make eye contact with her." (Adusumilli 12(N) Statement P 19).

[**13] Finally, Adusumilli challenges the district judge's determination that one of the statements in her affidavit conflicts with her earlier deposition testimony. [HN4]A party cannot prevail on a motion for summary judgment by "submitting an affidavit containing conclusory allegations which contradict plain admissions in prior deposition or otherwise sworn testimony." *Diliberti v. United States*, 817 F.2d 1259, 1263 (7th Cir. 1987) (collecting cases). Therefore, "where deposition and affidavit are in conflict, the affidavit is to be disregarded unless it is demonstrable that the statement in the deposition was mistaken. . . ." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 67-68 (7th Cir. 1995).

Following this well-established rule, the district judge struck the following statement from Adusumilli's affidavit: "During my tenure at the 24th District, I was harassed on a near daily basis by my co-workers, Atkins, Muzupappa, and Zeliasz." (Adusumilli Aff. P 2). The judge found that this statement "clearly contradicts" Adusumilli's deposition testimony to the effect that her first year at the Twenty-Fourth District was uneventful. Adusumilli, 1997 WL 769457 [**14] at *3. Specifically, when Adusumilli was asked whether "there [was] anything in the first year that made [her] feel that [she was] . . . being discriminated against on the basis of [her] sex," she responded "no." (Adusumilli Dep. at 60). [4] Adusumilli asserts that her deposition testimony and affidavit do not really conflict because at her deposition she was referring to specific incidents, while in her affidavit she was referring to the general atmosphere at the Twenty-Fourth District.

4 Adusumilli testified similarly when asked about race and national origin discrimination. (Adusumilli Dep. at 59).

Even under Adusumilli's interpretation, however, there is no getting around the contradiction. First she says that she cannot recall any incidents of harassment in 1992 and then she says that she was harassed on a near daily basis during her tenure at the Twenty-Fourth District. In the language of Diliberti, Adusumilli has done nothing more than "submit[] an affidavit containing conclusory allegations [**15] which contradict plain admissions in prior deposition . . . testimony." 817 F.2d at 1263. *See also Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1296 (7th Cir. 1993) (finding a "direct contradiction" between an antitrust plaintiff's deposition testimony that "he could not remember any specific instance in which he wanted to charge more but didn't," and his affidavit statement that "'if Schweigert had not fixed the price that I had to charge my customers, there would have been many occasions on which I would have charged more for many of the Schweigert products I sold'"). Therefore, the trial judge did not abuse his discretion.

B. Summary Judgment

Under Federal Rule of Civil Procedure 56, [HN5]summary judgment must only be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We apply this standard [*361] with particular care in employment discrimination cases, where intent and credibility are critical. *Senner v. Northcentral Technical College*, 113 F.3d 750, 757 (7th Cir. 1997). Nevertheless, "[HN6]an adverse party may not rest [**16] upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Furthermore, a "party needs more than a scintilla of evidence . . . to defeat summary judgment." *Senner*, 113 F.3d at 757. Applying these standards, the district judge held that there was no genuine issue as to any material fact and that the City was entitled to judgment as a matter of law on all of Adusumilli's claims. On appeal, Adusumilli contends that summary judgment was inappropriate with respect to her sexual harassment and retaliation claims. [HN7]We review the district court's grant of summary judgment de novo.

1. Hostile Environment Sexual Harassment

[HN8]Under Title VII of the Civil Rights Act of 1964, it is unlawful "for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e2(a)(1). [HN9]An employer violates Title VII [**17] when "discrimination based on sex . . . creates a hostile or abusive work environment." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66, 106 S. Ct. 2399, 2405, 91 L. Ed. 2d 49 (1986). However, "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Id.* at 67, 106 S. Ct. at 2405. Rather, "for sexual harassment to be actionable, it must be sufficiently severe or pervasive." *Id.* (internal quotation marks omitted).

[HN10]In order to prevail on a hostile environment sexual harassment claim, a plaintiff must show that his or her work environment was both subjectively and objectively hostile. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993). Furthermore, while employers are vicariously liable for hostile environment sexual harassment by supervisors (subject to certain defenses), *Faragher v. City of Boca Raton*, 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275, 2292-93 (1998); Burlington Industries Inc., 118 S. Ct. at 2270, a plaintiff must show negligence in order [**18] to hold an employer liable for co-worker harassment, *Baskerville v. Culligan Internat'l Co.*, 50 F.3d 428, 431-32 (7th Cir. 1995). The district court assumed that Adusumilli had been sufficiently adversely affected to satisfy the subjective test for hostile environment harassment; however, the court held that there was no genuine issue of material fact as to either the objective test for harassment, or the negligence test for employer liability. Adusumilli, 1997 WL 769457 at *10-11. Either deficiency is sufficient to sustain the district court's grant of

summary judgment. Adusumilli challenges both holdings.

[HN11]An objectively hostile environment is one that a reasonable person would find hostile or abusive. Harris, 510 U.S. at 21, 114 S. Ct. at 370. In determining whether a plaintiff has met this standard, courts must consider all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23, 114 S. Ct. at 371.

In this case, [**19] the most salient feature of the harassment is its lack of severity. As the Supreme Court recently cautioned, "[HN12]'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" Faragher, 118 S. Ct. at 2283 (internal citations omitted). Yet that is precisely what we have here. Adusumilli complains of no more than teasing about waving at squad cars, ambiguous comments about bananas, rubber bands, and low-neck tops, staring and attempts to make eye contact, and four isolated incidents in which a co-worker briefly touched her arm, fingers, or buttocks. The [*362] "low-neck" comment was not even directed at Adusumilli, and was, therefore, only "second-hand harassment." *See Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1144 (7th Cir. 1997) (holding that "the impact of 'second-hand harassment' is obviously not as great as the impact of harassment directed at the plaintiff). Furthermore, the most serious misconduct, the unwanted touching of Adusumilli's buttocks, took the relatively mild form of a poke and occurred only once. It is well established [**20] in this Circuit that [HN13]there is a "safe harbor for employers in cases in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex." *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996). Adusumilli's allegations clearly fall within this safe harbor.

Adusumilli raises the additional argument that the City created an environment that was sexually hostile to her by assigning Gray to work near her after she had complained about his conduct. It is true that "in some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment." *Ellison v. Brady*, 924 F.2d 872, 883 (9th Cir. 1991) (emphasis added). *See also Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 199 (5th Cir. 1992) (holding that an employer created a sexually hostile environment by transferring an employee to a department supervised by someone who had previously harassed the employee). However, in this case, as discussed above, Gray did not engage [**21] in harassment, let alone "particularly severe or pervasive harassment." Therefore, as a matter of law, the City's actions in assigning Gray to work near Adusumilli did not create an objectively hostile environment. *See Saxton v. American Telephone and Telegraph Co.*, 10 F.3d 526, 536 n. 18 (7th Cir. 1993) (holding misconduct insufficiently severe or pervasive to cause supervisor's mere presence to render the employee's environment hostile when misconduct consisted of supervisor placing his hand on employee's leg above the knee, rubbing his hand along her upper thigh, forcibly kissing her, and lurching at her from behind bushes).

Because we hold that the incidents alleged by Adusumilli do not constitute harassment, we need not discuss the City's liability for the conduct of its employees.

2. Retaliation

[HN14]Under Title VII, it is "an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. §§ 2000e-3(a). [HN15]Under the McDonnell Douglas burden shifting [**22] method of proving discrimination, Adusumilli must first establish a prima facie case of retaliation. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). In order to do so, she must show that "(1) she engaged in statutorily protected expression; (2) she suffered an adverse action by her employer; and (3) there is a causal link between the protected expression and the adverse action." *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446, 1457 (7th Cir. 1994) (internal quotation marks and citations omitted). Once Adusumilli makes this showing, the burden shifts to the City to state a "legitimate, nondiscriminatory reason" for the adverse action. *Id.* If the City is able to state such a reason, the burden shifts back to Adusumilli to show that the "proffered reasons are pretextual and that [the] actual reason was discriminatory." *Id.* Although the burden of production shifts under this method, "the burden of persuasion rests at all times on the plaintiff." *Klein v. Trustees of Indiana University*, 766 F.2d 275, 280 (7th Cir. 1985). The district court held that Adusumilli had satisfied [**23] the first two elements of a prima facie case of retaliation. First, her complaint about Gray's conduct was protected expression. Adusumilli, 1997 WL 769457 at *8. Second, placing Adusumilli in the Behavior Alert program and subsequently firing her were adverse actions. *Id.* However, the lower court held that Adusumilli had not created a genuine issue of fact with respect to the causal link between the protected activity [*363] and

the adverse action. Furthermore, the court held, Adusumilli had not created a genuine issue regarding whether the City's proffered reason for its adverse actions was pretextual. Adusumilli challenges these determinations.

It is settled in this Circuit that, "[HN16]a plaintiff may establish . . . a [causal] link [between protected expression and adverse action] through evidence that the discharge took place on the heels of protected activity." Dey, 28 F.3d at 1458. *See also* Hunt-Golliday v. Metropolitan Water Reclamation District of Greater Chicago, 104 F.3d 1004, 1014 (7th Cir. 1997) ("Suspicious timing does constitute circumstantial, or indirect, evidence to support a claim of discrimination."); [**24] Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 511 (7th Cir. 1998) (holding that a causal nexus between protected activity and adverse action can be established by showing that "the employer's adverse action follows fairly soon after the employee's protected expression"). In this case, Adusumilli complained about Gray's conduct in January, she was placed in the Behavior Alert program in March, and she was terminated in September, approximately eight months after her complaint. Although, in some circumstances, this sequence of events could raise the inference of a causal connection, it cannot do so here because Adusumilli has failed to show that she was fired in retaliation for her complaint rather than for her inability to do her job well. See Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 321 (7th Cir. 1992) (holding that the "timing of the complaints, standing alone, did not create a genuine issue as to a causal connection" when Juarez "could not prove that she was terminated because of her sexual harassment complaint rather than for poor work performance").

[HN17]In order to meet the causal link requirement for establishing a prima [**25] facie case of retaliation, Adusumilli must demonstrate that the City "would not have taken the adverse action 'but for' the protected expression." McKenzie v. Illinois Department of Transportation, 92 F.3d 473, 483 (7th Cir. 1996) (citing Klein, 766 F.2d at 280). The City asserts that it would have fired Adusumilli whether or not she had complained about Gray's conduct because she was performing poorly. Adusumilli admits to making some mistakes, but she insists that she "was performing up to the legitimate expectations of [her] employer." (Adusumilli Aff. P 3). However, "[HN18]an employee's self-serving statements about [her] ability . . . are insufficient to contradict an employer's negative assessment of that ability." Gustovich v. AT&T Communications, Inc., 972 F.2d 845, 848 (7th Cir. 1992); Dey, 28 F.3d at 1460. Self-serving statements do not "shed any light on whether the employer honestly based its employment decision on performance-related considerations, which is the focus of our inquiry in these cases." Dey, 28 F.3d at 1460; Gustovich, 972 F.2d at 848. Therefore, Adusumilli must rely [**26] on other evidence to show that the City is insincere when it asserts that it fired her for poor performance.

In an attempt to provide such evidence, Adusumilli offers her first four evaluations, which rated her "good" on a scale of "unsatisfactory," "marginal," "good," and "excellent." She further asserts that her last, unfavorable, evaluation should not be credited. In addition to being out of line with her previous evaluations, she reasons, the last evaluation was prepared after she complained about Gray and is, therefore, suspect. [5] In any case, Adusumilli's reliance on her positive evaluations is misplaced in light of the extensive documentation of her poor performance. We recently characterized [HN19]similar performance evaluations as "makeweight evidence," and admonished that "such evaluations have little significance in a case in which there is so dramatic a discrepancy between evaluation and performance." Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1398 (7th Cir. 1997) (addressing a situation in which the employee "received [*364] generally favorable evaluations till shortly before he was fired"). *See also* Clay v. City of Chicago Department of Health, 143 F.3d 1092, 1094 (7th Cir. 1998) [**27] ("The fact that at one point [the employee] had received a 'good' rating does not help her because uncontradicted evidence is replete that her performance was extremely flawed."). The City documented serious and persistent performance problems beginning in 1992, long before Adusumilli's complaint about Gray. See Davidson, 133 F.3d at 512 (finding that a decision to discharge an employee was not tainted by discriminatory animus because, inter alia, "criticism [of the employee] was aired long before" his discharge). The errors, and documentation thereof, continued up to the time when Adusumilli was fired. Given this history, no jury could rationally conclude that the City would not have fired Adusumilli but for her complaint against Gray.

5 The City attests that the difference between the evaluations may be explained by the fact that the first four evaluations were prepared by Sergeant Rottner, while the final evaluation was prepared by Zeliasz, who worked more closely with Adusumilli and was, therefore, more familiar with her work.

[**28] As a final matter, Adusumilli notes that in Dey, this Court found it significant that the decision to fire Dey was made with input from the person who had harassed her. See Dey, 28 F.3d at 1459. The Court reasoned that, "even if [the harasser] kept Dey's sexual harassment complaints to himself, those complaints may have affected [the harasser's] unflattering assessment of

her job performance." *Id.* Adusumilli asserts that her situation is similar because Commander Byrne conferred with Muzupappa and Zeliasz before deciding to terminate her. However, Adusumilli's situation is distinguishable from the one addressed in *Dey*, where the alleged harasser was consulted after Dey had complained about his behavior. *Id.* In this case, Adusumilli never complained about either Muzupappa or Zeliasz. Therefore, there is no reason to believe that they sought to retaliate against her.

Even if Adusumilli's allegations were sufficient to show a causal connection between her complaint about Gray and the City's decision to fire her, summary judgment on the retaliation claim would still be appropriate because Adusumilli has not shown that the City's stated reason for firing [**29] her is pretextual. [HN20]Pretext can be demonstrated either by showing "that a discriminatory reason more likely motivated the employer or [by showing] that the employer's proffered explanation is unworthy of credence." *Gleason*, 118 F.3d at 1143 (internal quotation marks and citations omitted). As we have already discussed, Adusumilli has not shown that the City's stated reason for firing her, i.e. poor performance, was insincere. Therefore, Adusumilli has failed to create a genuine issue as to pretext.

Conclusion

The district court did not err in striking several statements from Adusumilli's affidavit. Furthermore, summary judgment was appropriate as to both Adusumilli's hostile environment sexual harassment claim and her retaliation claim. Therefore, we Affirm.

LEXSEE

Positive
As of: May 06, 2010

DAVID O. BENNETT, Plaintiff, v. WILLIAM J. HENDERSON, [1] Postmaster General of United States Postal Service, Defendant.

1 The President of the United States appointed William J. Henderson to serve as Postmaster General, effective May 17, 1998. Pursuant to Fed. R. Civ. P. 25(d)(1), the court substitutes William J. Henderson as the defendant in this litigation for Marvin T. Runyon, former Postmaster General of the United States Postal Service.

CIVIL ACTION No: 97-2151-GLR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

15 F. Supp. 2d 1097; 1998 U.S. Dist. LEXIS 12424; 8 Am. Disabilities Cas. (BNA) 1361

August 7, 1998, Decided
August 7, 1998, Filed; August 7, 1998, Entered on the Docket

DISPOSITION: [**1] Defendant's Motion for Summary Judgment (doc. 26) and its Motion For Leave to File Separately Attachments to Declarations of Mark Scarborough and John Ford Submitted with Memorandum in Support of Defendant's Motion for Summary Judgment (doc. 28) sustained.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant employer, the United States Postal Service, filed motions for summary judgment and for leave to file separately attachments to declarations of two witnesses in plaintiff employee's discrimination suite based on violation of the Rehabilitation Act of 1973, 29 U.S.C.S. §§ 701-797b. The employee filed no response to the latter motion.

OVERVIEW: After the employee was terminated by the employer for being absent without leave, he filed a discrimination action pursuant to the Rehabilitation Act of 1973 (Act), 29 U.S.C.S. §§ 701-797b. The employer filed motions for summary judgment as to the employee's claims under the Act and to a retaliation claim. The court sustained both of the employer's motions. The court found that the employee showed no reasonable accommodation which would permit him to perform the essential functions of his former position. He failed to show any vacant light duty position to which the employer could have transferred him. The employee's claim of discrimination under § 501 of the Rehabilitation Act of 1973, 29 U.S.C.S. § 791, failed. The court granted summary judgment in the favor of the employer on that claim. The employer showed no causal connection between his protected activity and his termination. He failed to show anything to indicate that a retaliatory motive played a part in the adverse action of his termination.The employee did not establish that his protected activity and termination were related. The court granted summary judgment in favor of the employer on the claim of retaliation.

OUTCOME: The court granted summary judgment to the employer on it motion for summary judgment in the employee's discrimination action.

CORE TERMS: Rehabilitation Act, accommodation, reasonable accommodation, disability, summary judgment, disabled, retaliation, termination, door, promulgated, documentation, protected activity, prima facie case, reassignment, adverse action, accommodate, accommodated, impairment, pounds, appointment, federal employees, causal connection, employment opportuni-

ties, vacant position, unable to perform, performing, duration, lifting, notice, supervisor

LexisNexis(R) Headnotes

Governments > Federal Government > Employees & Officials
Labor & Employment Law > Discrimination > Disability Discrimination > Rehabilitation Act
Labor & Employment Law > Discrimination > Retaliation > Statutory Application > Americans With Disabilities Act
[HN1]Section 501 of the Rehabilitation Act of 1973, 29 U.S.C.S. § 791, protects federal employees from discrimination on the basis of disability.

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality
[HN2]In deciding a motion for summary judgment, the court must examine any evidence tending to show triable issues in the light most favorable to the nonmoving party. Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show 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). A fact is "material," if it might affect the outcome of the suit under the governing law. A genuine factual issue is one that can reasonably be resolved only by a finder of fact because it may reasonably be resolved in favor of either party. All disputed facts, and reasonable inferences derived from the evidence presented, must be resolved in favor of the nonmoving party.

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
[HN3]The moving party bears the burden to show the absence of a genuine issue of material fact. This burden may be discharged by showing--that is, pointing out to the district court --that there is an absence of evidence to support the nonmoving party's case. Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party, who may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Courts construe Fed. R. Civ. P. 56 to satisfy one of its principal purposes, namely, to segregate and eliminate factually unsupported claims and defenses. Entitlement to summary judgment must be proven beyond a reasonable doubt.

Governments > Federal Government > Employees & Officials
Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Federal Employees
[HN4]Section 501 of the Rehabilitation Act (Act), 29 U.S.C.S. § 791, provides a federal employee's exclusive remedy for disability discrimination. Section 794a(a)(1) of the Act extends the remedies, procedures, and rights available under Title VII, 42 U.S.C.S. § 2000e-16 to federal employees with disability discrimination claims.

Governments > Federal Government > Employees & Officials
Governments > Federal Government > U.S. Postal Service
Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Exhaustion of Remedies > Federal Employees
[HN5]29 C.F.R. § 1614 governs Federal Sector Equal Employment Opportunity, that is, claims brought under § 501 of the Rehabilitation Act, 29 U.S.C.S. §§ 701-797b. It covers individual and class complaints of discrimination and retaliation prohibited by the Rehabilitation Act. 29 C.F.R. § 1614.103(a). It expressly applies to the United States Postal Service. 29 C.F.R. § 1614.103(b)(3). Effective October 1, 1992, 29 C.F.R. § 1614 superceded 29 C.F.R. § 1613 and began to govern administrative complaints and appeals alleging employment discrimination filed by federal employees and applicants for federal employment.

Governments > Federal Government > U.S. Postal Service
Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize
Labor & Employment Law > Employment Relationships > At-Will Employment > Employers

[HN6]The specific purpose of 29 C.F.R. § 1630 is to implement Title I of the Americans with Disabilities Act. 29 C.F.R. § 1630.1(a). Part 1630 applies to employers, employment agencies, labor organizations, and joint labor management committees, 29 C.F.R. §§ 1630.1(b) and 1630.2(b). The United States Postal Service is not an employer under 29 C.F.R. § 1630. The regulations specifically exclude the United States from the definition of employer. 29 C.F.R. § 1630.2(e)(2)(i). The United States Postal Service, furthermore, is not an employment agency or labor organization. 42 U.S.C.S. §§ 2000e(c) and (d). The United States Postal Service is also not a joint labor management committee.

Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN7]Section 501 of the Rehabilitation Act, 29 U.S.C.S. § 791, provides that the standards applied under Title I of the Americans with Disabilities Act shall be used to determine whether that section has been violated. 29 U.S.C.S. § 791(g).

Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Accommodation
Governments > Federal Government > Claims By & Against
Labor & Employment Law > Discrimination > Accommodation
[HN8]Under § 501 of the Rehabilitation Act (Act), 29 U.S.C.S. § 791, federal agencies must develop affirmative action programs for the hiring, placement, and advancement of individuals with disabilities. 29 U.S.C.S. § 791(b). By contrast, neither § 504 of the Rehabilitation Act , 29 U.S.C.S. §§ 701-797b, nor the Americans with Disabilities Act (ADA) creates such affirmative action obligations.Federal employers have greater duties to accommodate disabled workers under § 501of the Act than the duties owed by federal grantees under § 504 or those owed by employers under the ADA.

Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Accommodation
Labor & Employment Law > Affirmative Action > General Overview
Labor & Employment Law > Discrimination > Accommodation
[HN9]Courts should be wary of applying cases interpreting federal grantees' duties of reasonable accommodation under § 504 of the Rehabilitation Act (Act), 29 U.S.C.S. §§ 701-797b, to cases brought under § 501 of the Act, 29 U.S.C.S. § 791, due to the affirmative action duties placed upon federal employers under § 501. In some instances, however, case law decided under the Americans with Disabilities Act applies to cases brought under § 501. Courts are cautioned to remain mindful of the heightened duties of "reasonable accommodation" not applicable to private employers under the Americans with Disabilities Act.

Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN10]The burden-shifting framework from McDonnell-Douglas applies in cases under both §§ 501 and 504 of the Rehabilitation Act, 29 U.S.C.S. §§ 701-797b, when an employer disclaims any reliance upon the protected status of a plaintiff in making the employment decision. A plaintiff must produce evidence that raises a reasonable inference that each element of a prima facie case exists. Once a plaintiff establishes a prima facie case of discrimination the burden shifts to defendant to articulate legitimate, nondiscriminatory reasons for its treatment of plaintiff.

Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Accommodation
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN11]To succeed on a claim of discrimination under § 501 of the Rehabilitation Act, 29 U.S.C.S. § 791, a plaintiff must prove that (1) he is "disabled" within the meaning of the statute; (2) he is "otherwise qualified," that is, he can perform the essential functions of the job with or without accommodation; and (3) the personnel action was taken by defendant because of his disability.

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN12]The term "individual with a disability" means any person who: (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. 29 U.S.C.S. § 706(8)(B); 29 C.F.R. § 1614.203(a)(1).

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > Disabilities > Impairments > Major Life Activities
Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > Disabilities > Impairments > Substantial Limitation

Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN13]"Major life activities" means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1614.203(a)(3). 29 C.F.R. § 1614 provides no definition for "substantially limits." 29 C.F.R. § 1630 defines the phrase, however, to mean that the individual is either unable to perform, or significantly restricted as to the condition, manner, or duration under which the individual can perform, a major life activity as compared to an average person in the general population. 29 C.F.R. § 1630.2(j)(1)(i) and (ii). Courts have specifically adopted this definition in cases brought against the United States Postal Service under section 501 of the Rehabilitation Act, 29 U.S.C.S. § 791.

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > Disabilities > Impairments > Major Life Activities
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN14]In the context of an Americans with Disabilities Act claim, lifting is a major life activity. The same should hold true in the context of a claim under § 501 of the Rehabilitation Act, 29 U.S.C.S. § 791.

Governments > Federal Government > Employees & Officials
Labor & Employment Law > Discrimination > Disability Discrimination > Defenses & Exceptions > General Overview
Workers' Compensation & SSDI > Coverage > Employment Relationships > Governmental Employees
[HN15]A plaintiff is "not judicially estopped" from making claims inconsistent with his prior representations in a related Federal Employees' Compensation Act proceeding. The Tenth Circuit has expressly rejected the doctrine of judicial estoppel.

Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Accommodation
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
Workers' Compensation & SSDI > Benefit Determinations > Medical Benefits > Rehabilitation
[HN16]A plaintiff may be unable to perform a particular job for purposes of a workers compensation claim, even though he or she can perform it, within the meaning of the Rehabilitation Act, 29 U.S.C.S. §§ 701-797b, with reasonable accommodation.

Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Accommodation
Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN17]The Tenth Circuit Court of Appeals has established the following framework for analyzing whether a disabled individual is "otherwise qualified" under the Americans with Disabilities Act: first, a court must determine whether the individual could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue. Second, if but only if the court conclude that the individual is not able to perform the essential functions of the job, we must determine whether any reasonable accommodation by the employer would enable him to perform those functions. The Tenth Circuit has subsequently held the framework applicable under § 501 of the Rehabilitation Act, 29 U.S.C.S. § 791. It has modified it as follows: to determine if a person with a disability is "otherwise qualified" for employment, we look to whether or not a reasonable accommodation would enable the person to perform the job. There are two components to the reasonable accommodation analysis. First, whether a reasonable accommodation would enable the employee to do the particular job. Additional training might be a reasonable accommodation for this purpose. Second, whether the employee could be transferred to other work which could be done with or without accommodation.

Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Accommodation
Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
[HN18]Under 29 C.F.R. § 1614.203(a)(6), a "qualified individual with handicaps" is: an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who meets the experience or education requirements of the position in question. 29 C.F.R. § 1614.203(a)(6). The relevant inquiry in determining whether an employee is "qualified" under the amended Rehabilitation Act, 29 U.S.C.S. §§ 701-797b, for purposes of a motion for summary judgment is whether the employee has provided evidence that he or she can be reasonably accommodated--which includes reasonable reassignment--sufficient to require submission to a jury.

Labor & Employment Law > Discrimination > Accommodation
Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN19] 29 C.F.R. § 1614.203(g) explicitly provides that a federal employer must attempt reassignment when a disabled employee cannot be reasonably accommodated to perform the essential functions of his or her existing job: when a non-probationary employee becomes unable to perform the essential functions of his or her position even with reasonable accommodation due to a handicap, an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required, but availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C.S. § 8337 or 5 U.S.C.S. § 8451.

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN20] 29 C.F.R. § 1614.203(g) imposes an obligation on the federal employer to offer reassignment, unless the employer has already posted the position as available: if the agency has already posted a notice or announcement seeking applications for a specific vacant position at the time the agency has determined that the non-probationary employee is unable to perform the essential functions of his or her position even with reasonable accommodation, then the agency does not have an obligation under this section to offer to reassign the individual to that position, but the agency must consider the individual on an equal basis with those who applied for the position. If the available position has been posted, the employer must consider the employee for that position without discrimination.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Ultimate Burden of Persuasion
Labor & Employment Law > Discrimination > Accommodation
[HN21]The burden of proof plaintiffs and defendants must meet in order to survive summary judgment under § 501 of the Rehabilitation Act, 29 U.S.C.S. § 791 is:that a plaintiff bears the ultimate burden of proving he or she is "qualified" within the meaning of the Rehabilitation Act, that there are jobs available that his or her disability will nevertheless allow him or her to do, with or without reasonable accommodation. However, a plaintiff's burden with respect to the plausibility of reasonable accommodation is one of production only. In accordance with § 501 of the Rehabilitation Act's mandate that federal employers act affirmatively to provide reasonable accommodation for disabled workers, this burden of production is not a heavy one. It is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits. Once the plaintiff has made this facial showing that accommodation is possible, the burden shifts to the defendant to prove that accommodating the plaintiff would pose an undue hardship.

Governments > Federal Government > Claims By & Against
Labor & Employment Law > Affirmative Action > Compliance
Labor & Employment Law > Discrimination > Accommodation
[HN22]Placing the burden of locating other available jobs entirely on the plaintiff would be inconsistent both with the implementing regulations of the 1992 amendments and with the affirmative action duties contemplated by § 501, of the Rehabilitation Act, 29 U.S.C.S. § 791, the latter of which do not apply to private employers under the Americans with Disabilities Act, the statute controlling our decision in. The duties of reasonable accommodation under § 501 and the duty to reassign under the 1992 amendments are mandates with which federal employers are obligated to comply. Federal employers therefore must play a considerable role in ensuring that every reasonable effort is made to find suitable jobs for disabled employees. Without question, employees must come forward with that information they are best placed to know--the fact and nature of their disability and their wish to be accommodated. In other words, employers are not required to initiate the inquiry into whether a given employee with a disability can be accommodated.

Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Accommodation
Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN23]An employer, to meet its burden under the Rehabilitation Act, 29 U.S.C.S. §§ 701-797b, may not merely speculate that a suggested accommodation is not feasible. When accommodation is required to enable the employee to perform the essential functions of the job, the employer has a duty to 'gather sufficient information from the applicant and qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform the job. Common sense dictates that an employee need not identify an available position for reassignment prior to enlisting the employer's assistance. In order to initiate the interactive process, it is enough for a plaintiff to notify the employer of the nature of his or her disability and specifically request information about possible reassignment. At that point, the employer is obliged to assist him or her in the effort to identify an available job.

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
[HN24]When requested accommodations do not permit a plaintiff to perform all essential functions of his or her former position, then he or she is not otherwise qualified for that position.

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN25]The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. 29 C.F.R. § 1630.2(n)(1). The term does not include the marginal functions of the position. A job function may be considered essential for any of several reasons, including but not limited to the following: (i) The function may be essential because the reason the position exists is to perform that function; (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function. 29 C.F.R. § 1630.2(n)(2).

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN26]Evidence relevant to the determination of what functions are essential includes, but is not limited to: (i) The employer's judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3).

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN27]The determination of which functions are essential may be critical to the determination of whether or not the individual with a disability is qualified. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation. The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential. If the individual who holds the position is actually required to perform the function the employer asserts is an essential function, the inquiry will then center around whether removing the function would fundamentally alter that position. This determination of whether or not a particular function is essential will generally include one or more of the factors listed in 29 C.F.R. § 1630.

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN28]Whether a particular function is essential is a factual determination that must be made on a case by case basis. In determining whether or not a particular function is essential, all relevant evidence should be considered. 29 C.F.R. § 1630 lists various types of evidence,

such as an established job description, that should be considered in determining whether a particular function is essential. Since the list is not exhaustive, other relevant evidence may also be presented. Greater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed. 29 C.F.R.§ 1630 app.

Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Accommodation
Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > General Overview
[HN29]If plaintiff cannot perform even one essential function with accommodation, then he is not otherwise qualified for the position.

Civil Rights Law > Protection of Disabled Persons > Rehabilitation Act > Accommodation
Labor & Employment Law > Discrimination > Accommodation
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN30]The Rehabilitation Act, 29 U.S.C.S. §§ 701-797b, does not require the employer to make structural changes to a temporary facility or undertake a requested accommodation against a simply speculative possibility that it might allow the employee to perform the essential functions of the position despite his or her condition. Inherent in the concept of reasonable accommodation is the requirement that it permit the disabled worker to perform the essential functions of the position. To be deemed a qualified individual, an individual must be capable of performing the essential functions of the job in question, with or without accommodation.

Labor & Employment Law > Discrimination > Retaliation > Statutory Application > Age Discrimination in Employment Act
Labor & Employment Law > Discrimination > Retaliation > Statutory Application > Rehabilitation Act
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN31] 29 C.F.R. § 1614.101(b) provides that no person shall be subject to retaliation for opposing any practice made unlawful by the Rehabilitation Act (Act), 29 U.S.C.S. §§ 701-797b, or for participating in any stage of administrative or judicial proceedings under the Act. To establish a prima facie case of retaliation in violation of the Rehabilitation Act plaintiff must show (1) that he engaged in activity protected under the Act, (2) that he suffered an adverse employment action subsequent to or contemporaneous with such protected activity, and (3) that there is a causal connection between the protected activity and the adverse employment action. The elements of the prima facie case of retaliation are the same whether a plaintiff proceeds under the Rehabilitation Act, Americans with Disabilities Act, Age Discrimination in Employment Act, or Title VII, 42 U.S.C.S. § 2000e-16. A court can thus appropriately rely upon case law interpreting any of these statutes.

Labor & Employment Law > Discrimination > Retaliation > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN32]A court must determine whether a given employment action is adverse on a case-by-case basis. In evaluating a claim of retaliation courts have indicated that not everything that makes an employee unhappy is an actionable adverse action. An actionable adverse action is one that affects the terms, privileges, duration, or conditions of employment. Adverse employment action has been liberally described by courts as actions by an employer that disadvantage the employee. Examples of actionable adverse action include disciplinary demotion, termination, unjustified evaluations and reports, loss of normal work assignments, and extension of a probationary period. In addition prosecution of a former employee for suspected criminal activity may constitute adverse employment, because it can have an adverse impact on future employment opportunities. A "threatened letter of warning," however, is not an adverse employment action, as a matter of law.

Labor & Employment Law > Discrimination > Retaliation > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN33]The causal connection element requires that plaintiff establish that the protected opposition and adverse action are not wholly unrelated and such an inference is permissible where the adverse action closely follows the protected activity.

COUNSEL: For DAVID O BENNETT, plaintiff: Shellie L. James, Sloan, Listrom, Eisenbarth, Sloan & Glassman, Overland Park, KS.

For UNITED STATES POSTAL SERVICE, POSTMASTER GENERAL, defendant: Robert A. Olsen, Office of United States Attorney, Kansas City, KS.

JUDGES: Gerald L. Rushfelt, United States Magistrate Judge.

OPINION BY: Gerald L. Rushfelt

OPINION

[*1099] **MEMORANDUM AND ORDER**

The court has under consideration Defendant's Motion for Summary Judgment (doc. [*1100] 26) and a Motion For Leave to File Separately Attachments to Declarations of Mark Scarborough and John Ford Submitted with Memorandum in Support of Defendant's Motion for Summary Judgment (doc. 28). Plaintiff opposes the motion for summary judgment. He has filed no response to the motion for leave. Accordingly, the court grants the latter motion as uncontested. *See* D.Kan. Rule 7.4. The court will consider the documents attached to the [**2] motion for leave as attachments to the submitted declarations.

Pursuant to Fed. R. Civ. P. 56(c), defendant seeks summary judgment on the claims of plaintiff. Plaintiff alleges discrimination in violation of the Rehabilitation Act of 1973 (the Act), 29 U.S.C. §§ 701-797b (1985 & Supp. 1998). [HN1]Section 501 of the Act, 29 U.S.C. § 791, protects federal employees from discrimination on the basis of disability. [2] *Johnson v. United States Postal Serv.*, 861 F.2d 1475, 1477-78 (10th Cir. 1988). Plaintiff specifically alleges that defendant failed to accommodate him as a disabled individual protected under the Act and retaliated against him and terminated his employment because of his disability. (Pretrial Order, doc. 30, P 4.) The following facts are either uncontroverted or, if controverted, viewed in the light most favorable to the plaintiff. *Applied Genetics Int'l Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The court has ignored immaterial facts and those not properly supported in the record. Pursuant to D.Kan. Rule 56.1, the court has deemed "all material facts set forth [**3] in the statement of the movant . . . admitted for the purpose of summary judgment unless specifically controverted by the statement of [plaintiff]."

2 In 1992 Congress amended the Act to substitute use of the term "disability" for "handicaps." *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 155 n.7 (2d Cir. 1998). The court will likewise utilize the terms "disabled" or "disability," for clarity. The definition of persons covered under the Act before and after the 1992 amendments remains essentially the same. *Compare* 29 U.S.C. § 706(8) (Supp. 1998) (defining "individual with a disability") *with* 29 U.S.C. § 706(7) (1991) (defining "handicapped individual"). The regulations promulgated pursuant to the Act, 29 C.F.R. pt. 1614, were issued prior to the 1992 amendments and thus still use the outdated "handicapped" terminology. "The regulations have not caught up" with the 1992 amendments. *Knapp v. Northwestern Univ.*, 101 F.3d 473, 482 n.7 (7th Cir. 1996), *cert. denied*, 138 L. Ed. 2d 212, 117 S. Ct. 2454 (1997). Courts have used "disabled" and "handicapped" interchangeably. *See Burns v. City of Columbus*, 91 F.3d 836, 840 n.3 (6th Cir. 1996). The change in terminology made no substantive change to the Act. *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 929 n.3 (8th Cir. 1994).

[**4] **I. Factual Background**

On Thursday June 23, 1994, plaintiff worked for defendant as a General Expediter (GE) PS-6 at its General Mail Facility in Kansas City, Kansas (GMF). On that date he completed his assigned duties and left work at the end of his shift with no complaint of injury or accident. Although experiencing soreness, he returned to work Friday, June 24, 1994. Throughout June 25 and 26, 1994, he experienced increased pain and stiffness in his cervical back area. He thus scheduled an appointment with his health care provider, Kaiser Permanente, for Monday, June 27, 1994. On that Monday he asked defendant to grant him two weeks sick leave.

On July 8, 1994, Paul W. Baumert, Jr., M.D. examined plaintiff. He diagnosed right cervical radiculopathy. He ordered plaintiff off work until July 22, 1994. He saw plaintiff for follow-up on July 22 and would not release him to work. On August 3, 1994, he released plaintiff for light duty until August 19, 1994, with the following restrictions: minimal stooping, twisting, and bending and minimal pushing, pulling, and repetitively lifting over twenty pounds. Defendant accommodated these restrictions by assigning plaintiff to available [**5] light duty positions. Plaintiff continued on light duty status until August 25, 1994, when he returned to regular duty. While attempting regular duty, he admitted to defendant that he could no longer perform the functions of the GE position. Accordingly, he did not return to work after September 5, 1994. On November 23, 1994, Dr. Baumert advised defendant that the condition of plaintiff would not improve and that plaintiff should seek a position in another environment.

[*1101] On January 20, 1995, L.F. Glaser, M.D. examined plaintiff. Dr. Glaser concurred with the diagnosis of Dr. Baumert. Dr. Glaser indicated that he would not permit plaintiff to perform the duties of GE.

On February 20, 1995, Geoffrey L. Blatt, M.D. recommended that plaintiff should try returning to work. He further recommended that plaintiff look for a less strenuous position should that attempt fail. Dr. Blatt later

opined in March 1995 that, although plaintiff would most likely not sustain more serious injury by returning to work, he had no problem recommending a career change. On January 9, 1996, Dr. Baumert opined that plaintiff "is very capable of gainful employment in a desk-type job which requires [**6] little strenuous activity."

Plaintiff has degenerative cervical disc disease. It prevents strenuous activities. His medical care providers have restricted his job opportunities to those which do not involve bending, twisting, stooping, pushing, pulling, and lifting more than twenty pounds. They have recommended that he switch to a more sedentary position. Plaintiff has difficulty, furthermore, in standing or sitting for long periods of time. His limitations preclude mowing the lawn, lifting a laundry basket, pushing a vacuum cleaner, maintaining an automobile, and performing recreational activities, such as softball.

Plaintiff has acknowledged that he cannot perform the duties of the GE position or the light duty tasks available at the GMF. In August or September 1994 he briefly spoke with his supervisor Charlie Frazier about changing the doors at the GMF to accommodate his condition. He asked no one, however, to evaluate whether the doors could be changed to accommodate his condition. He never asked for automated plates as an accommodation for his condition. He never requested the procurement of a motorized riding device or chair to assist him. He made no specific request for any [**7] other aids to accommodate his condition. His primary aim was to transfer to a vacancy within the GMF. He basically sought accommodation in the form of job transfer, rather than any type of expensive equipment or changes. Defendant had no vacant position to which it could transfer him, however, with physical restrictions within the limits that he could tolerate.

On December 19, 1994, plaintiff filed a formal complaint with the EEO Complaint Processing unit of the Mid America District of defendant. Among other remedies, he sought accommodation in the form of education, training, and job placement outside the United States Postal Service. The EEO counselor memorialized these requested accommodations in an Inquiry Report. Plaintiff has repeatedly requested either education, training, or job placement in the form of detail, transfer, or reassignment with the defendant. Other than the brief conversations with Mr. Frazier, plaintiff has sought no other accommodation.

By letter dated August 1, 1995, plaintiff sought a transfer to another governmental agency. He stated in that letter that he could no longer perform his "required job duties." He sought a position compatible with his physical [**8] restrictions. On August 7, 1995, defendant advised plaintiff that it could not transfer him to another federal agency, but he could request transfer to another Postal Service installation. On August 10, 1995, plaintiff requested information regarding detail, transfer, or reassignment. He sought education, training, and job placement with Continuation of Pay. In August of 1995 defendant had no positions to which it could transfer plaintiff. Although defendant could not transfer plaintiff within the Postal Service, it did locate an open position with the General Service Administration that was within his limitations.

Besides filing a formal complaint of discrimination, plaintiff has pursued several avenues of relief since June 23, 1994. On July 11, 1994, he requested Continuation of Pay (COP) benefits while he pursued a claim for injury under the Federal Employees' Compensation Act with the Office of Workers' Compensation Programs (OWCP), United States Department of Labor. He received such benefits for the period of July 8 through August 3, 1994. On September 12, 1994, he submitted a Notice of Occupational Disease and Claim for Compensation (CA-2 form) to his supervisor, Charlie Frazier. [**9] OWCP denied [*1102] this claim initially and upon reconsideration.

The parties have engaged in much correspondence regarding the proceedings initiated by plaintiff and his work status. By letter dated September 21, 1994, defendant directed plaintiff to return to work by September 26, 1994, or show cause why he should be excused from work. It informed plaintiff that failure to explain his absences would result in his being designated Absent Without Leave (AWOL) and possibly disciplinary action, including termination. It further directed that plaintiff provide acceptable documentation from a physician. In response plaintiff referred defendant to the CA-2 form. On November 7, 1994, plaintiff contacted an Equal Employment Opportunity (EEO) Counselor and claimed discrimination under the Rehabilitation Act by reason of the letter of September 21, 1994. On November 19, 1994, and January 20, 1995, defendant requested that plaintiff provide documentation about his work status and anticipated date of return to work. Plaintiff advised defendant that he would provide such documentation when he received it.

On July 20, 1995, defendant notified plaintiff that his COP benefits had been denied [**10] and that his payroll records needed to be changed to sick leave, annual leave, or leave without pay. On July 24, 1995, plaintiff informed defendant that he would authorize no adjustment to his payroll record, until the OWCP again reviewed his claim. On August 21, 1995, defendant advised plaintiff that his claim had been disallowed and that, by August 28, 1995, he should report for duty or provide documentation as to his inability to work. It also

advised him that failure to respond could result in corrective action, including termination.

On August 26, 1995, plaintiff advised defendant that he had requested additional review of the denial of benefits. He also provided a copy of Dr. Baumert's letter dated November 23, 1994. On August 30, 1995, defendant advised plaintiff that the requested review did not relieve him of his obligation to maintain contact with his supervisor. It further advised him that the letter of November 23, 1994, was not current medical documentation. It directed him to maintain contact with his supervisor until matters resolved. It also informed him that he had until September 7, 1995, to provide current documentation.

On September 2, 1995, plaintiff advised [**11] defendant that he had scheduled another medical appointment for September 5, 1995, and would provide the results of that appointment, when available. On September 11, 1995, he advised defendant that he had been referred for an appointment on September 25, 1995, with a Dr. DiFazio. On September 15, 1995, defendant informed plaintiff that the items submitted on September 11, 1995, were not medical documentation that showed him unable to perform his duties. It also informed him that it would continue to carry him as AWOL pending the results of the appointment with Dr. DiFazio.

On September 28, 1995, plaintiff provided defendant with copies of a referral form reflecting the appointment with Dr. DiFazio, a Physical Therapy referral form, a return to work authorization form showing that Dr. DiFazio sent him to physical therapy, and an appointment card for appointment with Dr. Baumert scheduled for October 24, 1995. On October 16, 1995, defendant advised plaintiff that it was necessary to meet and discuss his employment status. On October 28, 1995, plaintiff refused to meet with defendant.

On February 21, 1996, defendant issued a Notice of Removal, wherein it advised plaintiff that his [**12] employment would be terminated at the close of business, April 4, 1996, for his "failure to properly respond to notices of absence inquiry, resulting in you being charged Absent Without Leave" since January 9, 1995. The notice informed plaintiff that he had the right to file a grievance. He pursued no grievance on the matter. He responded to the Notice only through the EEOC process. Defendant terminated plaintiff on April 4, 1996.

II. Summary Judgment Standards

[HN2]In deciding a motion for summary judgment, the court must examine any evidence tending to show triable issues in the light most favorable to the nonmoving party. *Bee* [*1103] *v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with . . . affidavits, if any, show 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). A fact is "material," if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). [**13] A genuine factual issue is one that "can reasonably be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." *Id.* at 250. All disputed facts, and reasonable inferences derived from the evidence presented, must be resolved in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 977 (10th Cir. 1995); *FDIC v. 32 Edwardsville, Inc.*, 873 F. Supp. 1474, 1479 (D. Kan. 1995).

[HN3]The moving party bears the burden to show the absence of a genuine issue of material fact. *Turpin v. State of Kan., Dep't of Corrections*, 1996 U.S. Dist. LEXIS 6146, No. 94-2480- JWL, 1996 WL 227792, at *2 (D. Kan. Apr. 5, 1996). This burden "may be discharged by 'showing'--that is, pointing out to the district court --that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party has properly [**14] supported its motion for summary judgment, the burden shifts to the nonmoving party, who "may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Id.* Courts construe Fed. R. Civ. P. 56 to satisfy one of its principal purposes, namely, to segregate and eliminate factually unsupported claims and defenses. *Celotex Corp.*, 477 U.S. at 323-24. "Entitlement to summary judgment must be proven beyond a reasonable doubt." *Duff v. GMC*, 962 F. Supp. 1420, 1422 (D. Kan. 1997) (citing *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir.1980)).

III. Applicable Statutory and Regulatory Schemes

Plaintiff alleges discrimination under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b. "The regulatory scheme promulgated pursuant to this and other acts addressing the discrimination of disabled citizens in the public and private [**15] sector has resulted in a Gordian knot of regulations, jurisprudence, and, occasionally, confused citations to each." *Magee v. United States Postal Serv.*, 903 F. Supp. 1022, 1026 n.4 (W.D. La.

1995), *aff'd*, 79 F.3d 1145 (5th Cir. 1996). Unfortunately, this case has not escaped the Gordian knot. Defendant cites to 29 C.F.R. pts. 1613, 1614, and 1630. [3] Plaintiff cites to 45 C.F.R. pt. 84. Both parties rely upon case law which cites and relies upon these various provisions of the Code of Federal Regulations. Before proceeding to the substantive questions presented by the motion for summary judgment, clarification as to which statute and regulations govern this action appears in order.

3 Although defendant also cites to "29 C.F.R. 422 (app. to pt. 1630)," the correct citation appears to be 29 C.F.R. pt. 1630 app. (commentary on 29 C.F.R. § 1630.15(d)). Title 29 of the Code of Federal Regulations has no part or section 422. The cited appendix, furthermore, does not appear on page 422.

[**16] [HN4]

"In the Tenth Circuit, section 501 of the Rehabilitation Act, 29 U.S.C. § 791, provides a federal employee's exclusive remedy for disability discrimination." *DeFrees v. West*, 988 F. Supp. 1390, 1393 (D. Kan. 1997); *see also*, *Williams v. Widnall*, 79 F.3d 1003, 1004 n.1 (10th Cir. 1996). In its original form, section 501 contained no private right of action. "Congress added such a right in 1978 by enacting section 505(a)(1), 29 U.S.C. § 794a(a)(1)." *Williams*, 79 F.3d at 1004 n.1. Section 794a(a)(1) extends the "remedies, procedures, and rights" available under Title VII, 42 U.S.C. § 2000e-16 to federal employees with disability discrimination claims.

[*1104] The Equal Employment Opportunity Commission (EEOC) has promulgated regulations to implement the anti-discrimination provisions of the Rehabilitation Act. [HN5]Part 1614 of Title 29 of the Code of Federal Regulations governs Federal Sector Equal Employment Opportunity, i.e. claims brought under section 501 of the Act. It covers individual and class complaints of discrimination and retaliation prohibited [**17] by the Rehabilitation Act. 29 C.F.R. § 1614.103(a). It expressly applies to the United States Postal Service. *Id.* § 1614.103(b)(3). Effective October 1, 1992, Part 1614 superceded Part 1613 and began to govern administrative complaints and appeals alleging employment discrimination filed by federal employees and applicants for federal employment. *Johnson v. Runyon*, 47 F.3d 911, 915 (7th Cir. 1995); Federal Sector Equal Employment Opportunity, 57 Fed. Reg. 12,634, 12,634 (1992). Effective August 25, 1995, the EEOC eliminated Part 1613 as obsolete. Federal Sector Equal Employment Opportunity, 60 Fed. Reg. 43,371, 43,371-72 (1995). "Prior to its repeal, [Part] 1613 set forth procedures to be used by federal agencies and the EEOC for processing complaints of employment-related retaliation and discrimination filed before October 1, 1992; [Part] 1614 governs complaints filed after October 1, 1992." *Anvari v. Shalala*, 83 F.3d 426, No. 95-15147, 1996 WL 208942, at *1 (9th Cir. Apr. 25, 1996) (Table, text on Westlaw).

The EEOC has also promulgated regulations to implement the Equal Employment provisions [**18] of the Americans with Disabilities Act (ADA). *See* 29 C.F.R. pt. 1630. [HN6]The specific purpose of Part 1630 is to implement Title I of the ADA. 29 C.F.R. § 1630.1(a). Part 1630 applies to employers, employment agencies, labor organizations, and joint labor management committees, *Id.* §§ 1630.1(b) and 1630.2(b). Defendant is not an employer under Part 1630. The regulations specifically exclude the United States from the definition of employer. *See id.* § 1630.2(e)(2)(i). Defendant, furthermore, is not an employment agency or labor organization. *See* 42 U.S.C. § 2000e(c) and (d) (29 C.F.R. § 1630.2(c) provides that labor organizations and employment agencies "shall have the same meaning given those terms" in 42 U.S.C. § 2000e). Defendant is also not a joint labor management committee. Part 1630 thus appears facially inapplicable to this action.

As amended in 1992, [HN7]section 501 of the Rehabilitation Act, as codified, provides that the standards applied under Title I of the ADA shall be used to determine whether that section has been violated. 29 U.S.C. § 791(g). To that extent regulations promulgated [**19] under the ADA appear relevant to claims based upon section 501. The Tenth Circuit Court of Appeals has recently commented on the issue in dictum:

> while the ADA and the Rehabilitation Act *generally* are to be interpreted and applied consistently with one another . . . the standards used to determine whether a federal employer has violated section 501 of the Rehabilitation Act will not always be identical to those employed in suits brought under section 504 or under the ADA. In particular, this court recently noted that "the meaning of reasonable accommodation . . . may vary due to the heightened duties ascribed to federal employers under section 501."

Smith v. Midland Brake, Inc., 138 F.3d 1304, 1311 (10th Cir. 1998) (citations and footnote omitted). The reasoning in *Midland Brake* appears sound. The court accepts the general rule, as set forth therein.

The court also recognizes significant differences between regulations promulgated under section 501 and those promulgated under the ADA. The former regulations are "stricter than those promulgated under the

ADA." *Midland Brake*, 138 F.3d at 1311. [HN8]Under section 501 federal agencies [**20] must develop affirmative action programs for the hiring, placement, and advancement of individuals with disabilities. *See* 29 U.S.C. § 791(b). "By contrast, neither section 504 of the Rehabilitation Act nor the ADA creates such affirmative action obligations." *Midland Brake*, 138 F.3d at 1311. "It is well established both by the statutory language and Supreme Court decisions interpreting the [Rehabilitation] Act that federal employers have greater duties to accommodate disabled workers under section 501 than the duties [*1105] owed by federal grantees under section 504 or those owed by employers under the ADA." *Woodman v. Runyon*, 132 F.3d 1330, 1343 (10th Cir. 1997). ADA regulations as contained in Part 1630 of Title 29 of the United States Code, however, are often relevant and helpful to the resolution of actions brought under section 501 of the Rehabilitation Act. *See Powers v. Runyon*, 974 F. Supp. 693, 701 (S.D. Ind. 1997).

The Department of Health and Human Services has also promulgated regulations to implement the provisions of the Rehabilitation Act. *See* 45 C.F.R. Pt. 84. The express purpose [**21] of Part 84 "is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance." *Id.* § 84.1. Part 84 has no applicability to the matters now before the court. Plaintiff may proceed only under section 501 of the Rehabilitation Act, not section 504. The court, nevertheless, notes that Parts 84 and 1614 have substantial similarities. *Compare* 29 C.F.R. §§ 1614.101 to 1614.607 *with* 45 C.F.R. §§ 84.1 to 84.55.

IV. Applicable Case Law

The Tenth Circuit Court of Appeals has recently addressed the applicability of case law construing the ADA and section 504 of the Rehabilitation Act to cases under section 501 of the Rehabilitation Act. *See Woodman v. Runyon*, 132 F.3d 1330 (10th Cir. 1997). It cautions that "[HN9]courts should be wary of applying cases interpreting federal grantees' duties of reasonable accommodation under section 504 to cases brought under section 501," due to the affirmative action duties placed upon federal employers under section 501. *Id.* at 1338 n.6. It noted that in some instances, [**22] however, case law decided under the ADA applies to cases brought under section 501. *Id.* at 1339 n.8. Again it cautioned courts to remain mindful of the "heightened duties of 'reasonable accommodation' not applicable to private employers under the ADA." *Id.*

V. Applicable Burden-shifting Framework

The parties agree that the well-known, burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) and its progeny applies in this case. [HN10]That framework indeed applies in cases under both sections 501 and 504 of the Rehabilitation Act, when the employer disclaims any reliance upon the protected status of plaintiff in making the employment decision. *Florence v. Runyon*, 990 F. Supp. 485, 494 (N.D. Tex. 1997) (applying framework in context of section 501 claim); *Dratz v. Johnson*, 60 F.3d 837, 1995 WL 406946, at *3 (10th Cir. 1995) (Table, text on Westlaw) (applying framework in context of section 504 claim). Plaintiff thus bears the initial burden to establish a *prima facie* case of discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). [**23] He must produce evidence that raises a reasonable inference that each element of a *prima facie* case exists. *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 530 (10th Cir. 1994). Once plaintiff establishes a *prima facie* case of discrimination the burden shifts to defendant to articulate legitimate, nondiscriminatory reasons for its treatment of plaintiff. *Brinkman v. State Dep't of Corrections*, 863 F. Supp. 1479, 1485 (D. Kan. 1994).

VI. Discussion

Defendant argues that plaintiff cannot state a *prima facie* case of discrimination under the Rehabilitation Act, as amended. It suggests that plaintiff is not disabled, within the meaning of the Act. It further suggests that plaintiff was unqualified to perform the essential functions of his job or any available light duty positions. It argues, furthermore, that plaintiff's claim for compensation under the Federal Employees' Compensation Act and his failure to seek accommodation preclude him from maintaining that he is otherwise qualified for his former position. Alternatively, it argues that it has reasonably accommodated plaintiff. It also argues that plaintiff has failed to [**24] state a *prima facie* case of retaliation.

[HN11]To succeed on his claim of discrimination under section 501 of the Rehabilitation Act, [*1106] plaintiff must prove that (1) he is "disabled" within the meaning of the statute; (2) he is "otherwise qualified," that is, he can perform the essential functions of the job with or without accommodation; and (3) the personnel action was taken by defendant because of his disability. *Woodman v. Runyon*, 132 F.3d 1330, 1338 (10th Cir. 1997).

A. Disability

The court first examines whether plaintiff is "disabled," within the meaning of the Rehabilitation Act. For

present purposes, "[HN12]the term 'individual with a disability' means . . . any person who: (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B); *see also*, 29 C.F.R. § 1614.203(a)(1). Subparts (ii) and (iii) are not at issue here. It is undisputed, furthermore, that plaintiff has a physical impairment -- degenerative cervical disc disease. The parties disagree [**25] as to whether that impairment substantially limits a major life activity.

[HN13]"Major life activities means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1614.203(a)(3). Part 1614 of Title 29 of the Code of Federal Regulations provides no definition for "substantially limits." Part 1630 defines the phrase, however, to mean that the individual is either unable to perform, or significantly restricted as to the condition, manner, or duration under which the individual can perform, a major life activity as compared to an average person in the general population. *See* 29 C.F.R. § 1630.2(j)(1)(i) and (ii). Courts have specifically adopted this definition in cases brought against the Post Office under section 501 of the Rehabilitation Act, 29 U.S.C. § 791. *See Powers v. Runyon*, 974 F. Supp. 693, 701 (S.D. Ind. 1997). Under the ADA, as well as sections 501 and 504 of the Rehabilitation Act, courts consider three factors in determining whether an impairment substantially limits a major life activity. *Gonzagowksi v. Widnall*, 1995 U.S. Dist. LEXIS 21546, [**26] No. 94-0016 MV/LFG, 1995 WL 930486, at *4-5 (D.N.M. Oct. 17, 1995) (finding the analysis applicable to sections 501 and 504 "virtually identical" and applying regulations implementing Title I of the ADA, 29 C.F.R. pt. 1630), *aff'd*, 115 F.3d 744 (10th Cir. 1996); *Dutton v. Johnson County Bd. of Comm'rs*, 859 F. Supp. 498, 505 (D. Kan. 1994) (perceiving "no practical difference" between the ADA and sections 501 and 504 of the Rehabilitation Act and applying Part 1630 to all the claims). The factors are: (1) the nature and severity of the impairment; (2) its duration or expected duration; and (3) its permanent or long-term impact, or expected impact. 29 C.F.R. § 1630.2(j)(2).

For the purposes of this motion it is uncontested that the condition of plaintiff restricts him to non-strenuous activities. His medical care providers have restricted his job opportunities to those which do not involve bending, twisting, stooping, pushing, pulling, and lifting more than twenty pounds. They have recommended that he switch to a more sedentary position. It is also uncontested that plaintiff has difficulty standing or sitting for long periods of time. [**27] The listed limitations preclude mowing the lawn, lifting a laundry basket, pushing a vacuum cleaner, maintaining an automobile, and performing recreational activities, such as softball. In view of these uncontested facts, a question of fact exists as to whether plaintiff is substantially limited in any major life activity. The Tenth Circuit Court of Appeals has held that, [HN14]in the context of an ADA claim, lifting is a major life activity. *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996). The same should hold true in the context of a claim under section 501 of the Rehabilitation Act. Evidence that a plaintiff cannot lift more than fifteen pounds and should only occasionally lift items of lesser weight creates a genuine issue of material fact with respect to whether the impairment substantially limits the ability to lift. *Id.* Evidence that a plaintiff cannot lift more than twenty pounds likewise presents a triable issue of material fact.

B. Otherwise Qualified and Reasonable Accommodation

Defendant next argues that plaintiff was not qualified to perform the essential functions [*1107] of his job. It suggests that he should [**28] be estopped from maintaining that he is otherwise qualified by his claim for compensation under the Federal Employees' Compensation Act (FECA) and his failure to seek accommodation. Alternatively, it argues that it has reasonably accommodated him. It suggests that plaintiff has admitted that he cannot perform the essential functions of the GE position or light duty positions available at the Post Office. Viewing the record in a light most favorable to plaintiff, it appears that he has admitted only that he is unable to perform the essential functions of those positions in the absence of reasonable accommodation.

1. Judicial Estoppel

The argument that the FECA claim of plaintiff precludes a present assertion that he is "otherwise qualified" has no merit. Under the law of the Tenth Circuit Court of Appeals, [HN15]plaintiff is "not judicially estopped" from now making claims inconsistent with his prior representations in the related FECA proceeding. *See Smith v. Midland Brake, Inc.*, 138 F.3d 1304, 1312 (10th Cir. 1998). The Tenth Circuit has expressly "rejected the doctrine of judicial estoppel." *See United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986). [**29] Had the Circuit accepted the doctrine, furthermore, it would have applied it only if plaintiff had succeeded in the earlier proceeding. *See id.* It is undisputed that plaintiff failed in the FECA proceeding.

Defendant cites a number of cases from other jurisdictions to support its assertion of judicial estoppel. Such opinions, however, carry little weight when contrary, binding authority exists within the Tenth Circuit. The position of plaintiff at the FECA proceeding, furthermore, does not appear inconsistent with a claim that he is

"otherwise qualified" within the meaning of the Rehabilitation Act. [HN16]A plaintiff may be unable to perform a particular job for purposes of a workers compensation claim, even though he or she can perform it, within the meaning of the Rehabilitation Act with reasonable accommodation.

2. Alleged Failure to Seek Accommodation

The argument that plaintiff cannot now claim that he is "otherwise qualified," because he failed to request reasonable accommodation, likewise has no merit. Viewed in a light most favorable to plaintiff, the record shows that he requested reasonable accommodation. Plaintiff had brief conversations with his supervisor about changing [**30] the doors at the GMF to accommodate his condition. Plaintiff filed an affidavit with the EEOC, furthermore, wherein he specifically requested "education, training and/or job placement whether it be with the postal service or another Federal agency" as part of the resolution of his complaint. (EEO Investigative Affidavit, attached to Mem. in Supp. Def.'s Mot. Summ. J., doc. 27.) Such a request asks for reasonable accommodation.

3. Related Issues of Otherwise Qualified and Reasonable Accommodation

The court next addresses the related issues of "otherwise qualified" and "reasonable accommodation." [HN17]The Tenth Circuit Court of Appeals has established the following framework for analyzing whether a disabled individual is "otherwise qualified" under the ADA:

> First, we must determine whether the individual could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue. Second, if (but only if) we conclude that the individual is not able to perform the essential functions of the job, we must determine whether any reasonable accommodation by the employer would enable him to perform those functions.

White v. York Int'l Corp., 45 F.3d 357, 361-62 (10th Cir. 1995) [**31] (quoting *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993)); *see also, Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996). The Tenth Circuit has subsequently held the framework applicable "under section 501 of the Rehabilitation Act." *See Woodman v. Runyon*, 132 F.3d 1330, 1339 (10th Cir. 1997). It has modified it as follows:

> To determine if a person with a disability is "otherwise qualified" for employment, [*1108] we look to whether or not a reasonable accommodation would enable the person to perform the job. There are two components to the reasonable accommodation analysis. *First*, whether a reasonable accommodation would enable the employee to do the particular job. Additional training might be a reasonable accommodation for this purpose. *Second*, whether the employee could be transferred to other work which could be done with or without accommodation.

Gonzagowski v. Widnall, 115 F.3d 744, 747 (10th Cir. 1997); *see also, Woodman*, 132 F.3d at 1340.

According to the EEOC regulations implementing the Rehabilitation Act, [HN18]a "qualified [**32] individual with handicaps" is: "an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who . . . meets the experience or education requirements . . . of the position in question." 29 C.F.R. § 1614.203(a)(6). "The relevant inquiry in determining whether an employee is 'qualified' under the amended Act for purposes of a motion for summary judgment is whether the employee has provided evidence that [he or] she can be reasonably accommodated--which includes reasonable reassignment--sufficient to require submission to a jury." *Woodman*, 132 F.3d at 1340. [HN19]Section 1614.203(g) of Title 29 of the Code of Federal Regulations explicitly provides that a federal employer must attempt reassignment when a disabled employee cannot be reasonably accommodated to perform the essential functions of his or her existing job:

> When a nonprobationary employee becomes unable to perform the essential functions of his or her position even with reasonable accommodation due to a handicap, an agency shall offer to reassign the [**33] individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available

> grade or level below the employee's current grade or level shall be required, but availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C. § 8337 or 5 U.S.C. § 8451.

[HN20]In addition § 1614.203(g) imposes an obligation on the federal employer to offer reassignment, unless the employer has already posted the position as available:

> If the agency has already posted a notice or announcement seeking applications for a specific vacant position at the time the agency has determined that the nonprobationary employee is unable to perform the essential functions [**34] of his or her position even with reasonable accommodation, then the agency does not have an obligation under this section to offer to reassign the individual to that position, but the agency must consider the individual on an equal basis with those who applied for the position.

If the available position has been posted, the employer "must consider the employee for that position without discrimination." *Gonzagowski*, 115 F.3d at 748.

In *Woodman* the Tenth Circuit Court of Appeals addressed [HN21]"the burden of proof plaintiffs and defendants must meet in order to survive summary judgment under [section 501 of] the Rehabilitation Act." 132 F.3d at 1342-46. It provides the following guidance:

> We . . . hold that a plaintiff bears the ultimate burden of proving [he or] she is "qualified" within the meaning of the Rehabilitation Act, *i.e.*, that there are jobs available that [his or] her disability will nevertheless allow [him or] her to do, with or without reasonable accommodation. However, a plaintiff's burden with respect to the plausibility of reasonable accommodation is one of production only. In accordance with section 501 of [**35] the Rehabilitation Act's mandate that federal employers act affirmatively to provide reasonable accommodation [*1109] for disabled workers, this burden of production "is not a heavy one. It is enough for the plaintiff to suggest the existence of a plausible accommodation, the costs of which, facially, do not clearly exceed its benefits." Once the plaintiff has made this facial showing that accommodation is possible, the burden shifts to the defendant to prove that accommodating the plaintiff would pose an undue hardship.

[HN22]We are convinced that placing the burden of locating other available jobs entirely on the plaintiff would be inconsistent both with the implementing regulations of the 1992 amendments and with the affirmative action duties contemplated by section 501, the latter of which do not apply to private employers under the Americans with Disabilities Act, the statute controlling our decision in [*White v. York Int'l Corp.*, 45 F.3d 357 (10th Cir. 1995)]. The duties of reasonable accommodation under section 501 and the duty to reassign under the 1992 amendments are mandates with which federal employers are obligated to comply. Federal employers therefore [**36] must play a considerable role in ensuring that every reasonable effort is made to find suitable jobs for disabled employees. Without question, employees must come forward with that information they are best placed to know--the fact and nature of their disability and their wish to be accommodated. In other words, employers are not required *to initiate the inquiry* into whether a given employee with a disability can be accommodated.

Nevertheless, we agree with those courts concluding that realizing the goals of the Rehabilitation Act requires an "interactive process" whereby federal employers investigate in good faith the availability of positions to which disabled employees could be reassigned, a task that employers are far better placed to do than are employees, and that they must do under the Act. We find persuasive the Ninth Circuit's interpretation of the employer's duties under the Rehabilitation Act once an employee has identified the nature of [his or] her disability and requested accommodation:

> [HN23]An employer, to meet its burden under the Act, may not merely speculate that a suggested accommodation is not feasible. When accommoda-

> tion is required to enable the employee [**37] to perform the essential functions of the job, the employer has a duty to 'gather sufficient information from the applicant and qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform the job. . . .'
>
> Common sense dictates that an employee need not identify an available position for reassignment prior to enlisting the employer's assistance. In order to initiate the interactive process, it is enough for a plaintiff to notify the employer of the nature of [his or] her disability and specifically request information about possible reassignment. At that point, the employer is obliged to assist [him or] her in the effort to identify an available job.

Id. 132 F.3d at 1344-45 (citations and footnotes omitted).

Plaintiff has not carried his burden to show that he is "otherwise qualified" for his former GE position, within the meaning of section 501 of the Rehabilitation Act. It is undisputed that he cannot perform the essential functions of that position without accommodation. He has shown no reasonable accommodation, however, which would permit him to do the job. He must suggest to defendant a plausible [**38] accommodation, the costs of which do not clearly exceed its benefits. He presently suggests that defendant could install automated doors and lifts or procure a motorized cart or chair to accommodate his condition. The court cannot find, however, that he made all of these suggestions to defendant in a timely manner. Prior to his termination he had requested accommodation, other than transfer or reassignment, only in brief conversations with his supervisor Charlie Frazier. Although plaintiff leaves the content of those conversations vague, it appears that he and Mr. Frazier discussed the possibility of changing or altering the doors of the GMF to accommodate his condition. He specifically admits upon deposition that he never requested that defendant place automated plates upon the doors or that it procure a motorized riding device or chair to accommodate his condition. [*1110] Giving him every benefit of the doubt, the court can find only that he timely requested defendant to change the doors at the GMF.

Had plaintiff indeed timely requested all the above listed accommodations, his case still falls short. The suggested accommodations appear facially unreasonable. Some of them [**39] would require structural changes to the temporary facility of defendant. By plaintiff's own testimony, moreover, even with the accommodations he would not be able to perform all essential functions of the GE position. [HN24]When requested accommodations do not permit the plaintiff to perform all essential functions of his or her former position, then he or she is not otherwise qualified for that position. *Shiring v. Runyon*, 90 F.3d 827, 831 (3d Cir. 1996); *see also*, 29 C.F.R. § 1614.203(a)(6) (stating that qualified individual must be able to perform essential functions of the position).

The regulations promulgated to implement the anti-discrimination provisions of section 501 of the Rehabilitation Act, 29 C.F.R. pt. 1614, do not define "essential functions." The regulations promulgated to implement Title I of the ADA, 29 C.F.R. pt. 1630, however, again provide helpful and appropriate guidance. [HN25]"The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n)(1). The term "does not include the marginal functions of the position." *Id.*

> A job function [**40] may be considered essential for any of several reasons, including but not limited to the following: (i) The function may be essential because the reason the position exists is to perform that function; (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

Id. § 1630.2(n)(2) (paragraph structure altered). [HN26]Evidence relevant to the determination of what functions are essential

> includes, but is not limited to: (i) The employer's judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job per-

forming the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs.

[**41] *Id.* § 1630.2(n)(3).

[HN27]The determination of which functions are essential may be critical to the determination of whether or not the individual with a disability is qualified. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation.

The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential. . . .

If the individual who holds the position is actually required to perform the function the employer asserts is an essential function, the inquiry will then center around whether removing the function would fundamentally alter that position. This determination of whether or not a particular function is essential will generally include one or more of the . . . factors listed in part 1630.

. . .[HN28]

Whether a particular function is essential is a factual determination that must be made on a case by case basis. In determining whether or not a particular function is essential, all relevant evidence should be considered. Part [**42] 1630 lists various types of evidence, such as an established job description, that should be considered in determining whether a particular function is essential. Since the list is not exhaustive, other relevant evidence may also be presented. Greater weight will not be granted to the types of evidence [*1111] included on the list than to the types of evidence not listed.

29 C.F.R. pt. 1630 app. (commentary on 29 C.F.R. § 1630.2(n)).

Plaintiff has detailed the functions of the GE position. (*See* Ex. 9 attached to Mem. in Supp. Def.'s Mot. Summ. J. at 100321-23.) He states that, upon the arrival of a vehicle at the dock, the following series of events occurs while servicing the vehicle: (1) open dock door; (2) open vehicle door, which may include removing seals, wires, chains, and/or padlocks; (3) pull-out dock plate; (4) remove load securing device; (5) load or unload contents; (6) remove dock plate; (7) close vehicle door; and (8) close dock door. (*Id.* at 100321.) In addition to servicing vehicles the GE position of plaintiff entailed constant and continual sorting of mail contained in letter trays, flat trays, sacks, parcels, and pouches. (*Id.* at 100322.) [**43] Plaintiff estimated the average weight of letter trays to be fifteen pounds and flat trays to be thirty-five pounds. He noted that sacks, pouches, and parcels were limited to seventy pounds. (*Id.* at 100323.) The identification of the functions of the GE position by plaintiff appears consistent with the stated functions of the position by the defendant. (*See* General Expediter--Level 6, Basic Function, attached as Ex. 9 at 100320.)

Testimony of plaintiff indicates that his requested accommodations would not enable him to perform all functions of the GE position. He testified that, even with the accommodations, he would be unable to open the truck doors or cut seals and wires, without assistance from others. He also testified that use of a mechanized chair would probably preclude loading and unloading trucks. He further testified that the accommodations would not permit him to sort mail as required between handling trucks. The court need not determine whether all of these functions are essential, within the meaning of the Rehabilitation Act. [HN29]If plaintiff cannot perform even one essential function with accommodation, then he is not otherwise qualified for the position.

If opening [**44] truck doors and cutting seals and wires are arguably marginal functions of the GE position, sorting mail is nevertheless essential. Plaintiff has testified that not all expediters loaded and unloaded trucks. Sorting mail, however, unquestionably appears to be an essential function of the position. Nothing of record indicates otherwise. Testimony and statements of both parties, moreover, indicate that it is essential. The court finds it essential to the GE position. Plaintiff has unambiguously stated that he cannot perform that function, furthermore, even with his requested accommodations. Accordingly, he is not otherwise qualified for the position.

Plaintiff makes no suggestion and presents no evidence, furthermore, that the requested accommodations *would* enable him to perform the other functions of the

GE position. He states only that they *might* permit him to perform them. No doctor opines that he may return to his former position with the requested, or any other, accommodation. The doctors only suggest transfer as an accommodation. [HN30]The Rehabilitation Act does not require the employer to make structural changes to a temporary facility or undertake a requested accommodation [**45] against a simply speculative possibility that it might allow the employee to perform the essential functions of the position despite his or her condition. Inherent in the concept of reasonable accommodation is the requirement that it permit the disabled worker to perform the essential functions of the position. "To be deemed a qualified individual, an individual must be capable of performing the essential functions of the job in question, with or without accommodation." Rio v. Runyon, 972 F. Supp. 1446, 1457 (S.D. Fla. 1997). Although the record contains no estimates of the costs involved in making the accommodations requested by plaintiff, the cost would clearly exceed the benefit to be derived in view of the fact that no evidence indicates that the requested accommodations would permit plaintiff to perform all essential functions of the GE position.

In view of the affirmative goal of the federal government to be a model employer for those with disabilities, the court realizes that an accommodation which would be unreasonable for a private employer could be [*1112] found to be a reasonable undertaking for the federal government. *See* Woodman, 132 F.3d at 1344 n. 14. [**46] Although "there is little to stop the federal government from expending considerable money and effort to become a model employer of handicapped individuals, when that is its chosen policy," *id.* (quoting Lex K. Larson, *Employment Discrimination* § T106.44(a) (2d ed. 1977)), there nevertheless exists some point at which a suggested accommodation exceeds the bounds of reasonableness even for the federal government. The suggestions of plaintiff crosses that point.

Plaintiff also has not shown himself "otherwise qualified" for a transfer to some other position of defendant which he could do with or without accommodation. He initiated an inquiry into whether he could be accommodated by a transfer. That inquiry obliged defendant to assist him in identifying an available position. Defendant provided such assistance. The search uncovered no vacant position in the same commuting area serviced by defendant. Although plaintiff has shown that he could perform sedentary, office type work, he has shown no vacant position in the same commuting area and serviced by defendant. In the absence of such a vacant position, the requested accommodation of transfer is unreasonable. "If it turns out [**47] there is no job which the worker (with or without accommodation) is capable of performing, then the company cannot be liable for an ADA or Rehabilitation Act violation." Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997). The Rehabilitation Act does not require a defendant to create a new position for a disabled worker. *Id.* at 418.

Plaintiff has shown no reasonable accommodation which would permit him to perform the essential functions of his former position. He has shown no vacant light duty position to which defendant could transfer him. His claim of discrimination under section 501 of the Rehabilitation Act of 1973, accordingly fails. The court will grant summary judgment in the favor of defendant on that claim.

C. Retaliation

Defendant also seeks summary judgment on the retaliation claim of plaintiff. Plaintiff alleges that "defendant retaliated against [him] for objecting to and reporting the discriminatory conduct of the defendant and for requesting reasonable accommodation." (Pretrial Order P 4h.) He further alleges that his "disability was a direct, motivating factor in the defendant's" decision to terminate him in April 1996. [**48] (*Id.* PP 4i and 4j.)

Although the Rehabilitation Act itself provides no cause of action for retaliation, the regulations promulgated pursuant to it do so. [HN31]Section 1614.101(b) of Title 29 of the Code of Federal Regulations provides that "no person shall be subject to retaliation for opposing any practice made unlawful by . . . the Rehabilitation Act . . . or for participating in any stage of administrative or judicial proceedings" under the Act. To establish a *prima facie* case of retaliation in violation of the Rehabilitation Act plaintiff must show (1) that he engaged in activity protected under the Act, (2) that he suffered an adverse employment action subsequent to or contemporaneous with such protected activity, and (3) that there is a causal connection between the protected activity and the adverse employment action. Moore v. City of Overland Park, 950 F. Supp. 1081, 1085 (D. Kan. 1996) (setting forth elements for a *prima facie* case for the Rehabilitation Act, ADA, and ADEA). The elements of the *prima facie* case of retaliation are the same whether a plaintiff proceeds under the Rehabilitation Act, ADA, ADEA, or Title VII. *Compare id. with* [**49] Jeffries v. State, 147 F.3d 1220, , 1998 U.S. App. LEXIS 12952, 1998 WL 318533, at *10 (10th Cir. 1998) (setting forth elements under Title VII). The court can thus appropriately rely upon case law interpreting any of these statutes.

The record shows that plaintiff engaged in protected activity by seeking counseling with an EEO counselor on November 7, 1994, and filing a formal complaint in December 1994. That element of the *prima facie* case is not in dispute. Defendant disputes, however, that it took adverse employment action against plaintiff. Plaintiff sug-

gests that the adverse action took two forms: (1) his ultimate termination and (2) threatened termination if he did not provide information and medical documentation sufficient to satisfy [*1113] the subjective standards of defendant. He contends that, prior to the exercise of his federally protected rights, defendant had never threatened to terminate his employment. He claims that defendant only began to submit threatening and harassing letters and requests for information after he sought counseling with the EEO.

[HN32]The court must determine whether a given employment action is adverse on a [**50] case-by-case basis. *Jeffries*, F.3d at , 1998 U.S. App. LEXIS 12952, 1998 WL 318533, at *11. In evaluating a claim of retaliation courts have indicated that "not everything that makes an employee unhappy is an actionable adverse action." *Dunbar v. Board of Dirs. of Leavenworth Pub. Library*, 996 F. Supp. 1086, 1092 (D. Kan. 1998) (internal quotations omitted). "An actionable adverse action is one that affects the 'terms, privileges, duration, or conditions of employment.'" *Hysten v. Jefferson County Bd. of County Comm'rs*, 995 F. Supp. 1191, 1202 (D. Kan. 1998) (quoting *Yerdon v. Henry*, 91 F.3d 370, 378 (2d Cir. 1996)). "Adverse employment action has been liberally described by courts as actions by an employer that disadvantage the employee." *Ballou v. University of Kan. Med Ctr.*, 1995 U.S. Dist. LEXIS 6052, No. Civ.A. 93-2524- GTV, 1995 WL 261981, at *6 (D. Kan. Apr. 7, 1995). "Examples of actionable adverse action include disciplinary demotion, termination, unjustified evaluations and reports, loss of normal work assignments, and extension of a probationary period. [**51] " *Dunbar*, 996 F. Supp. at 1092-93. In addition prosecution of a former employee for suspected criminal activity may constitute adverse employment, because it can have an adverse impact on future employment opportunities. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996). A "threatened letter of warning," however, is not an adverse employment action, as a matter of law. *Green v. Runyon*, 131 F.3d 151, 1997 WL 755270, at *1 (10th Cir. 1997).

The record shows that defendant took adverse employment action in April 1996, when it terminated the employment of plaintiff. The letters and requests for information which preceded this termination do not constitute adverse employment action. They of themselves disadvantage plaintiff to no extent. They do not alter the terms, privileges, duration, or conditions of employment. They inquire into the reasons for plaintiff's continued absence from work. They seek to obtain current medical documentation to support an inability to work. They inform plaintiff that defendant may take adverse employment action were plaintiff to fail to provide adequate documentation. They also inform plaintiff [**52] of the status of his many pursuits of relief. The correspondence is more akin to "threatened letters of warning," than to any actionable adverse action. Any alteration of the terms, privileges, duration, or conditions of employment is speculative and prospective in nature. That the correspondence followed protected activity does not of itself transform the letters and requests into adverse employment action. Of itself the correspondence is not adverse. Only when defendant took the next step and terminated his employment did it take adverse action against him.

The retaliation claim of plaintiff fails at the next step of the *prima facie* case. Plaintiff has shown no causal connection between his protected activity and his termination. He has shown nothing to indicate that a retaliatory motive played a part in the adverse action. [HN33]"The causal connection element requires that plaintiff establish that the protected opposition and adverse action are not wholly unrelated and such an inference is permissible where the adverse action closely follows the protected activity." *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 560 (D. Kan. 1995). Nearly seventeen months [**53] elapsed between the protected activity of plaintiff and the adverse employment action of defendant. Such an interval "does not support a reasonable inference of a causal connection . . . given the total dearth of other evidence of discriminatory motive." *See id.* at 560-61 (finding that an interval of eight months does not of itself give rise to a reasonable inference of a causal connection).

The correspondence from defendant between November 7, 1994, and the termination of plaintiff provides no evidence of retaliatory motive. Plaintiff contends that defendant never threatened his employment until after he exercised his federally protected rights. [*1114] The contention is erroneous. By letter dated September 21, 1994, defendant informed plaintiff that it could terminate him unless he provided adequate reason for being absent since September 5, 1994. Plaintiff alleges retaliation for exercising his federally protected rights beginning November 1994. The mere fact that defendant may have threatened termination upon the failure of plaintiff to provide sufficient documentation regarding his medical condition thus appears to be an insufficient basis to show retaliatory [**54] motive. Defendant had engaged in the same behavior prior to the protected activity of plaintiff. It had no occasion, furthermore, to threaten termination for failure to appear for work and to provide appropriate medical documentation for remaining off work, until plaintiff stopped working on September 5, 1994. Prior to that time, plaintiff had not been absent for a significant period of time.

Plaintiff has not established that his protected activity and termination were related. The temporal proximity between the two events provide an insufficient basis to

infer such a causal connection. Plaintiff provides nothing else to establish the requisite connection. In the absence of a causal connection between his protected activity and subsequent termination his claim of retaliation fails as a matter of law. The court thus grants summary judgment in favor of defendant on the claim of retaliation.

For the foregoing reasons, the court sustains Defendant's Motion for Summary Judgment (doc. 26) and its Motion For Leave to File Separately Attachments to Declarations of Mark Scarborough and John Ford Submitted with Memorandum in Support of Defendant's Motion for Summary Judgment (doc. 28). The [**55] ruling on the motion for summary judgment disposes of this case in its entirety.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 7th day of August, 1998.

Gerald L. Rushfelt

United States Magistrate Judge

LEXSEE

Positive
As of: May 06, 2010

JOHN CELLINI, Plaintiff, vs. HARCOURT BRACE & COMPANY; HARCOURT GENERAL, Defendants.

CASE NO. 98-1424-IEG (LAB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

51 F. Supp. 2d 1028; 1999 U.S. Dist. LEXIS 9264; 83 Fair Empl. Prac. Cas. (BNA) 483

April 26, 1999, Decided
April 27, 1999, Filed

DISPOSITION: [**1] Defendants' motion for summary judgment GRANTED. Plaintiff's complaint, in its entirety, DISMISSED WITH PREJUDICE.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff's complaint asserted that defendants violated the California Fair Employment and Housing Act, Cal. Gov't. Code § 12940, and asserted claims for retaliation, intentional infliction of emotional distress, wrongful constructive termination, breach of an implied-in-fact contract to terminate only for good cause, and defamation in regards to his resignation of employment. Defendant employer and parent corporation moved for summary judgment.

OVERVIEW: The court granted defendants' motions for summary judgment and dismissed plaintiff's claims for violations of the California Fair Employment and Housing Act, Cal. Gov't. Code § 12940 et seq., and other state-law claims in regard to his resignation and allegations of sexual harassment. Defendants' operations were not interrelated in the sense that defendant parent corporation exercised greater control over defendant employer's operations than a parent corporation normally would exercise over a subsidiary. Plaintiff also failed to raise a triable issue of fact under the alternative theory that the two functioned as a single entity. Plaintiff failed to establish a prima facie case of retaliatory termination in that plaintiff failed to produce the specific and substantial evidence necessary to rebut defendants' proffered nonretaliatory reasons for defendant employer's employment actions. Plaintiff did not produce evidence demonstrating that defendant employer's investigation of plaintiff's conduct was insufficient to support a determination that plaintiff had behaved inappropriately. Plaintiff also failed to raise a triable issue of fact as to the at-will nature of his employment.

OUTCOME: Defendants' motions for summary judgment were granted and plaintiff's claims were dismissed with prejudice because there was no liability on the part of defendant parent corporation where there was no control of or identity with defendant employer, the statute of limitations had run on plaintiff's state-law claims, and plaintiff failed to prove a prima facie case of retaliation.

CORE TERMS: summary judgment, retaliation, employment decisions, sexual harassment, subsidiary, retaliatory, triable, at-will, issues of fact, prima facie case, harassment, causes of action, termination, tangible, adverse action, good cause, moving party, implied-in-fact, co-worker, terminate, written warning, inappropriate, diversity, omissions, warning, genuine, sexual, human resources, constructive discharge, constructive termination

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Civil Procedure > Federal & State Interrelationships > Erie Doctrine
[HN1]A federal district court sitting in diversity must apply the substantive law of the forum state. In a diversity suit, however, federal law governs questions of procedure such as a motion for summary judgment under Fed. R. Civ. P. 56.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
[HN2]Summary judgment is appropriate when the moving party demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A moving party who bears the burden of proof at trial is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. If the moving party does not bear the burden of proof at trial, he may discharge his burden of showing that no genuine issue of material fact remains by demonstrating that there is an absence of evidence to support the non-moving party's case. The moving party is not required to produce evidence showing the absence of genuine issues of material fact. Nor must the moving party support his or her motion with evidence negating the non-moving party's claim.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
[HN3]Once the moving party shows the absence of an issue of material fact, the non-moving party must go beyond the pleadings and offer specific facts showing that there is a genuine issue for trial. Throughout the review of a motion for summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. However, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial.

Civil Procedure > Discovery > Methods > General Overview
Torts > Vicarious Liability > Corporations > General Overview
Torts > Vicarious Liability > Employers > Activities & Conditions > General Overview
[HN4]Absent any evidence or allegation of a direct contractual relationship between plaintiff and the parent corporation of a subsidiary employer, the court examines whether an employee can hold the parent corporation liable under an alternative theory of employer liability.

Labor & Employment Law > Discrimination > Racial Discrimination > Coverage & Definitions
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > Employers
Torts > Vicarious Liability > Corporations > Subsidiary Corporations
[HN5]Under both federal and California law, an "employer" includes any agent of an employer. 42 U.S.C.S. § 2000e(b); Cal. Gov't Code § 12926. An agent, under California law, is one who represents another, called the principal, in dealings with third persons. Cal. Civ. Code § 2295. In order to establish a parent corporation's liability for the acts or omissions of its subsidiary under an agency theory, a plaintiff must show more than mere representation of the parent by the subsidiary in dealings with third persons. Rather, the plaintiff must show that the parent corporation so controls the subsidiary as to cause the subsidiary to become merely the agent or instrumentality of the parent.

Business & Corporate Law > Agency Relationships > Establishment > Elements > General Overview
Torts > Vicarious Liability > Corporations > Subsidiary Corporations
[HN6]A plaintiff alleging employment discrimination fails to create a triable issue of fact as to whether a parent corporation is liable for the actions of its subsidiary where the plaintiff makes no showing that the parent corporation exercises any control over the subsidiary's employment decisions.

Business & Corporate Law > Agency Relationships > Establishment > Elements > General Overview
Torts > Vicarious Liability > Corporations > Subsidiary Corporations
Torts > Vicarious Liability > Employers > Activities & Conditions > General Overview
[HN7]The integrated enterprise test, used to determine whether a parent and subsidiary corporation can be held liable as a single employer in a discrimination suit, requires an examination of four factors: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial con-

trol. Under this test common ownership or control alone is never enough to establish parent liability. In addition, although a court must consider each of the factors, the critical inquiry requires an examination of which entity made the final decisions regarding employment matters.

Governments > Legislation > Statutes of Limitations > Time Limitations
Labor & Employment Law > Wrongful Termination > Public Policy
[HN8]A one-year statute of limitations governs claims asserting violations of personal rights under the California Constitution.

Civil Procedure > Summary Judgment > Opposition > General Overview
Labor & Employment Law > Discrimination > Retaliation > General Overview
Labor & Employment Law > Employment Relationships > At-Will Employment > General Overview
[HN9]California's Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12940 et seq., prohibits an employer from retaliating against an employee, including an at-will employee, because the person has opposed any practices forbidden under FEHA or because the person has filed a complaint, testified, or assisted in any proceeding under FEHA. Cal. Gov't Code § 12940(f). Absent direct evidence of retaliation, the elements of a FEHA retaliation claim require (1) that the plaintiff establish a prima facie case of retaliation, (2) that the defendant articulate a legitimate, nonretaliatory explanation for its actions, and (3) that the plaintiff show that the defendant's proffered explanation is merely a pretext for its retaliatory actions. In cases in which the plaintiff offers direct evidence of retaliatory motive, the plaintiff needs to produce very little evidence of pretext to create a triable issue as to the actual motivation of the employer.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Interference With Protected Activities
Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN10]In those cases in which direct evidence of retaliation is unavailable, the plaintiff must come forward with specific and substantial circumstantial evidence tending to show that the employer's proffered justifications were pretextual in order to survive a motion for summary judgment. A plaintiff may establish a prima facie case of retaliation by showing that (1) he engaged in a protected activity, (2) his employer subjected him to an adverse employment action, and (3) there is a causal link between the protected activity and the employer's action.

Labor & Employment Law > Discrimination > Retaliation > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN11]Suits claiming retaliatory discharge in violation of the California Fair Employment and Housing Act (FEHA) are analogous to federal retaliation claims brought pursuant to Title VII and, therefore, federal law interpreting Title VII is instructive in evaluating retaliation claims brought pursuant to FEHA.

Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN12]Although an adverse action need not be an ultimate employment decision in order to be actionable, a plaintiff must nevertheless demonstrate some adverse material effect upon the terms or conditions of employment stemming from the employer's actions in order to satisfy the adverse action requirement.

Labor & Employment Law > Wrongful Termination > Constructive Discharge > Burdens of Proof
[HN13]To establish a claim of constructive discharge under California law, a plaintiff must demonstrate employment conditions that were so extraordinary, egregious, and intolerable that a reasonable person would have had no alternative but to resign.

Labor & Employment Law > Wrongful Termination > Constructive Discharge > General Overview
[HN14]Under California law a plaintiff's subjective reactions to the employment environment are not relevant.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > Antiharassment Policy
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employer Liability > Supervisors
Torts > Vicarious Liability > Employers > Activities & Conditions > General Overview
[HN15]An employer may be held vicariously liable under Title VII for a supervisor's sexual harassment of an employee and an employer may avoid liability by showing by a preponderance of evidence that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior.

Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN16]Where a plaintiff has not produced any direct evidence of retaliation by plaintiff accordingly, the court examines whether plaintiff has met his burden of producing specific and substantial circumstantial evidence tending to show that defendants' proffered justifications were pretextual.

Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN17]An ill-informed or ill-considered action by an employer is not automatically pretextual if the employer articulates an honest explanation in support of its action.

Labor & Employment Law > Wrongful Termination > Breach of Contract > For Cause Standard
Labor & Employment Law > Wrongful Termination > Breach of Contract > Implied Contracts
[HN18]The existence of an implied-in-fact contract requiring good cause for termination is a question for the trier of fact; however, if only one reasonable conclusion can be drawn from the undisputed facts, the issue may be decided as a matter of law on summary judgment.

Labor & Employment Law > Employment Relationships > At-Will Employment > Duration of Employment
Labor & Employment Law > Employment Relationships > Employment Contracts > General Overview
Labor & Employment Law > Wrongful Termination > Breach of Contract > Express Contracts
[HN19]In California, an employment, having no specified term, may be terminated at the will of either party on notice to the other. Cal. Labor Code § 2922. Section 2922 establishes a presumption of at-will employment if the parties have made no express oral or written agreement specifying the length of employment or the grounds for termination. This presumption may, however, be overcome by evidence that, despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, for example, by a requirement that termination be based only on good cause. In the employment context, factors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement, including the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.

Labor & Employment Law > Employment Relationships > At-Will Employment > Duration of Employment
Labor & Employment Law > Wrongful Termination > Breach of Contract > For Cause Standard
Labor & Employment Law > Wrongful Termination > Breach of Contract > Implied Contracts
[HN20]The California courts have held that an application for employment is a mere solicitation of an offer of employment and, therefore, that at-will language contained in a standardized, preprinted application for employment may not be the sole basis for rejecting a claim of an implied contract not to terminate except for good cause. Nevertheless, at-will language in an employment application constitutes evidence concerning the ultimate agreement entered into between the parties.

Labor & Employment Law > Employment Relationships > At-Will Employment > Duration of Employment
Labor & Employment Law > Employment Relationships > At-Will Employment > Exceptions > Implied Contracts
[HN21]Evidence of positive performance reviews, commendations, salary increases, and vague assurances of long-term employment are not sufficient to create a triable issue of fact as to whether the parties have implicitly agreed to modify the terms of an at-will employment arrangement in California.

Labor & Employment Law > Employment Relationships > At-Will Employment > General Overview
[HN22]Use of progressive discipline and written warnings do not indicate that an employee could only be terminated for cause since such a finding would encourage employers to terminate their employees at the first infraction.

COUNSEL: For JOHN CELLINI, plaintiff: Linda Zappe Flynn, Law Office of Linda Zappe Flynn, San Diego, CA.

For HARCOURT BRACE AND COMPANY, HARCOURT GENERAL, defendants: Phillip L Kossy, Littler Mendelson, San Diego, CA.

JUDGES: IRMA E. GONZALEZ, Judge, United States District Court.

OPINION BY: IRMA E. GONZALEZ

OPINION

[*1031] ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Doc. # 5]

BACKGROUND

Plaintiff John Cellini, a former employee of defendant Harcourt Brace & Company ("Harcourt Brace"), brings this action against Harcourt Brace and Harcourt General ("Harcourt General"), the parent corporation of Harcourt Brace, based on allegations surrounding his resignation from the position of telemarketing coordinator for Harcourt Brace's professional publishing division.

Plaintiff began his employment with Harcourt Brace on January 16, 1996. Prior to commencing his employment with Harcourt Brace, plaintiff signed an employment application, entitled "Harcourt Brace & Company Or A Subsidiary Application for Employment," which stated that plaintiff's employment could be terminated by [**2] Harcourt Brace "with or without cause" and "with or without notice at any time." (Dow Decl., Ex. 10.) During his employment with Harcourt Brace, plaintiff received copies of a bonus plan on three separate occasions which stated that plaintiff was an "at will" employee of Harcourt Brace.

On December 3, 1996, plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging sexual harassment by a female supervisor, Jenna Lake ("Lake"). In his EEOC complaint, plaintiff alleged (1) that Lake routinely referred to plaintiff as "gigante phallus," "giant penis," and "GP"; (2) that Lake patted and pinched plaintiff's bottom in mid-September, as he was leaving the office of co-worker John Losavio ("Losavio"); and (3) that, while sitting in Losavio's office, Lake moaned and stated "I need sperm" in plaintiff's presence. Harcourt Brace conducted an internal investigation in response to plaintiff's complaint, which included interviews with plaintiff, Lake, Losavio, and co-worker Keri Sims ("Sims"). David Scroggins ("Scroggins"), Harcourt Brace's Employment Manager, conducted the internal investigation. Based on the results of the investigation, on December 17, 1996 [**3] Harcourt Brace reprimanded both plaintiff and Lake for unprofessional and inappropriate conduct. Harcourt Brace warned both Lake and plaintiff that any future conduct of this kind would result in their immediate termination.

After plaintiff received this initial warning, plaintiff confronted Losavio, accused him of making false statements, and called him a "scum." Losavio reported this incident to the Human Resources Department. Subsequently, Sims reported that plaintiff had telephoned her at her home, on two separate occasions, wishing to talk to her about his sexual harassment complaint against Lake. Sims stated that she was uncomfortable interacting with plaintiff at work. On December 23, 1996, Marilyn Bailin ("Bailin"), Director of Harcourt Brace's Human Resources Department, issued a second written warning reprimanding plaintiff for his "rude and abusive" conduct toward Sims and Losavio. In addition, plaintiff's supervisor, Christine Lee ("Lee"), instructed plaintiff not to interact directly with either Lake or Sims in the future.

[*1032] Plaintiff contends that, after he filed his sexual harassment complaint with the EEOC, he was subjected to adverse treatment by his co-workers at [**4] Harcourt Brace. In addition to the aforementioned investigation, warnings, and instructions, plaintiff claims that Harcourt Brace employees retaliated against him by subjecting him to unjustified criticisms of his job performance. Plaintiff resigned from Harcourt Brace on January 15, 1997, in anticipation of a negative job performance evaluation on his one-year anniversary.

On February 17, 1998, plaintiff filed suit against defendants in San Diego Superior Court. [1] In his complaint, plaintiff asserts the following nine state law causes of action against defendants: (1) sexual discrimination and harassment in violation of California's Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940; (2) failure to maintain a workplace free from harassment in violation of FEHA; (3) retaliation in violation of FEHA; (4) statutory discrimination in violation of California Civil Code sections 51.5, 51.7, 51.9, 52, and 52.1; (5) intentional infliction of emotional distress; (6) violation of Article I, sections 1, 7, and 8 of the California Constitution; (7) wrongful constructive termination in violation of public policy; (8) breach of an implied-in-fact contract to only terminate for [**5] good cause; and (9) defamation. Plaintiff dismissed his fourth cause of action on June 2, 1998, in response to a demurrer filed by defendants in state court.

1 In his complaint, plaintiff also names Lake as a defendant. Plaintiff dismissed his action against Lake on June 16, 1998.

Defendants removed plaintiff's suit to this Court on August 5, 1998, invoking the Court's jurisdiction based on the parties' diversity of citizenship. [2] On March 10, 1999, the parties stipulated to the dismissal of plaintiff's first, second, fifth, and ninth causes of action. Now before the Court is defendants' motion for summary judgment or, in the alternative, for partial summary judgment on plaintiff's remaining third, sixth, seventh, and eighth causes of action.

2 The dismissal of Lake as a defendant on June 16, 1998 eliminated the only non-diverse party in this case.

[**6] **DISCUSSION**

A. Applicable Law

[HN1]A federal district court sitting in diversity must apply the substantive law of the forum state. *See, e.g., American Triticale, Inc. v. Nytco Servs., Inc.*, 664 F.2d 1136, 1141 (9th Cir. 1982) ("It is well settled that a federal court exercising diversity jurisdiction must apply substantive state law.") (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)). In the present case, defendants removed plaintiff's action from the California state court to the United States District Court for the Southern District of California based on diversity of citizenship. Therefore, the Court is required to apply California's substantive law in ruling on defendant's motion for summary judgment.

In a diversity suit, however, federal law governs questions of procedure. *See Hanna v. Plumer*, 380 U.S. 460, 470-74, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965). Because a motion for summary judgment is a procedural device, *see* Fed. R. Civ. P. 56, in the instant case the Court applies the federal standard for summary judgment. *See, e.g., Martinez v. Asarco Inc.*, 918 F.2d 1467, 1470 n.3, 1474 (9th Cir. 1990) (applying, in [**7] a diversity case, the federal standard for summary judgment in reviewing whether the plaintiff's evidence was sufficient to withstand the defendant's motion for summary judgment).

B. Motion for Summary Judgment

[HN2]Summary judgment is appropriate when the moving party demonstrates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A moving party who bears [*1033] the burden of proof at trial is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the moving party does not bear the burden of proof at trial, he may discharge his burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Id.* The moving party is not required to produce evidence showing the absence of genuine issues of material fact. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990). Nor must the moving party support [**8] his or her motion with evidence negating the non-moving party's claim. *See id.* [HN3]Once the moving party shows the absence of an issue of material fact, the non-moving party must go beyond the pleadings and offer "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Throughout the review of a motion for summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587-88, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)). However, "if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *California Architectural Bldg. Products v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987).

C. Analysis

1. Harcourt General's Liability

At the outset, the Court addresses defendants' [**9] motion for summary judgment as to the claims against Harcourt General. Defendants argue that, under the facts of this case, Harcourt General cannot be held liable for the acts or omissions of its subsidiary, Harcourt Brace. Plaintiff contends that triable issues of fact exist as to whether Harcourt General can be held liable for the tortious acts of Harcourt Brace under an agency theory of liability. [3]

3 Notably, plaintiff does not argue, and has not produced any evidence, that he possessed an employment contract with Harcourt General directly. In fact, such an argument appears unavailable to plaintiff. Plaintiff's employment application identifies Harcourt Brace, or *its* subsidiaries, as plaintiff's employer. (*See* Dow Decl., Ex. 10.) In addition, in his response to an interrogatory propounded by Harcourt Brace, plaintiff identified himself as an employee of Harcourt Brace only. (*See* Dow Decl., Ex. 20.) [HN4]Absent any evidence (or allegation) of a direct contractual relationship between plaintiff and Harcourt General, the Court examines whether plaintiff can hold Harcourt General liable under an alternative theory of employer liability.

[**10] [HN5]

Under both federal and California law, an "employer" includes any agent of an employer. *See* 42 U.S.C. § 2000e(b); Cal. Gov't Code § 12926. An agent, under California law, is "one who represents another, called the principal, in dealings with third persons." Cal. Civ. Code § 2295. Recently, in *Laird v. Capital Cit-*

ies/ABC, Inc., 68 Cal. App. 4th 727, 741 (1998), the California Court of Appeal, Third Appellate District, held that in order to establish a parent corporation's liability for the acts or omissions of its subsidiary under an agency theory, a plaintiff "must show more than mere representation of the parent by the subsidiary in dealings with third persons." *Id.* Rather, the plaintiff must show that the "parent corporation so controls the subsidiary as to cause the subsidiary to become merely the agent or instrumentality of the parent." *Id.* (internal quotation marks omitted).

Plaintiff has not produced a triable issue of fact as to whether Harcourt General can be held liable for the acts or omissions of Harcourt Brace under an agency theory. In support of his agency theory, plaintiff points to the fact that [*1034] Harcourt General provided employee benefits programs [**11] for Harcourt Brace employees; that Harcourt General issued a code of conduct that applied to Harcourt Brace employees; that Bailin contacted Martha Walz ("Walz"), Harcourt General's corporate counsel, about plaintiff's lawsuit; [4] and that Harcourt General provided sexual harassment seminars for Harcourt Brace employees in San Diego. These facts, however, are insufficient to establish an agency relationship between Harcourt General and Harcourt Brace because they do not demonstrate that Harcourt General exercised any control over Harcourt Brace's day-to-day employment decisions. *Cf. Laird*, 68 Cal. App. 4th at 741 (holding that [HN6]a plaintiff alleging employment discrimination had failed to create a triable issue of fact as to whether a parent corporation was liable for the actions of its subsidiary because the plaintiff had made no showing that the parent corporation had exercised any control over the subsidiary's employment decisions). For example, plaintiff has produced no evidence indicating that the individuals who evaluated plaintiff's work performance or reprimanded plaintiff were acting at the behest of Harcourt General's management. On the contrary, the uncontroverted evidence [**12] in this case demonstrates that Harcourt Brace's day-to-day employment decisions--such as hiring, performance evaluations, and work assignments--are conducted by Harcourt Brace employees without the involvement of Harcourt General. Harcourt General and Harcourt Brace also maintain their own separate human resources departments and separate payrolls. In addition, plaintiff has produced no evidence that the operations of Harcourt Brace and Harcourt General are interrelated in the sense that Harcourt General exercises greater control over Harcourt Brace's operations than a parent corporation normally would exercise over a subsidiary, or that the two corporations share management-level employees. Absent evidence of this kind, the Court finds that no reasonable trier of fact could conclude that Harcourt Brace was so controlled by Harcourt General that Harcourt Brace functioned as Harcourt General's mere agent or instrumentality.

4 Plaintiff alleges in his brief that Bailin had multiple telephone conversations with Walz concerning plaintiff. The evidence cited by plaintiff, however, only indicates the existence of a single telephone conversation between Bailin and Walz.

[**13] Plaintiff does not specify whether, alternatively, he is attempting to hold Harcourt General liable for the acts or omissions of Harcourt Brace on the theory that the two entities constitute a single employer. In his complaint and motion papers, however, plaintiff refers to Harcourt Brace and Harcourt General collectively. (*See, e.g.*, Compl. at 2 ("On or about January 16, 1996, Plaintiff began full time employment with HARCOURT as a telemarketing coordinator.").) Even assuming that plaintiff is attempting to hold Harcourt General and Harcourt Brace liable as a single employer, the Court finds that plaintiff has failed to show a triable issue of fact as to Harcourt General's liability under this theory.

In *Laird*, the Court of Appeal applied the "integrated enterprise" test--a test derived from federal labor case law--to determine whether a parent and subsidiary corporation could be held liable as a single employer in a discrimination suit. *See Laird*, 68 Cal. App. 4th at 738-40. [HN7]The integrated enterprise test requires an examination of four factors: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial [**14] control. *See id.* Under this test, however, "common ownership or control alone is never enough to establish parent liability." *Id.* at 738. In addition, although a court must consider each of the factors, the critical inquiry requires an examination of which entity made the final decisions regarding employment matters. *See id.*

[*1035] As discussed above, plaintiff has produced no evidence (1) that Harcourt General exercised control over Harcourt Brace's employment decisions, (2) that the operations of Harcourt Brace and Harcourt General were interrelated in the sense that Harcourt General exercised greater control over Harcourt Brace's operations than a parent corporation normally would exercise over a subsidiary, or (3) that the two corporations share a common management. Although Harcourt Brace is a subsidiary of Harcourt General, as explained above, this fact alone is not sufficient to establish Harcourt General's liability under the integrated enterprise test. The Court therefore finds that plaintiff has failed to raise a triable issue of fact as to Harcourt General's liability for Harcourt Brace's acts or omissions even under this alternative theory.

For the foregoing reasons, [**15] the Court hereby **GRANTS** defendants' motion for summary judgment as to the claims against Harcourt General. Plaintiff's claims against Harcourt General are **DISMISSED WITH PREJUDICE.** [5]

5 The Court notes that, even assuming that Harcourt General can be held liable for the acts and omissions of Harcourt Brace, the Court would still grant summary judgment in favor of Harcourt General for the reasons identified by the Court below.

2. Plaintiff's State Constitution and Constructive Termination Claims

Defendants move for summary judgment on plaintiff's sixth and seventh causes of action--alleging violation of Article I, sections 1, 7, and 8 of the California Constitution, and wrongful constructive termination in violation of public policy, respectively--on the ground that both of these causes of action are barred by California's one-year statute of limitations. *See* Acua v. Regents of the Univ. of Cal., 56 Cal. App. 4th 639, 645-46 (1997) (holding that [HN8]a one-year statute of limitations governs [**16] claims asserting violations of personal rights under the California Constitution); Barton v. New United Motor Mfg., Inc., 43 Cal. App. 4th 1200, 1209 (1996) (holding that a one-year statute of limitations governs claims for wrongful termination in violation of public policy). Plaintiff did not commence his suit until February 17, 1998--more than one year after the date that his resignation became effective (i.e., January 15, 1997). Plaintiff acknowledges that his sixth and seventh causes of action are barred by the statute of limitations and does not oppose defendants' motion for summary judgment as to these claims. Accordingly, the Court hereby **GRANTS** defendants' motion for summary judgment as to plaintiff's sixth and seventh causes of action. Plaintiff's sixth and seventh causes of action are **DISMISSED WITH PREJUDICE.**

3. Plaintiff's FEHA Retaliation Claim

Defendants next move for summary judgment on plaintiff's third cause of action--plaintiff's FEHA retaliation claim. [HN9]FEHA prohibits an employer from retaliating against an employee, including an at-will employee, "because the person has opposed any practices forbidden under . . . [FEHA] or because the person has [**17] filed a complaint, testified, or assisted in any proceeding under . . . [FEHA]." Cal. Gov't Code § 12940(f). Absent direct evidence of retaliation, the elements of a FEHA retaliation claim require (1) that the plaintiff establish a prima facie case of retaliation, (2) that the defendant articulate a legitimate, nonretaliatory explanation for its actions, and (3) that the plaintiff show that the defendant's proffered explanation is merely a pretext for its retaliatory actions. *See, e.g.,* Flait v. North American Watch Corp., 3 Cal. App. 4th 467, 476 (1992). In cases in which the plaintiff offers direct evidence of retaliatory motive, the plaintiff needs to produce "very little" evidence of pretext to create a triable issue as to the actual motivation of the employer. Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir. 1998) (discussing the showing of pretext [*1036] by a plaintiff in a FEHA discrimination suit sufficient to overcome a defendant's motion for summary judgment). In contrast, [HN10]in those cases in which direct evidence of retaliation is unavailable, the plaintiff must come forward with "specific and substantial" circumstantial evidence tending to show that the employer's [**18] proffered justifications were pretextual in order to survive a motion for summary judgment. Id. at 1222 (internal quotation marks omitted).

Defendants first move for summary judgment on plaintiff's FEHA retaliation claim on the ground that plaintiff has failed to establish a prima facie case of retaliation. A plaintiff may establish a prima facie case of retaliation by showing that (1) he engaged in a protected activity, (2) his employer subjected him to an adverse employment action, and (3) there is a causal link between the protected activity and the employer's action. *See* Flait, 3 Cal. App. 4th at 476. Defendants do not dispute either that plaintiff engaged in a protected activity by filing a complaint alleging sexual harassment with the EEOC or that causation sufficient to establish plaintiff's prima facie burden can be inferred from the proximity of time between the filing of plaintiff's EEOC complaint and Harcourt Brace's actions with respect to plaintiff. Defendants argue, however, that plaintiff has failed to make a prima facie case of retaliatory termination because plaintiff has not produced any evidence that he was subjected to any "tangible" adverse employment [**19] action, such as a loss of salary, benefits, or position. Plaintiff contends that adverse employment actions that fall short of being "tangible" suffice to establish a prima facie case of retaliation. As the California courts have not addressed the issue of whether an adverse employment action must be "tangible" in order to constitute retaliation under FEHA, the Court looks for guidance on this issue to the federal courts' treatment of the adverse action requirement in retaliation suits brought pursuant to Title VII. *See* Flait, 3 Cal. App. 4th at 475-76 (recognizing that [HN11]suits claiming retaliatory discharge in violation of FEHA are analogous to federal retaliation claims brought pursuant to Title VII and, therefore, that federal law interpreting Title VII is instructive in evaluating retaliation claims brought pursuant to FEHA).

The federal courts are divided on the issue of what constitutes an adverse employment action for purposes of Title VII. [6] The Fifth and Eighth Circuits have held that only adverse employment actions that rise to the level of "ultimate" employment decisions--e.g., decisions involving hiring, the granting of leave, terminations, promotions, and compensation--are [**20] actionable under Title VII. *See Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995) (holding that "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions"); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 706-708 (5th Cir. 1997) (finding that hostility from co-workers, threats of discharge, ridicule, and missed pay increases do not constitute adverse employment actions [*1037] because of their "lack of consequence"); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (holding that only adverse employment actions that "rise to the level of an ultimate employment decision [are] intended to be actionable under Title VII"). In contrast, the First, Seventh, Tenth, and Eleventh Circuits have indicated that Title VII's protection against retaliatory discrimination can extend to adverse actions that fall short of ultimate employment decisions. *See Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (stating that actions other than discharge are covered by Title VII's anti-retaliation provision and listing as examples, "employer actions [**21] such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees"); *Knox v. Indiana*, 93 F.3d 1327, 1334-35 (7th Cir. 1996) (stating that "there is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights" and finding that co-worker harassment and vicious gossip sufficed to support a jury verdict in favor of an employee claiming retaliation); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998) (holding that co-worker hostility or retaliatory harassment, if sufficiently severe, can constitute adverse employment action for purposes of a Title VII retaliation claim); [7] *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (finding that written reprimands, an employer's solicitation of negative comments by co-workers, and a one-day suspension constituted adverse employment actions).

6 Defendants' suggestions to the contrary notwithstanding, the United States Supreme Court did not address this issue in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 2268, 141 L. Ed. 2d 633 (1998). In *Ellerth*, the Supreme Court defined the phrase "tangible employment action" in considering the issue of an employer's vicarious liability for the actions of its employees in hostile work environment cases. *Id.* ("We think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability issue we consider here. A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."). *Ellerth*, however, did not address the kinds of adverse employment actions that a plaintiff must demonstrate in order to establish a prima facie case of retaliation. Accordingly, in the present case *Ellerth* is instructive only insofar as it defines the concept of "tangible" adverse employment actions.

[**22]

7 *But cf. Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998) (recognizing that, although "the law in this circuit liberally defines adverse employment action," "unrealized threats or tense personal relationships do not rise to the level of actionable retaliation").

The Ninth Circuit has not provided clear guidance on this issue. In *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987), for example, the Ninth Circuit stated that such employment decisions as "transfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions'" cognizable under Title VII. This language suggests that an adverse action does not need to rise to the level of an "ultimate" employment decision in order to be actionable. Yet, more recently, in *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), the Ninth Circuit questioned the existence of adverse employment action where an employee was transferred to a different work shift, but did not suffer any material detriment. *Id.* at 1465 n.6 ("We note in addition that the transfer is just barely--if [**23] at all-characterizable as 'adverse' employment action: Steiner was not demoted, or put in a worse job, or given any additional responsibilities."). [8] In addition, in *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir. 1997), the Ninth Circuit declined to view an employee's transfer, which was not accompanied by any material detriment such as a decrease in pay or grade, as an adverse employment action. *Id.; see also Strother v. Southern Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir. 1996) (stating that "not every employment decision amounts to an adverse employment action" and that "for example, mere ostracism in the workplace is not enough to show an adverse employment decision"); *Kortan v. California*, 5 F. Supp. 2d 843, 853 (C.D. Cal. 1998) (finding that a low performance evaluation, a denied request for a change in supervisors, a denied request

for a transfer, and denied access to files did not constitute adverse employment actions because these actions "did not place the plaintiff in a worse job, give her any additional, fewer or different responsibilities" or "result in a loss of salary or benefits") (citing Steiner, 25 F.3d at 1465, and Mattern, [**24] [*1038] 104 F.3d at 707); Cable v. Department of Dev. Servs., 973 F. Supp. 937, 942 (C.D. Cal. 1997) (defining adverse employment action, in a Title V case, as "one that causes 'tangible harm, such as loss of salary, benefits, or position'") (quoting Wu v. Thomas, 996 F.2d 271, 273 (11th Cir. 1993)). The more recent decisions within the Ninth Circuit appear to indicate that, [HN12]although an adverse action need not be an "ultimate" employment decision in order to be actionable, a plaintiff must nevertheless demonstrate some adverse material effect upon the terms or conditions of employment stemming from the employer's actions in order to satisfy the adverse action requirement.

8 In *Steiner*, the Ninth Circuit did find, however, that the employee in that case had established a prima facie case or retaliation stemming from three low marks on her employee evaluation. *See* 25 F.3d at 1465.

In the present case, plaintiff has failed to establish a prima facie case of retaliatory termination because plaintiff has not [**25] produced evidence that Harcourt Brace's actions materially affected the terms and conditions of his employment. In opposition to defendants' motion, plaintiff alleges the following actions by Harcourt Brace's employees in satisfaction of the adverse action requirement: (1) Harcourt Brace's employees "pressured" plaintiff to speak with Scroggins about the substance of plaintiff's sexual harassment claim against Lake; (2) Scroggins conducted an incomplete and biased internal investigation of plaintiff's harassment claim; [9] (3) on December 17, 1996, Harcourt Brace gave plaintiff a written warning, reprimanding him for inappropriate and unprofessional conduct because of his relationship with Lake; (4) on December 23, 1996, Harcourt Brace gave plaintiff a second written warning for calling Losavio a "scum" and for pressuring Sims to provide plaintiff with a written statement in support of plaintiff's sexual harassment claim; (5) on December 23, 1996, Lee instructed plaintiff not to interact directly with either Sims or Lake on a telemarketing campaign, following a complaint by Sims that she felt uncomfortable interacting with plaintiff; (6) plaintiff was treated "rudely" by Lee; (7) Lee [**26] maintained a file on plaintiff that documented plaintiff's emotional state, and (8) plaintiff received "several" e-mail messages from Lee critical of his job performance. [10] As an initial matter, the Court finds that plaintiff has failed to produce any evidence in support of two of his allegations. First, plaintiff has failed to identify any specific evidence in support of his sweeping claim that he was treated "rudely" by Lee. Second, plaintiff has identified only a single e-mail message--dated December 19, 1996--that was sent by Lee to plaintiff which, on its face, is *not* critical of plaintiff's job performance. (*See* Cellini Decl., Ex. 2.) Assuming the truth of plaintiff's other allegations, the Court finds that none of these actions constitute a cognizable adverse employment action, since plaintiff has provided no evidence that any of these actions had any adverse material effect upon the terms or conditions of plaintiff's employment. Plaintiff has not alleged, for example, that any of these actions cost plaintiff a promotion or led to a decrease in plaintiff's benefits, compensation, or responsibilities.

9 Specifically, plaintiff alleges that Scroggins interviewed plaintiff for only ten minutes and thereafter prepared a one-sided account of the interview. In addition, plaintiff alleges that Scroggins intentionally failed to interview all of the witnesses who could have corroborated plaintiff's charge of sexual harassment. In particular, plaintiff alleges that Scroggins failed to interview Dann Bergmann, another male employee at Harcourt Brace who allegedly had been pinched by Lake, Renee Fountain, an employee who had warned the president of Harcourt Brace about Lake's flirtatious conduct, and Lynette Sul ("Sul"), an employee who spoke to plaintiff shortly after Lake allegedly pinched plaintiff.

[**27]

10 Plaintiff also alleges that Harcourt Brace retaliated against Sul after she corroborated plaintiff's claims of sexual harassment. However, plaintiff has not explained why this allegation is relevant to the issue of whether defendants retaliated against *plaintiff* for filing a sexual harassment complaint.

Moreover, plaintiff has not demonstrated that the totality of the aforementioned actions created conditions sufficiently [*1039] egregious and intolerable so as to support a finding of constructive termination. " [HN13]To establish a claim of constructive discharge under California law, a plaintiff must demonstrate employment conditions that were so extraordinary, egregious, and intolerable that a reasonable person would have had no alternative but to resign. *See, e.g.*, Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 1246, 876 P.2d 1022 (1994) ("The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job . . . ."). Isolated incidents of the kind identified [**28] by plaintiff simply do not amount to the kind of egregious conduct necessary to support a finding of constructive discharge. *Cf.* Soules v. Cadam, Inc., 2 Cal. App. 4th

390, 401 (1991) (holding that "demotion of an employee or criticism of his job performance--even if alleged to be unfair or outrageous--does not . . . create the intolerable working conditions necessary to support a claim of constructive discharge"). Moreover, although plaintiff has provided evidence indicating that he may have suffered from anxiety stemming from his work environment, [HN14]under California law a plaintiff's subjective reactions to the employment environment are not relevant. *See Turner*, 7 Cal. 4th at 1248 (holding that the proper focus in a constructive discharge case is on the working conditions themselves, rather than on the plaintiff's subjective reactions to those conditions).

11 Plaintiff argues in his brief that the totality of the aforementioned actions resulted in plaintiff's constructive discharge and, implicitly, that proof of an employee's constructive termination can satisfy the adverse action requirement. In particular, plaintiff argues that the totality of the aforementioned actions caused plaintiff to resign in anticipation of a negative evaluation on his one-year anniversary.

[**29] Even assuming that plaintiff has established a prima facie case of retaliation, the Court finds that plaintiff has failed to produce the specific and substantial evidence necessary to rebut defendants' proffered legitimate, nonretaliatory reasons for Harcourt Brace's employment actions. [12] First, defendants acknowledge that Harcourt Brace employees pressured plaintiff into speaking with Scroggins about plaintiff's sexual harassment claim. Defendants argue, however, that Harcourt Brace had a legal duty to investigate plaintiff's sexual harassment claim and to take immediate corrective action. In light of defendants' clear legal duty to investigate plaintiff's sexual harassment claim, *See generally Ellerth*, 118 S. Ct. at 2270-71 (holding that [HN15]an employer may be held vicariously liable under Title VII for a supervisor's sexual harassment of an employee and that an employer may avoid liability by showing by a preponderance of evidence that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior), the Court finds that plaintiff has failed to demonstrate retaliation based on the fact that he felt pressured to cooperate with defendants' internal [**30] investigation of his sexual harassment claim.

12 [HN16]Plaintiff has not produced any direct evidence of retaliation by plaintiff. Accordingly, the Court examines whether plaintiff has met his burden of producing specific and substantial circumstantial evidence tending to show that defendants' proffered justifications were pretextual. *See Godwin*, 150 F.3d at 1222.

Second, defendants have demonstrated a legitimate, non-retaliatory reason for reprimanding plaintiff on December 17, 1996 for inappropriate and unprofessional conduct--namely, that three of Harcourt Brace's employees had reported inappropriate and unprofessional behavior by plaintiff. The undisputed evidence in this case establishes that Losavio, Lake, and Sims reported that plaintiff had participated in various acts of inappropriate conduct, including holding a pool cue in a provocative manner, participating in sexual banter (including referring to himself as "GP"), intentionally brushing himself up against and bumping into Lake in hallways, and [*1040] kissing [**31] Lake on the mouth without invitation in front of the office building on one occasion. Plaintiff has only offered blanket denials of these allegations in rebuttal. Moreover, even assuming that the allegations made by Losavio, Lake, and Sims were false, plaintiff has not produced specific and substantial circumstantial evidence indicating that Harcourt Brace lacked a good faith basis for reprimanding plaintiff based on these allegations. The federal courts have recognized that [HN17]an ill-informed or ill-considered action by an employer is not automatically pretextual if the employer articulates an honest explanation in support of its action. *See, e.g., Billups v. Methodist Hosp. of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991) ("Our inquiry in this case is not whether the alleged acts actually occurred. Rather, our inquiry is limited to whether the employer's belief was honestly held."). Although plaintiff disputes the adequacy of defendants' investigation of plaintiff's sexual harassment claim against Lake, plaintiff has not produced evidence demonstrating that Harcourt Brace's investigation of *plaintiff's* conduct was insufficient to support Harcourt Brace's determination that [**32] *plaintiff* had behaved inappropriately. Plaintiff has not produced evidence indicating, for example, that the three witnesses that Scroggins failed to interview would have stated that plaintiff had not participated in the unprofessional conduct of which he was accused. Absent such evidence, no reasonable trier of fact could conclude that Harcourt Brace's internal investigation was a sham or that the December 17th warning was motivated by retaliatory animus.

Third, defendants contend that Harcourt Brace had a good-faith basis for reprimanding plaintiff on December 23, 1996. The undisputed evidence in this case establishes that plaintiff called Losavio a "scum" after plaintiff received his first warning and that Losavio complained about this incident to Human Resources. In addition, the undisputed evidence establishes that plaintiff contacted Sims at her home in an attempt to obtain a favorable statement from her concerning his sexual harassment claim against Lake and that Sims thereafter complained to Human Resources that plaintiff's contacts were making her uncomfortable. Plaintiff has not produced the

strong and substantial circumstantial evidence necessary to demonstrate that [**33] Harcourt Brace's second written warning was motivated by retaliatory animus. Plaintiff points merely to the fact that the second written warning was issued three days after Sul informed Scroggins that she had observed Lake pinch plaintiff and five days following Sims' complaint about plaintiff's first telephone call as circumstantial evidence that the second warning was retaliatory. Plaintiff, however, has ignored the fact that Harcourt Brace's second warning was issued shortly after Sims complained of plaintiff's *second* telephone call.

Fourth, defendants have cited a legitimate, non-retaliatory reason for Lee's instruction that plaintiff not interact directly with either Lake or Sims--i.e., to avoid further trouble between these three employees. The undisputed evidence in this case establishes that Sims requested that she not have to deal with plaintiff directly and that plaintiff had accused Lake of sexual harassment. Plaintiff has not offered any explanation, much less any evidence, for why it was inappropriate for defendants to instruct plaintiff not to interact directly with either Lake or Sims in light of these facts. In addition, although plaintiff alleges that this instruction [**34] created delays for plaintiff in working on a telemarketing campaign, plaintiff has not identified any detriment that he suffered because of these delays.

For the foregoing reasons, the Court hereby **GRANTS** defendants' motion for summary judgment on plaintiff's FEHA retaliation claim. Plaintiff's FEHA retaliation claim is **DISMISSED WITH PREJUDICE.**

4. Plaintiff's Breach of Implied-in-Fact Contract Claim

Finally, defendants move for summary judgment on plaintiff's breach of implied- [*1041] in-fact contract claim. Defendants argue that plaintiff's employment with Harcourt Brace was "at will," whereas plaintiff contends that he was constructively discharged in violation of an implied contract requiring good cause for termination.

Generally, [HN18]the existence of an implied-in-fact contract requiring good cause for termination is a question for the trier of fact; however, if only one reasonable conclusion can be drawn from the undisputed facts, the issue may be decided as a matter of law on summary judgment. *See* Davis v. Consolidated Freightways, 29 Cal. App. 4th 354, 366 (1994). In the present case, plaintiff contends that there is a triable issue of fact as to whether his employment [**35] with Harcourt Brace was terminable only for cause. For the reasons that follow, the Court disagrees.

[HN19]In California, "an employment, having no specified term, may be terminated at the will of either party on notice to the other." Cal. Labor Code § 2922. Labor Code section 2922 establishes a presumption of at-will employment if the parties have made no express oral or written agreement specifying the length of employment or the grounds for termination. This presumption may, however, be overcome by evidence that, despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, for example, by a requirement that termination be based only on "good cause." *See* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 677, 254 Cal. Rptr. 211, 765 P.2d 373 (1988). In the employment context, "factors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement, including 'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the [**36] industry in which the employee is engaged.'" *Id.* at 680 (quoting *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917 (1981)).

As the parties seeking summary judgment, defendants have the initial burden of demonstrating that plaintiff was an at-will employee. To meet this burden, defendants cite the presumption of at-will employment established by Labor Code section 2922. In addition, defendants have offered evidence that, in applying for employment with Harcourt Brace, plaintiff signed an application that stated that his employment with Harcourt Brace could be terminated "at will." Defendants have also offered evidence that plaintiff received three copies of a bonus plan containing at-will language and that plaintiff continued his employment with Harcourt Brace after having received these reminders of his at-will employment status. Since defendants' evidence is sufficient to demonstrate that plaintiff was an at-will employee of Harcourt Brace, the burden shifts to plaintiff to show the existence of a triable issue of fact as to his employment status. [13]

13 [HN20]The California courts have held that an application for employment is a "mere solicitation of an offer of employment" and, therefore, that "at-will language contained in a standardized, preprinted application for employment may not be the sole basis for rejecting a claim of an implied contract not to terminate except for good cause." *Harden v. Maybelline Sales Corp.*, 230 Cal. App. 3d 1550, 1552, 1556, 282 Cal. Rptr. 96 (1991). Nevertheless, at-will language in an employment application constitutes "evidence concerning the ultimate agreement entered into between the parties." *Id.* at 1556.

[**37] In support of his implied contract claim, plaintiff contends that during his employment with defendants, he received positive performance reviews, a salary increase, and unspecified verbal assurances about long-term employment. The California courts, however, have consistently rejected the notion that [HN21]evidence of positive performance reviews, commendations, salary increases, and vague assurances of long-term employment are sufficient to [*1042] create a triable issue of fact as to whether the parties have implicitly agreed to modify the terms of an at-will employment arrangement. *See, e.g., Kovatch v. California Casualty Management Co.*, 65 Cal. App. 4th 1256, 1276 (1998); *Gould v. Maryland Sound Indus., Inc.*, 31 Cal. App. 4th 1137, 1152 (1995); *Miller v. Pepsi-Cola Bottling Co.*, 210 Cal. App. 3d 1554, 1559, 259 Cal. Rptr. 56 (1989). Notably, plaintiff has produced no evidence of any personnel policies or practices either at Harcourt Brace or in the publishing industry to terminate employees only for good cause. [14] In addition, plaintiff cannot point to longevity of service in support of his implied contract claim; plaintiff worked at Harcourt Brace for less than one year. In [**38] light of the foregoing, the Court finds that plaintiff has failed to raise a triable issue of fact as to the at-will nature of his employment with Harcourt Brace. The Court therefore **GRANTS** defendants' motion for summary judgment on plaintiff's breach of implied-in-fact contract claim. Plaintiff's breach of implied-in-fact contract claim is hereby **DISMISSED WITH PREJUDICE.** [15]

14 Plaintiff does argue that Harcourt Brace's [HN22]use of progressive discipline and written warnings indicates that he could only be terminated for cause. This argument, however, has already been rejected by the courts, since such a finding would encourage employers to terminate their employees at the first infraction. *See Davis*, 29 Cal. App. 4th at 367.

15 The Court notes that, even assuming that plaintiff has demonstrated a triable issue of fact as to the existence of an implied-in-fact agreement to terminate only for good case, defendants are still entitled to summary judgment on this claim. As explained above, plaintiff has not produced evidence sufficient to demonstrate retaliation by Harcourt Brace in its employment decisions. Absent such evidence, the Court finds that no reasonable trier of fact could conclude that Harcourt Brace constructively discharged plaintiff in breach of an implied-in-fact contract to terminate only for good cause.

[**39] **CONCLUSION**

For the reasons already stated, the Court hereby **GRANTS** defendants' motion for summary judgment. Plaintiff's complaint, in its entirety, is **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

DATED: *4.26.99*

IRMA E. GONZALEZ, Judge

United States District Court

LEXSEE

Caution
As of: May 06, 2010

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. BARTON PROTECTIVE SERVICES, INC., Defendant.

Civil Action No. 98-1536 (JR)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

47 F. Supp. 2d 57; 1999 U.S. Dist. LEXIS 7951; 80 Fair Empl. Prac. Cas. (BNA) 180

May 24, 1999, Decided
May 25, 1999, Filed

DISPOSITION: [**1] Barton entitled to judgment as a matter of law on its Burlington affirmative defense.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant employer filed a motion for summary judgment seeking to dismiss a complaint for sexual harassment by plaintiff, the Equal Employment Opportunity Commission.

OVERVIEW: Defendant's employer motion for summary judgment was granted dismissing a complaint of sexual harassment filed by plaintiff, the Equal Employment Opportunity Commission. In granting the motion by defendant employer, the court held that defendant made reasonable efforts to correct any alleged sexual harassment against victim. According to the court, a defending employer could avoid liability for sexual harassment by showing that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the victim unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. The court found that defendant acted reasonably by immediately launching an investigation upon receiving a complaint from the victim. In addition, the court held that defendant made reasonable steps to be prevent harassment by implementing a sexual harassment policy. Continuing, the court held that the victim acted unreasonably by failing to take advantage of defendant's employer sexual harassment policy and by waiting eleven months to initiate a complaint after being subjected to the alleged sexual harassment.

OUTCOME: The court granted defendant's employer motion for summary judgment dismissing plaintiff's Equal Employment Opportunity Commission complaint for sexual harassment, because defendant employer took reasonable steps to prevent sexual harassment and because by waiting eleven months to complain about the sexual harassment, victim acted unreasonably.

CORE TERMS: harassment, manager, affirmative defense, sexual harassment, supervisor, unreasonably, constructive discharge, undisputed, tangible, reasonable care, summary judgment, corrective, dating, ogling, matter of law, sexually harassed, genuine issue, harassing, boyfriend, harasser's, waited, jokes, training, manual, reasonable person, daily basis, constructively discharged, material fact, preventive, sexually

LexisNexis(R) Headnotes

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > Antiharassment Policy
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employer Liability > Supervisors
Torts > Vicarious Liability > Employers > Activities & Conditions > General Overview
[HN1]An employer may be held vicariously liable for a supervisor's sexual harassment of an employee, but when no tangible employment action is taken, a defending em-

ployer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Labor & Employment Law > Wrongful Termination > Constructive Discharge > General Overview
[HN2]A constructive discharge occurs where the employer creates or tolerates discriminatory working conditions that would drive a reasonable person to resign.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault > Abuse of Adults > General Overview
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Correction & Prevention
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > General Overview
[HN3]Sexual harassment consists of unwelcome sexual conduct, not dating.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > General Overview
[HN4]If a victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > General Overview
[HN5]A demonstration that the employee unreasonably failed to use any complaint procedure provided by the employer will normally suffice to satisfy the employer's burden under the second element of the defense.

COUNSEL: Diane Bradley, U.S. Equal Employment Opportunity Commission, Washington, DC, for Plaintiff.

Deborah P. Kelly, Jorge Kotelanski, Dickstein Shapiro Morin & Oshinsky LLP, Washington, DC, for Defendant.

JUDGES: JAMES ROBERTSON, United States District Judge.

OPINION BY: JAMES ROBERTSON

OPINION

[*58] ***MEMORANDUM***

This memorandum sets forth the Court's reasoning for granting defendant's motion for summary judgment on May 9, 1999. This suit was filed by the Equal Employment Opportunity Employment Commission on behalf of Glynda Baptist, a former employee at defendant Barton Protective Services. EEOC asserted that Ms. Baptist had been sexually harassed while working at Barton. Barton denied the harassment but also interposed the affirmative defense recognized in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) -- that Barton exercised reasonable care in trying to prevent and correct harassment, and that Baptist acted unreasonably by waiting more than eleven months to report [**2] the harassment. The grant of summary judgment assumed for the sake of argument that the complained-of harassment happened, but concluded that the affirmative defense succeeded as a matter of law.

FACTS

The following facts were either undisputed or were assumed to be true for purposes of the Court's ruling: Glynda Baptist began working as a security guard for defendant Barton Protective Services in May 1995. She was assigned to work at Lafayette Center in Washington, D.C. On April 20, 1995, before beginning her job, she received and signed a copy of Barton's written Sexual Harassment Policy on April 20, 1995. The policy stated, "An employee alleging either harassment by anyone with supervisory authority, or failure by a supervisor to take immediate action on the individual's complaint of being sexually harassed by another employee should file a written and detailed complaint immediately." (Def. Ex. 6 & 9). She also received a copy of Barton's Security Officer's Training Manual. That manual stated,

> "Should...you ever become dissatisfied with [your supervisors'] treatment of you, you may file a formal complaint by submitting a letter through your Account Manager to your [**3] Branch Manager. If the complaint is about the Account Manager, you may file the complaint [*59] directly to the Branch Manager. Should you feel dissatisfied with the

Branch Manager's action, you may file directly to the Corporate Personnel Manager." (Def. Ex. 11).

Beginning on Ms. Baptist's first day of work in mid-May 1995, Troy Williams, the account manager at Lafayette Center, sexually harassed her on a daily basis. She did not report the harassment or complain about it until, eleven months later, in late-April 1996, she mentioned it to Basim Muhammad, her newly-appointed shift supervisor (who was subordinate to Mr. Williams). Mr. Muhammad confronted Mr. Williams that same day, and he denied the harassment. On June 4, 1996, Ms. Baptist for the first time told one of Mr. Williams' supervisors, Carl Box, the operations manager, about the harassment. That same day, Mr. Box changed Mr. Williams' schedule, pending investigation of the complaint, and he offered Ms. Baptist a transfer, which she declined. The next day, Barton offered Ms. Baptist leave with pay pending investigation of her complaint, and this offer she accepted. Two days later, on June 7, 1996, Ms. Baptist contacted Barton [**4] and asked to return to work.

Ms. Baptist did return to work on June 10, 1996. On that day, she met with Mr. Box, with Todd Carroll, Vice President, and with Jennifer Cavanaugh, Payroll Manager. After five or ten minutes, she felt "ambushed" by the meeting. She told Messrs. Box and Carol and Ms. Cavanaugh that she would prefer to speak with an attorney present. That same day, Roger Reed, Human Resources Manager, wrote to Ms. Baptist's lawyer asking for Ms. Baptist's cooperation in the investigation of her complaint. On June 11, Ms. Baptist resigned.

Ms. Baptist filed a timely complaint of discrimination with the EEOC alleging that she had been harassed by Mr. Williams and that Barton maintained a hostile work environment. She asserted that she had been constructively discharged in violation of Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The EEOC conducted an investigation and filed this lawsuit on June 30, 1998. On March 21, 1999, defendant moved for summary judgment.

ANALYSIS

[HN1]An employer may be held vicariously liable for a supervisor's sexual harassment of an employee, but "when no tangible employment action is taken, a defending [**5] employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence...." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 (1998). "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington*, 118 S. Ct. at 2270.

The first question that must be addressed is whether a "tangible employment action" occurred here. EEOC asserts that Ms. Baptist was constructively discharged and that a constructive discharge, like any discharge, is a tangible employment action. The initial appeal of that argument turns out, upon closer inspection in the context of this case, to be superficial.

[HN2]"[A] constructive discharge occurs where the employer creates or tolerates discriminatory working conditions that would drive a reasonable person to resign." *Katradis v. Dav-El of Washington, D.C.*, 270 U.S. App. D.C. 23, 846 F.2d [**6] 1482, 1485 (D.C. Cir. 1988) (quotations and citation omitted). It is not clear whether Ms. Baptist's claim of constructive discharge focuses on the eleven months of harassment or the "ambush" meeting that was the apparent trigger of [*60] her decision to resign. Assigning the labels of "constructive discharge" and "tangible employment action" to either set of facts, however, would make nonsense of the *Burlington* affirmative defense. If Barton may successfully defend by showing that Ms. Baptist unreasonably waited eleven months before telling anyone at work about the harassment, it makes no sense to permit the same eleven months of harassment to neutralize the defense. And, if Barton may successfully defend by showing that Ms. Baptist unreasonably failed to take advantage of a corrective opportunity, it makes no sense to permit that defense to be neutralized by her dissatisfaction with that opportunity, repackaged as "constructive discharge" and then as "tangible employment action." [1] In the context of this case, Ms. Baptist's claim of constructive discharge thus would not amount to a tangible employment action even if proven.

1 The proper way to attack an employer's "corrective opportunities" is to show that they were a sham, or that the employee's failure to take advantage of them was *not* unreasonable. EEOC has done neither.

[**7] Turning then to the merits of the two-element affirmative defense outlined in *Burlington*: The first element is the employer's exercise of reasonable care to prevent and correct promptly any sexually harassing behavior. It is undisputed that Barton had two policies in place to prevent discrimination, and that Ms. Baptist received and signed the Sexual Harassment Policy and the Security Officer Training Manual. It is further undisputed that Barton provided additional EEO training for

its managers and distributed written materials on how to prevent sexual harassment.

EEOC asserts, however, that Barton failed to exercise reasonable care to prevent sexual harassment because it did not investigate rumors that Mr. Williams and Ms. Baptist were dating, and because it condoned sexual jokes and ogling of non-Barton employees in the workplace. Neither assertion gives rise to a genuine issue of material fact. Rumors of dating (if they were in circulation) gave rise to no duty of investigation. Barton's sexual harassment policy in effect at the time did not prohibit dating between employees, *see* Def. Ex. 6. In any event, [HN3]sexual harassment consists of unwelcome sexual conduct, not dating. [**8] As for jokes, there is no evidence that Ms. Baptist -- or any other Barton employee -- complained about jokes or found them to be offensive. [HN4]"If the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993). [2]

2 When EEOC was unable to produce a witness to "ogling," it sought discovery well beyond acceptable boundaries in an effort to make the charge stick. More than a month after the close of discovery, EEOC moved to compel the disclosure of the names, addresses, and phone numbers of every female employee ever supervised by Mr. Williams over a five-year period. *See* Pl. Mot. to Compel, March 19, 1999. The motion was supported by the argument that EEOC wanted to search for evidence of "ogling." Defendant objected that none of the sixteen depositions taken by plaintiff showed any evidence of "ogling." *See* Def. Opp. to Mot. to Compel, April 12, 1999. The Court's grant of summary judgment in favor of defendant necessarily implies a denial of plaintiff's motion to compel.

[**9] EEOC also asserts that Barton's *policy* is inadequate for two asserted reasons: it "does not provide specifically for an alternate route for complaining when the harasser is the first or second line supervisor" and "the demand that the complaint be immediate and in writing unreasonably puts limitations on invoking the remedies of the policy and thus condones or encourages harassment." (Pltf. Mem. at 23). The first assertion is simply false. Barton's Employee Handbook states, "If the complaint is about the Account Manager, you may file the complaint directly to the [*61] Branch Manager." (Def. Ex. 11 at 8.) The second assertion -- that it is unreasonable to require an employee complaint to be in writing -- is irrelevant: Ms. Baptist never put her complaint in writing, and yet Barton acted upon it immediately.

By instituting a sexual harassment policy and distributing it to every new employee, including Ms. Baptist, before her first day of work, Barton exercised reasonable care to prevent harassment. *See Marsicano v. American Society of Safety Eng'eers*, 1998 U.S. Dist. LEXIS 14314, No. 97 - C7819, 1998 WL 603128, at *7 (N.D. Ill. Sept. 4, 1998); *Montero v. AGCO Corp.*, 19 F. Supp. 2d 1143, 1146 (E.D. Ca. 1998); [**10] *Romero v. Caribbean Restaurants, Inc.*, 14 F. Supp. 2d 185, 191 (D.P.R. 1998); *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 491 (S.D.N.Y. 1998) (all finding the first element of the *Burlington* affirmative defense satisfied by undisputed proof that the employer had an anti-harassment policy).

Barton's reasonable effort steps to *correct* the harassing behavior is established by the undisputed fact that, on the same day Ms. Butler first complained of harassment to a supervisor, an investigation was launched, Ms. Butler was offered a transfer (which she declined), and the harasser's schedule was changed pending the investigation.

The second element of the *Burlington* affirmative defense requires proof that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington*, 118 S. Ct. at 2270. [HN5]A demonstration that the employee unreasonably failed "to use any complaint procedure provided by the employer...will normally suffice to satisfy the employer's burden under the second element of the defense." *Faragher*, 118 S. Ct. at 2293. EEOC's assertion that Ms. Baptist [**11] tried to avoid harassment by asking her boyfriend to visit her at work is unpersuasive and certainly does not raise a genuine issue as to the reasonableness of Ms. Baptist's actions. Ms. Baptist never testified that she asked her boyfriend to visit her at work, and, even if she had, telling her boyfriend about the harassment does not relieve her of the duty to follow Barton's procedure to report harassment. It is undisputed that Ms. Baptist waited eleven months before telling anyone at Barton about the harassment, although the harassment allegedly began on her first day of work and occurred on a daily basis thereafter, and that she waited more than a year before telling the harasser's supervisors. "As a matter of law, a reasonable person in [Baptist's] place would have come forward early enough to prevent [Williams'] harassment from becoming 'severe or pervasive.'" *Greene v. Dalton*, 334 U.S. App. D.C. 92, 164 F.3d 671, 675 (D.C. Cir. 1999).

There were no genuine issues of material fact, and Barton was entitled to judgment as a matter of law on its *Burlington* affirmative defense.

JAMES ROBERTSON

United States District Judge

May 24, 1999

LEXSEE

Analysis
As of: May 06, 2010

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, vs. UNION CAMP CORPORATION, Defendant.

CIVIL ACTION NO. CV496-213

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION

7 F. Supp. 2d 1362; 1997 U.S. Dist. LEXIS 23027; 79 Fair Empl. Prac. Cas. (BNA) 1839

December 2, 1997, Decided
December 2, 1997, Filed

DISPOSITION: [**1] Defendant's Motion for Summary Judgment (Doc. 38) DENIED with regard to hostile work environment claim but GRANTED with regard to disparate treatment and retaliation claims. Defendant's Request for Oral Argument (Doc. 41) DENIED as MOOT.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff Equal Employment Opportunity Commission (EEOC) brought a gender discrimination action on behalf of a female firefighter against her employer pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq.

OVERVIEW: The EEOC alleged that, while a female firefighter for the employer, the charging party was subjected to repeated harassment by her male co-workers, including supervisory employees within the fire department, on account of her status as the sole firefighter in the department. The employer moved for summary judgment, and the court denied the motion as to the hostile work environment claims and granted the motions as to the disparate treatment and retaliation. Although there were pranks consistently within the department, the harassment was not directed at both sexes equally. The firefighter was teased, intimidated, and isolated on a regular basis in a workplace dominated by members of another gender. Her reaction to the harassment was objectively reasonable. The employer's cursory response was not reasonably calculated to end the harassment. The EEOC could not prevail on its disparate treatment claim because it could not show that the firefighter was treated less favorably than her male counterparts. The overtime and training records did not indicate disparate treatment. The EEOC failed to show that the firefighter was retaliated against for complaining about the harassment.

OUTCOME: The court denied the employer's summary judgment motion as to the EEOC's hostile work environment claims and granted the motions as to the disparate treatment and retaliation claims in the EEOC's gender discrimination action on behalf of a female firefighter.

CORE TERMS: harassment, firefighter, fire department, overtime, workplace, co-worker, locker, hostile, training, work environment, sex, calendar, summary judgment, male, sexual harassment, retaliation, disparate treatment, supervisor's, woman, sexual harassment, sexual, gender, intimidation, pervasive, hostility, female, personnel files, offensive, occurring, swimsuit

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview

[HN1]In assessing whether the movant is entitled to summary judgment in its favor, the district court must review the evidence and reasonable factual inferences arising from it in the light most favorable to the nonmoving party. The court must avoid weighing conflicting evidence during this endeavor.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Scintilla Rule
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality
[HN2]Where a reasonable fact finder may draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court is to refuse to grant summary judgment. However, if the evidence is merely colorable or not significantly probative, summary judgment may be granted.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > General Overview
[HN3]See 42 U.S.C.S. § 2000e-2(a).

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > General Overview
[HN4]Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., was enacted to prevent employment discrimination, achieve equal employment opportunity in the future, and to make victims of employment discrimination whole.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > General Overview
[HN5]Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e et seq., does not require that employers fancy every employee's whim. It requires only that employers do not treat their employees differently based on immutable characteristics such as gender. Title VII plaintiffs too often overlook the fact that employers are not required to treat their employees with fairness or kindness, but only to refrain from engaging in statutorily proscribed discrimination.

Governments > Legislation > Statutes of Limitations > Time Limitations
Labor & Employment Law > Discrimination > Gender & Sex Discrimination > General Overview
[HN6]In order for a charge to be timely, it must be filed within one hundred and eighty days after the alleged unlawful employment practice occurs. 42 U.S.C.S. § 2000e-5(e)(1).

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > General Overview
[HN7]Under the "continuing violation" doctrine, an employer who commits a series of discrete acts which amount to a practice of discrimination cannot rely on the 180 day filing requirement to bar an employee's suit unless the employee waits more than 180 days from the last occurrence of one of the discrete acts.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Burdens of Proof > Severe & Pervasive Standards
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employer Liability > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN8]The Equal Employment Opportunity Commission can seek to recover under the hostile work environment theory of sexual harassment. Under this theory, an employer faces liability when the work place is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter conditions of employment and create and abusive work environment.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > General Overview
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Burdens of Proof > General Overview
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > Antiharassment Policy
[HN9]In order to establish a claim of hostile work environment sexual harassment, the Equal Employment Opportunity Commission must show (1) that the charging party is a member of a protected group; (2) that she is subjected to unwelcome sexual harassment; (3) that the harassment complained of is based upon sex; (4) that the harassment affects a term, condition or privilege of her employment; and (5) that the employer knows or should know about the harassment and fails to take remedial action.

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > General Overview

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > Same-Sex Harassment
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN10]Where a work environment is dominated by members of one gender and the workplace environment is hostile to the other gender by treating that other gender as inferior, Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e-5(e)(1), affords protection.

Evidence > Relevance > Circumstantial & Direct Evidence
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Circumstantial & Direct Evidence
[HN11]Disparate treatment can be proved with direct or indirect evidence.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Interference With Protected Activities
Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN12]To make out a prima facie case of retaliatory discharge, the Equal Employment Opportunity Commission must show by a preponderance of the evidence that (1) the charging party is engaged in a statutorily protected activity; (2) an adverse employment action occurs simultaneously with or subsequent to the protected activity; and (3) the adverse action is causally related to the plaintiff's protected activity.

COUNSEL: For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: Robert P. Duffy, Charles Timothy Bell, Jr., EEOC Trial Atty., James D. Macy, EEOC, Legal Unit, Atlanta, GA.

For UNION CAMP CORPORATION, defendant: Joseph A. Mulherin, III, Frank Wilkens Seiler, Bouhan, Williams & Levy, Savannah, GA.

For UNION CAMP CORPORATION, defendant: John F. Meyers, Seyfarth, Shaw, Fairweather & Geraldson, Atlanta, GA.

JUDGES: WILLIAM T. MOORE, JR., UNITED STATES DISTRICT JUDGE, SOUTHERN DISTRICT OF GEORGIA.

OPINION BY: WILLIAM T. MOORE, JR.

OPINION

[*1364] ***ORDER***

Plaintiff Equal Employment Opportunity Commission ("EEOC") brings this Title VII action on behalf of Therese Robertson, a female firefighter with Union Camp's Savannah mill, alleging that Defendant Union Camp (1) condoned the existence of a hostile work environment; (2) treated her discriminatorily with regard to training, overtime and job assignments due to her sex; and (3) retaliated against her after she complained [**2] about the discrimination and harassment. Presently before this Court is Defendant's Motion for Summary Judgment (Doc. 38). Having considered carefully the parties' numerous briefs and reviewed the factual allegations and applicable law, the Court hereby **DENIES** Defendant's motion with regard to the hostile work environment claim, but **GRANTS** Defendant's motion with regard to the disparate treatment and retaliation claims. Defendant's Request for Oral Argument (Doc. 41) is **DENIED** as **MOOT**.

FACTS

At issue in this case is not a lurid, textbook set of facts with which courts more typically were faced when Title VII first became available to remedy discrimination in the workplace. Rather, the sex discrimination alleged by the EEOC in this action is more subtle and insidious in nature, but nonetheless warrants careful consideration by this Court. The EEOC alleges that while working as a firefighter for Union Camp, Therese Robertson, the charging party in this action, was subjected to repeated harassment by her male co-workers, including supervisory employees within the fire department, on account of her status as the sole female firefighter and the only female [**3] firefighter in the history of the department. The EEOC further alleges that Ms. Robertson was treated differently on account of her sex in that she was denied certain promotional and training opportunities due to favoritism shown to her male counterparts. Lastly, the EEOC claims that Ms. Robertson's supervisors retaliated against her for complaining about the discrimination.

The case unfolds in 1988, when Ms. Robertson began her employment at Union Camp's Savannah mill as a security officer. Ms. Robertson performed well on the job and, during periodic medical examinations by a Union Camp physician, she displayed no signs of physical or mental distress.

Ms. Robertson was employed as a security officer until January 5, 1992, when she transferred to the Union Camp fire department as the first and only female firefighter in the history of the Savannah mill. Apparently, Ms. Robertson "lept" at the opportunity: the transfer ful-

filled a dream of hers to join the family tradition of firefighting as her father is himself a fire chief. At that time, Ms. Robertson also preferred the day shift schedule she was offered at the fire department to the rotation shift schedule she worked as a security [**4] officer. Ms. Robertson had had some prior experience working as a volunteer firefighter since 1988 and cross-training in the fire department at Union Camp since 1991.

In June of 1992, Timothy Lewis also transferred to the fire department from Union Camp's ultragraphics department. Mr. Lewis had worked as a volunteer firefighter for approximately 10 years.

From July 1992, five individuals were stationed during the day shift at the fire station: Assistant Fire Chief Stanley Wendelken, day firefighters Robertson, Lewis, and Ivey Spence, and trainer/inspector Mike Smith. Also employed at the department were a number of shift firefighters who worked on a rotating schedule. All of the firefighters reported to Fire Chief Richard Hennie, who also supervised the security department. [1] Chief Hennie's office was located at the main gate, away from the fire department. Chief Hennie reported to Susan Morgan, an Industrial Relations Manager for Union Camp.

1 Chief Hennie died in December 1994.

Assistant Chief Wendelken [**5] had a number of responsibilities at the department, including scheduling daily work for the firefighters, prioritizing tasks to be performed, assigning individuals to particular tasks, assigning [*1365] overtime, running the radio, keeping attendance records and time cards, and coordinating vacation schedules. He also acted as fire chief in the absence of Chief Hennie. Chief Hennie was absent quite a bit due to health problems during 1993 and 1994.

Work Place Conditions Within the Fire Department

During her first year of employment at the fire department, Ms. Robertson appeared to perform her job without difficulty. Her performance ratings showed improvement and ranked her overall performance as "good." Subsequently, Ms. Robertson began experiencing problems in the workplace relating to her relationships with her male co-workers, and Assistant Chief Wendelken, Mr. Lewis, and Mr. Spence in particular.

To begin with, Ms. Robertson was the focus of a number of incidents which Union Camp defends by characterizing as pranks and teasing. These incidents included having stickers and other printed items posted on her locker, fire hat, and other equipment, containing such statements as "Jr. [**6] Fireman" and "wide load". Ms. Robertson's locker lock was glued shut. There were frequent problems surrounding the use of the locker/shower/bathroom facility, the only such facility in the fire department. [2] Although Union Camp denies the allegation, Assistant Chief Wendelken appears to have encouraged Ms. Robertson's male co-workers to hinder her access to the facility by taking deliberately long showers or locking her out entirely. (Pl.['] Ex. D(3&4) & O). On occasion, Mr. Lewis and Mr. Spence would lock Ms. Robertson out of the facility for no apparent reason, and at least once listened to her knock on the door while they "pitched coins." (Pl.['s] Ex. D(3) & O). Ms. Robertson also appears to have been regularly "picked at" during her lunch break, and then, on other occasions, she was ignored completely. Ms. Robertson allegedly was excluded from various activities by Mr. Lewis and Mr. Spence, such as driving with them in the "pumper truck." (Pl.['s] Ex. O).

2 Because the department always had been all male, it had only one such facility.

[**7] There were also incidents surrounding the use of work equipment. Unidentified co-workers blocked Ms. Robertson's work scooter in with other equipment. Work-related items which she left on the scooter were removed and placed in front of her locker. Ms. Robertson also appears regularly to have been made to use less desirable and even faulty equipment while Mr. Lewis and Mr. Spence used the better equipment. At other times, Mr. Lewis and Mr. Spence snatched hose nozzles out of Ms. Robertson's hand when they changed hoses.

On unidentified, isolated occasions in the past, other members of the department may also have been victims of similar episodes: one employee reportedly had his locker jammed shut, and others may have had stickers or signs placed on their lockers. An advertisement for "Skinny Dip" thigh cream was posted on Mr. Lewis' locker adjacent to Ms. Robertson's. [3] At some point, an unidentified person filled Chief Hennie's boots with water.

3 Both Ms. Robertson and Mr. Smith, a co-worker of Ms. Robertson's, believed that the ad was directed at Ms. Robertson, although both Mr. Lewis and Ms. Robertson apparently struggled with weight loss problems.

[**8] Ms. Robertson also was treated harshly by her supervisors. Although Union Camp denies the allegation, it appears that Assistant Chief Wendelken regularly picked on Ms. Robertson, was more critical of her performance, and condoned the pranking and isolation by her co-workers. (Pl.['s] Ex. D(1&3) & O; Morgan I Dep. Ex. 19(a&b)). Mr. Wendelken also assigned Ms. Robertson jobs that required more walking and/or climbing than Mr. Lewis. Chief Hennie similarly appears to have been aware of or even condoned misbehavior toward Ms. Robertson. (Pl.['s] Ex. D(3) & O; Morgan I Dep. Ex.

19(a&b)). Mr. Smith informed Chief Hennie on several occasions that Assistant Chief Wendelken picked on Ms. Robertson. (Pl.['s] Ex. O at P 7). Chief Hennie responded that he did not want to hear about it. (Pl.['s] Ex. O at P 7). On one occasion, Chief Hennie cursed Ms. Robertson, in the midst of fighting a fire, when she brought him the wrong tool.

[*1366] Some of Ms. Robertson's male co-workers confirm that the work place environment at the fire department was not pleasant for Ms. Robertson:

Robert Coffey, shift fireman, (Pl.['s] Ex. D(5)):

"I do not believe that anyone in the department wanted [**9] Theresa [sic] there because it was breaking an age-old tradition of an all-male department. . . . . Stanley [Wendelken] is smart enough to not do things himself but allows Ivy [sic] [Spence] and Tim [Lewis] and others do [sic] things without saying anything."

Melvin Lamb, security officer, (Pl.['s] Ex. D(2)):

"I worked in the Security Division with Theresa Robinson [sic] before she transferred to the Fire Department. I was present at the main gate when Chief Hennie returned from a sick leave to find that Theresa had been transferred to the Fire Dept. . . . . He expressed displeasure over the fact that [Ms. Robertson] was now in the Fire Department. He stated that he did not want her there. . . . . I believe that Theresa has been mistreated and that every effort is being made to make her as miserable as possible."

Enoch Gardner, shift fireman, (Pl.['s] Ex. D(4)):

"I have observed Stanley [Wendelken] urge the other men do [sic] things to Theresa [sic] to cause her problems. I have seen Stanley instigate the guys to get into the showers to keep Theresa out."

Alton Griffin, shift fireman, (Pl.['s] Ex. D(1)):

"[Spence and Lewis] [**10] would make fun of Theresa [sic] or make jokes about her job performance. She seemed to take this at first but as time went on she grew tired of it and became offended. She seemed to get the worst radio and worst scooter but it might have been accidental.

Spence, Lewis and Stanley seemed to pick at Theresa. Stanley would fuss because she took a break, and other little things I cannot recall. I would hate to have been treated the way they treated her."

Michael Smith, fire inspector, (Pl.['s] Ex. D(3)):

"After Spense [sic] and Lewis came to the department things seemed to happen against Theresa [sic]. I have noticed that they pick at Theresa in many ways. I know that Wendelken ignores the things that Spense [sic] and Lewis have done against Theresa. She was doing a good job but Wendelken finds something wrong with it. I get the feeling that an effort is being made to get Theresa to transfer out of the department. I have personally observed Stanley [Wendelken] time Theresa while she was on a break at the same time that Spense and Lewis were taking a break with him. He counseled her about taking too much time but said nothing to Spence and Lewis who took a 35 minute [**11] break. . . . . I have seen Spence & Lewis lock Theresa out of the locker room. I have seen them upset because she rode a scooter that they claimed as theirs. It is my belief that Stanley is behind the harassment. . . . . Spense [sic] and Lewis have ignored Theresa and would not talk to her--they isolate her. I have seen Theresa assigned a radio that did not work well. I switched radios and Tim [Lewis] and Ivey [Spence] got the bad radio to use but Stanley did not scold them the way he had Theresa.

Overtime, Training, Job Assignments and Promotions

At the department, Mr. Lewis performed the same job as Ms. Robertson and Mr. Spence performed similar job functions. Mr. Lewis received performance evaluations of "excellent;" Ms. Robertson's evaluations were "good." Ms. Robertson was paid more than Mr. Lewis and Mr. Spence. [4] Assistant Chief Wendelken was responsible for assigning jobs and overtime as well as training opportunities.

4 Ms. Robertson earned approximately $ 60 to $ 120 more per week than Mr. Lewis and Mr. Spence. (Sharpton Dep. Ex. 37).

[**12] Upon arrival at the department, Ms. Robertson received the same amount of basic [*1367] firefighter training as Mr. Lewis and Mr. Ivey. Between June 1, 1992, and March 1, 1994, Ms. Robertson and Mr. Lewis both received 135 hours of formal training and/or job-related testing. (Morgan Aff. at P 6 & Exs. 3 & 4).

Union Camp's overtime policy precluded an employee from overtime work during weeks in which that employee had worked fewer than forty hours. Ms. Robertson was absent from work frequently in the few months in 1994 during which she worked, limiting her from some overtime work. In 1993, Ms. Robertson was offered 261 hours of overtime, one-half hour more overtime than Mr. Lewis. (Wendelken Aff. at 2; Wendelken Dep. Exs. 9 & 10). Ms. Robertson actually worked twelve fewer overtime hours than Mr. Lewis because she declined fifteen of the hours offered. Between June and December 1992, Ms. Robertson worked 29 fewer overtime hours than Mr. Lewis. For approximately 11 weeks of that period, Ms. Robertson was precluded from overtime work due to periods of sick leave and light duty status stemming from a knee injury. Ms. Robertson was also ineligible for overtime for some of the weeks because she [**13] had worked fewer than 40 hours. Mr. Lewis was precluded from two weeks of overtime during that same period. Although Ms. Robertson believed that she had been denied overtime opportunities, she admits that, when she complained about improper distribution, she subsequently was "bombarded" and "inundated" with overtime opportunities. (Pl.['s] Ex. P at P 19).

Although she initially preferred the fixed schedule of a day shift firefighter, Ms. Robertson subsequently developed an interest in becoming a shift firefighter. The fire department had four shift firefighters on staff. Shift firefighters worked a rotational schedule and received special training in "incident command" operations. Because they worked all hours, they were required to work independently. Because of the additional duties and extraordinary hours, the position had a higher salary range and was more desirable than the day shift positions. At no point during Ms. Robertson's employment at the fire department, or subsequently, was a shift firefighter position vacant.

The first step to becoming a shift firefighter was to work as a relief shift firefighter. Accordingly, Ms. Robertson began to express an interest in receiving [**14] relief shift assignments. The EEOC and Union Camp dispute whether Ms. Robertson consistently expressed interest in such work, however, or whether she instead wanted to "freeze" in her day shift schedule. Mr. Lewis expressed a consistent, aggressive interest in shift work upon joining the department, and relief shift assignments were offered to Mr. Lewis more regularly than Ms. Robertson. Although Ms. Robertson had more seniority than Mr. Lewis within the department, Chief Hennie did not believe that Ms. Robertson was qualified to perform relief shift firefighter duties. Chief Hennie supported Mr. Lewis as more qualified based on his ten years of volunteer firefighting experience, his stronger evaluations, and his consistent, keen interest in shift work.

Ms. Robertson's 1993 Complaints

Ms. Robertson initially did not complain about the unpleasant workplace environment or her dissatisfaction with job assignments, training and overtime opportunities, and tried to be a good sport. Eventually, however, she got fed up. She informed Chief Hennie and Assistant Chief Wendelken about the series of problems she was having in the workplace. (Robertson Dep. at 80-81).

On March 10, 1993, [**15] Ms. Robertson also spoke to Susan Morgan (Robertson Dep. at 79) because Ms. Morgan was responsible for the supervision of the fire department. Ms. Robertson complained to Ms. Morgan of a pattern of behavior by her co-workers, including the episodes of harassment and isolation which she believed were based upon her status as the only woman in the department. At that meeting, Ms. Robertson also expressed her own doubts about her abilities as a firefighter.

Although Ms. Morgan admits to having discussions with Ms. Robertson regarding the bathroom door locks (Morgan I Dep. at 82-83), Ms. Morgan conducted no investigation of Ms. Robertson's complaints. Ms. Morgan made two suggestions in response to Ms. Robertson's concerns. First, she suggested that Ms. Robertson use a locker facility [*1368] in a building adjacent to the fire department. [5] Second, evidently picking up on Ms. Robertson's job insecurities, Ms. Morgan referred Ms. Robertson to counseling through Union Camp's confidential Employee Assistance Program (EAP). Ms. Morgan also approached Chief Hennie about his cursing of Ms. Robertson. The Chief subsequently met with Ms. Robertson to discuss the incident.

5 Following this suggestion, Ms. Robertson initially made use of the adjacent building's facilities, but she remained dissatisfied because entry to the shower in that facility was blocked by other lockers. She eventually returned to using the facility located in the fire department.

[**16] Following the referral to EAP, Ms. Robertson began counseling with Vivian Hathaway, a social worker. Ms. Morgan had forewarned Ms. Hathaway that Ms. Robertson was feeling harassed and vulnerable as a woman in the fire department. (Pl.['s] Ex. C). During her sessions, Ms. Robertson explained to Ms. Hathaway that she was picked on, intimidated, and criticized by her male co-workers and received less favorable jobs and training. Although Union Camp disputes the allegation, it appears that Ms. Hathaway informed Ms. Morgan about Ms. Robertson's complaints. (Pl.['s] Ex. C). Ms. Morgan's response was to suggest that Ms. Robertson transfer back to the security department. (Pl.['s] Ex. C). Ms. Robertson declined to do so, and Union Camp alleges that this was because she did not wish to return to the rotating schedule of a security officer.

Ms. Robertson complained to Ms. Morgan four or five times more in 1993 and assumed that a formal report would be conducted regarding her complaints. (Robertson Dep. at 221). Ms. Morgan, on the other hand, believed that, on the basis of her conversations with Ms. Robertson, the issues within the fire department had been satisfactorily resolved.

Shortly [**17] after her referral to EAP by Ms. Morgan, certain printed materials appeared on Ms. Robertson's locker. (Robertson Dep. at 234). One item stated "take control" and contained the slogan "don't let stress become a safety hazard." (Robertson Dep. at 235). A card with the EAP toll-free number was also affixed to her locker. (Robertson Dep. at 236). Although Ms. Robertson did not know who posted the materials, she believed that they were placed on her locker because her co-workers had learned of her confidential visits to EAP. (Robertson Dep. at 235-37).

The 1994 Complaint and Investigation

The last straw for Ms. Robertson fell on February 11, 1994, when Mr. Lewis and Mr. Spence hung swimsuit calendars on the outside of their lockers. Mr. Lewis' locker is immediately adjacent to Ms. Robertson's locker. Mr. Spence's locker is immediately across from Ms. Robertson's locker. The posting of this material is strictly prohibited under Union Camp's anti-harassment policy.

The calendars remained on display for several days until Ms. Robertson complained to Assistant Chief Wendelken, who directed Mr. Lewis and Mr. Spence to remove them. When Chief Hennie heard of the incident, he called Ms. [**18] Robertson to a meeting where he confronted her with pictures of newspaper lingerie ads and demanded to know if she found these ads or the calendars to be pornographic or offensive. Chief Hennie also asked Ms. Robertson whether she was sexually aroused by the pictures. Assistant Chief Wendelken had provided Chief Hennie with the lingerie ads at the request of Mr. Lewis and Mr. Spence, who believed these ads to be more revealing than the calendars.

After the confrontation, Chief Hennie contacted Jeff Sharpton, a human resource manager who worked under Ms. Morgan. Mr. Sharpton informed Chief Hennie that, regardless of whether the calendars were pornographic or whether an employee had complained, the posting of such materials violated Union Camp's policy on sexual harassment. Mr. Sharpton conducted no investigation of the incident.

On February 18, 1994, Ms. Robertson complained to Ms. Morgan about the calendar incident and the subsequent interrogation by Chief Hennie. Ms. Robertson also reiterated her earlier, 1993 complaints.

This time, in response to the complaints, Ms. Morgan conducted an investigation. Between February 18 and February 22, 1994, Ms. Morgan interviewed at least six [**19] of Ms. Robertson's male co-workers. Ms. Morgan's [*1369] notes document that those men advised her of the following:

> *Lindy Webb, shift firefighter* (Morgan I Dep. Ex. 19(a)): "[Ms. Robertson] is being harassed--mainly Chief, Stanley [Wendelken], Ivey [Spence] & Tim [Lewis]. . . . . Pick at her at lunch. Everyone knows calendar story. Even knows about newspaper being used. . . . . They prefer Tim--don't train her. . . . . Stanley and Chief have 'spies'; vindictive. Harder on Therese."
>
> *Enoch Gardner, shift firefighter* (Morgan I Dep. Ex. 19(b)): "Department full of intimidation--Chief, Stanley [Wendelken], Tim [Lewis], Ivey [Spence]. Trying to get rid of Therese--tough on her--pick at her; intimidate her. She does a good job; tries to; wants to. Could do shift job--let her sink or swim. . . . . Feels like 'set-up' people to get caught. They retaliate--can't prove it."
>
> *Robert Coffey, shift firefighter* (Morgan I Dep. Ex. 19(c)): "Therese . . . doesn't get opportunity. Tim has worked alone--she hasn't. She could. . . . . Never go to Chief or Stanley [Wendelken]--Can expect retaliation. Therese--sticker on locker--thigh cream--'you don't know who did it, [**20] but you do.'"
>
> *Mike Smith, inspector/instructor* (Morgan I Dep. Ex. 19(d)): "Afraid that

> Stanley [Wendelken] will get back at him if talked. . . . . Therese--no confidence. Thinking about quitting. They've ruined it. . . . . Therese asked him to quit cussing and don't make 'woman' comments--He did. . . . . They pick on her. Now she will only do what they want her to do. . . . . She doesn't get opportunities--Tim does all blood-borne pathogen stuff. . . . . Chief did come talk to them and tell them not to pick on Therese. Confidence is low--She *can* do the job."

As further documented in Ms. Morgan's notes, Mr. Lewis and Mr. Spence informed Ms. Morgan of the following regarding their relationship with Ms. Robertson:

> *Tim Lewis*, (Morgan I Dep. Ex. 19(e)): "Conflict with Therese. Walking on eggshells. Never knows how she will react to anything. Gets catered to. He does 'important' work--she gets to file stuff. . . . . Expected her to lead since she had been in the department longer. She doesn't--He does. . . . . He does not pick/tease her--he barely talks to her. . . . . Confusing because things offend her but she's living with a married man and child."
>
> [**21] *Ivey Spence*, (Morgan I Dep. Ex. 19(f)): "One person has bad attitude--Therese. Company caters to her--Tech bathroom. . . . . Don't know how to act around her--she jokes with her Maintenance buddies--she gets offended by Tim [Lewis] and Ivey [Spence]--'Give me the damn book' is what set her off the other day. . . . . Company is afraid of her because she may file a charge. Don't know why they won't take a stand. . . . . Therese doesn't like Tim or Ivey. Feels threatened--has competition. She was there first, but they are up and coming. One day she laughs at jokes and ignores cussing; one day she doesn't."

Ms. Morgan also interviewed Assistant Chief Wendelken and Chief Hennie, but apparently either took no notes or did not retain them.

On February 23, 1994, Ms. Morgan met with fire department personnel. At that meeting Ms. Morgan distributed copies of the Company's Sexual Harassment Policy. Ms. Morgan reiterated that the display of swimsuit calendars and all forms of harassment and intimidation on the basis of sex were considered to be in violation of Union Camp's sexual harassment policy.

As a result of the investigation, Ms. Morgan concluded that the calendar incident had [**22] indeed occurred, but was resolved because the calendars were no longer displayed.

The Final Days

Following the investigation, the situation in the fire department did not improve, and, indeed, appeared to get worse. One of Ms. Robertson's co-workers summarized the environment as follows:

> After Ms. Morgan interviewed us all during the Company's investigation of Theresa's [sic] complaints, Stanley [Wendelken] came back to the fire house and said 'I never forget. This will be over and I will still be the boss and somebody will pay.' . . . . Stanley has said that Theresa is not [*1370] going to be with the department long and they were going to see to it that she would not. . . . . He gives her the worst jobs to perform.

(Pl.['s] Ex. D(4)). Another stated that "after the meeting about calendars in the locker room . . . [Spence, Lewis and Wendelken] seemed to ignore her . . . ." (Pl.['s] Ex. D(1)). During this period, Mr. Lewis acknowledged that he stopped speaking to Ms. Robertson on account of her accusation of discrimination. Another co-worker stated that "Spence, Lewis and Wendelken seem to think Theresa's [sic] complaints are funny and they don't take them [**23] seriously." (Pl.['s] Ex. D(3)). Moreover, at least one of Ms. Robertson's co-workers was scolded for talking to Ms. Morgan during her investigation. (Pl.['s] Ex. D(3) & O).

Also during this period, Assistant Chief Wendelken began to closely monitor Ms. Robertson on the job, and document her activities and attendance. Mr. Wendelken kept Chief Hennie informed regarding Ms. Robertson's attendance. Mr. Wendelken also began to keep detailed personnel records on Ms. Robertson. Although Union Camp denies the allegation, there is evidence that Mr. Wendelken stopped giving Ms. Robertson jobs that would enhance her skills. (Pl.['s] Ex. O at P 6). He also shortened her lunch break so he would not have to "watch her sleep." (Pl.['s] Ex. D(3)). [6] Union Camp contends that at no point during this period was Ms. Robertson's job in danger. The EEOC also alleges a deliberate,

increased use of profanity by Mr. Lewis and Mr. Spence in Ms. Robertson's presence.

6 Apparently, it was common for the firefighters to take naps during the lunch break. (Pl.['s] Ex. D(3)).

[**24] Ms. Morgan conducted some follow up to her investigation during this period. Mr. Smith informed her of "the truth as he saw it" that the situation had not improved. (Pl.['s] Ex. D(3)). Mr. Smith advised Ms. Morgan that Assistant Chief Wendelken exacerbated Ms. Robertson's problems with Mr. Lewis and Mr. Spence. (Pl.['s] Ex. O).

On March 2, 1994, Ms. Robertson filed a charge of discrimination with the EEOC. Following the charge, on March 4, 1994, Ms. Morgan wrote memos to the personnel files of Assistant Chief Wendelken, Mr. Lewis, and Mr. Spence regarding "intimidation and teasing" of Ms. Robertson. These memos are obliquely worded. The memo to Mr. Wendelken's file concludes that Ms. Morgan's investigation indicated that he was aware of harassment and teasing of Ms. Robertson, but noted that Mr. Wendelken denied any knowledge. The memo states that Ms. Morgan reminded Mr. Wendelken that such treatment is unacceptable and that, as Assistant Fire Chief, he was "responsible for ensuring an equitable work environment." The memos to Mr. Lewis' and Mr. Spence's files also allude to evidence indicating that they had intimidated and teased Ms. Robertson and that such alleged behavior [**25] was unacceptable and unprofessional. The memos state that Mr. Lewis and Mr. Spence denied that they had acted inappropriately toward Ms. Robertson. Notwithstanding the personnel file memos, Union Camp maintained that the evidence against those employees did not constitute conclusive proof of sexual harassment, and denied any liability under Title VII.

Providing further evidence that the controversy surrounding Ms. Robertson's claim of sexual harassment was far from resolved, Assistant Chief Wendelken and Mr. Lewis wrote "rebuttal" letters to Ms. Morgan in response to the personnel file memos. In fact, Mr. Lewis advised Ms. Morgan that "a more intense and thorough investigation into this matter would prove [his version] to be factual." (Lewis Dep. Ex. at 2). Similarly, Assistant Chief Wendelken stated "I think a more intense investigation should have been made." (Wendelken Dep. Ex. 8 at 1).

The letters informed Ms. Morgan of Mr. Wendelken's and Mr. Lewis' beliefs that they were wrongly reprimanded, and complained of preferential treatment they perceived was afforded to Ms. Robertson. Mr. Lewis wrote that he was the victim of reverse discrimination insofar as Ms. Robertson was paid [**26] a higher wage than he. Mr. Lewis acknowledged the unpleasant work environment at the department, but blamed Ms. Robertson [*1371] for the working conditions. Mr. Lewis also suggested that Union Camp hired Ms. Robertson as a firefighter not because she was qualified, but because she was a woman, and cited Ms. Robertson's higher pay and unidentified "special privileges" as evidence of that fact. (Lewis Dep. Ex.). Assistant Chief Wendelken similarly expressed anger over Ms. Robertson's "trumped up harassment charge" and doubt that he could perform his job with her in the department and the issues unresolved. (Wendelken Dep. Ex. 8 at 2-3).

Ms. Robertson returned to Ms. Morgan on several occasions during this period to advise Ms. Morgan about ongoing problems Ms. Robertson was having in the work place, including an incident with Assistant Chief Wendelken on March 7, 1994, the details of which are fuzzy, which caused Ms. Robertson to leave the workplace in tears. Ms. Morgan took no action.

Alan Kahn, Ms. Robertson's therapist with the EAP program, noted that, beginning in March, 1994, Ms. Robertson's mental health suffered a gradual but definite deterioration. Ms. Morgan, Mr. Lewis and Mr. Spence [**27] also observed this deterioration, noting that Ms. Robertson was particularly emotional and sensitive during her last couple of months on the job.

Beginning in March 1994, Ms. Robertson frequently missed work. Prior to March 1994, Ms. Robertson had neither complained nor displayed symptoms of psychological distress to the Union Camp physician, Robert Balsley, M.D. Ms. Robertson's personal physician, Fenwick T. Nichols, Jr., M.D., similarly observed that Ms. Robertson had not experienced problems prior to this period. It was Dr. Nichols' opinion that the 1994 deterioration occurred as a result of the workplace conditions at the Union Camp fire department. (Pl.['s] Ex. M).

On March 7, 1994, Ms. Robertson saw Dr. Balsley. She was upset and crying because, she stated, she was under a lot of stress and duress from her co-workers. Dr. Balsley talked to Ms. Morgan later that day about Ms. Robertson and her situation.

Ms. Robertson's condition did not improve, and on March 14 and 16, 1994, Ms. Robertson again visited Dr. Balsley regarding her distress allegedly caused by her co-workers. In those visits and subsequent ones, it did not appear to Dr. Balsley that Ms. Robertson was trying [**28] to avoid work or was a malingerer.

On May 2, 1994, Ms. Robertson left the workplace on long-term disability leave for emotional and psychological problems. The EEOC asserts that the pervasive harassment and discrimination within the fire station

rendered her unable to work effectively in her position, and caused her to suffer a nervous breakdown. Ms. Robertson currently remains on long term disability leave from Union Camp.

Following Ms. Robertson's departure from the fire department, an unidentified co-worker placed an "abandoned" sticker on Ms. Robertson's locker and an "ex-fireman" sticker on her fire hat.

DISCUSSION

I. When Summary Judgment Is Appropriate

[HN1]In assessing whether the movant is entitled to summary judgment in its favor, the district court must review the evidence and reasonable factual inferences arising from it in the light most favorable to the nonmoving party. *See* Welch v. Celotex Corp., 951 F.2d 1235, 1237 (11th Cir. 1992). This Court must avoid weighing conflicting evidence during this endeavor. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). [HN2]Where a reasonable fact finder may "draw more [**29] than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment." Barfield v. Brierton, 883 F.2d 923, 933-34 (11th Cir. 1989) (citation omitted). However, if the evidence is merely colorable or not significantly probative, summary judgment may be granted. *See id.*

Courts in this jurisdiction adhere to the principle that employment discrimination cases should be disposed of at summary judgment only with "extreme caution." *See* Beard v. Annis, 730 F.2d 741, 743 (11th Cir. 1984); Hodges v. Stone Savannah River [*1372] Pulp & Paper Corp., 892 F. Supp. 1571, 1576 (S.D. Ga. 1995).

II. Title VII Framework

The EEOC brings this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended. Title VII provides in relevant part that it is unlawful for an employer:

> ([HN3]1) to . . . discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, *because of* [her] race, color, religion, *sex*, or national origin; or
>
> (2) to *limit, segregate, or classify* . . . employees . . . in any way which would [**30] . . . tend to deprive any individual of employment opportunities or otherwise adversely affect [her] status as an employee, *because of* [her] race, color, religion, *sex*, or national origin.

42 U.S.C. § 2000e-2(a) (emphasis added). [HN4]Title VII was enacted to prevent employment discrimination, achieve equal employment opportunity in the future, and to make victims of employment discrimination whole. *See* Kilgo v. Bowman Transp., Inc., 789 F.2d 859, (11th Cir. 1986).

[HN5]Title VII does not require, however, that employers fancy every employee's whim. It requires only that employers do not treat their employees differently based on immutable characteristics such as gender. Title VII plaintiffs too often overlook the fact that "employers [are not] required to treat their employees with fairness or kindness," but only to refrain from engaging in statutorily proscribed discrimination. Mayberry v. Endocrinology-Diabetes Assocs., 926 F. Supp. 1315, 1324 (M.D. Tenn. 1996). This Court, it must be remembered, "do[es] not sit as a super-personnel department that reexamines an entity's business decisions." Eldon v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. [**31] 1991) (internal quotes omitted).

Plaintiffs can claim sexual discrimination in a variety of ways, including a hostile workplace, disparate treatment, and retaliatory discharge. The EEOC attempts to show all three in the instant case.

III. Union Camp Is Not Entitled to Summary Judgment on Plaintiff's Hostile Work Environment Claim

A. The EEOC's Allegations of 1993 Harassment are Timely

Union Camp first argues that the EEOC's allegations of sex harassment based on acts occurring prior to September 3, 1993 are untimely and should not be heard by this Court. A filing of a timely charge of discrimination with the EEOC is a prerequisite to a Title VII action. 42 U.S.C. § 2000e-5(e)(1); Delaware State College v. Ricks, 449 U.S. 250, 256, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980). [HN6]In order for a charge to be timely, it must be filed "within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ." 42 U.S.C. § 2000e-5(e)(1). Union Camp contends that because Ms. Robertson filed her Charge with the EEOC on March 2, 1994, the EEOC's claims of discrimination are timely only as to the events either alleged to have occurred within 180 days prior [**32] to March 2, 1994, or those events specifically alleged in Ms. Robertson's Charge or in the Complaint. Union Camp asserts that the Charge and the Complaint expressly limit the Title VII claims to events occurring in 1994, and, thus, at most, the 180 day filing requirement prevents the EEOC from

seeking to impose liability for events occurring before September 3, 1993.

[HN7]Under the "continuing violation" doctrine, however, an employer who has committed a series of discrete acts which amount to a practice of discrimination cannot rely on the 180 day filing requirement to bar an employee's suit unless the employee has waited more than 180 days from the last occurrence of one of the discrete acts. *See* Beavers v. American Cast Iron Pipe Co., 975 F.2d 792, 796 (11th Cir. 1992); *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793, 799-800 (11th Cir. 1988), *modified on other grounds*, 850 F.2d 1549 (11th Cir. 1988). The continuing violation doctrine is particularly applicable to hostile work environment claims because such claims are supported by Plaintiff establishing an ongoing pattern of offensive conduct. *Accord* Morrow v. Auburn University at Montgomery, 973 F. Supp. 1392, 1401 [**33] (M.D. Ala. 1997). In this regard, the [*1373] Court is unpersuaded by the case law relied upon by Union Camp which addresses the continuing violation theory in the context of disparate treatment or retaliation claims. *See, e.g.,* Coon v. Georgia Pacific Corp., 829 F.2d 1563, 1570 (11th Cir. 1987) (rejecting a plaintiff's assertion of a continuing violation in the context of a denial of promotion claim).

Plaintiff's Complaint alleges that "since at least February 18, 1994," Ms. Robertson was subject to a hostile workplace. (Compl. at P 7). Under a liberal pleading standard, this paragraph alone is sufficient to alert Union Camp to allegations of conduct occurring prior to February 17, 1994. When the EEOC Charge and letter determination, identified on a document list filed with the Complaint, are read as a part of the Complaint, [7] the continuing violation is clear. Although Ms. Robertson's Charge is not the picture of precision, the box labeled "continuing action" is clearly marked with an "X". (Pl.['s] Ex. A). In its determination letter, the EEOC's alleges that members of the fire department staff subjected Ms. Robertson to intimidation, harassment, humiliation and a hostile work environment [**34] based on her sex. (Pl.['s] 2d. Resp. to Def.['s] Mot. Summ. J., Ex. C). That letter does not limit its allegations to a particular period. If these allegations state a claim of sexual harassment it is because of the pattern and continuing nature of the complained of conduct. *Accord* Morrow, 973 F. Supp. at 1402. There is a sufficient nexus between the acts so as to survive summary judgment. *See* Roberts, 835 F.2d at 800.

7. *See* Coon, 829 F.2d at 1567.

Moreover, Union Camp cannot claim that it had insufficient notice or was unfairly surprised by the EEOC's pursuit of a claim for conduct occurring in 1993. *See* EEOC v. Jacksonville Shipyards, Inc., 696 F. Supp. 1438, 1444 (M.D. Fla. 1988); *Cruz v. Ecolab Pest Elimination Div., Ecolab, Inc.*, 817 F. Supp. 388, 391-92 (S.D.N.Y. 1993). Again, the EEOC Charge, letter determination and Complaint provide Union Camp with notice that the EEOC was pursuing a hostile workplace claim. Discovery thoroughly covered events occurring during 1993. Union Camp's [**35] own investigation of Ms. Robertson's complaints to Ms. Morgan extended to misconduct occurring prior to 1994.

Accordingly, the EEOC's sexual harassment claim should not be limited to conduct that occurred within 180 days of Ms. Robertson's filing of the EEOC charge. Union Camp's attempt to limit the EEOC's claim to conduct that occurred after September 3, 1993 is without merit.

B. The Events Alleged by Plaintiff Constitute Actionable Sexual Harassment

[HN8]The EEOC seeks to recover under the hostile work environment theory of sexual harassment. Under this theory, an employer faces liability when the work place is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter conditions of employment and create and abusive work environment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986). Applying this standard, it is clear to this Court that there is a genuine dispute of material fact as to whether Ms. Robertson was harassed in the workplace.

[HN9]In order to establish a claim of hostile work environment sexual harassment, the EEOC must show (1) that Ms. Robertson is a member of a protected [**36] group; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment complained of was based upon sex; (4) that the harassment affected a term, condition or privilege of her employment; and (5) that the employer knew or should have known about the harassment and failed to take remedial action. *Munn v. Mayor & Alderman of Savannah, Georgia*, 906 F. Supp. 1577, 1583 (S.D. Ga. 1995) (citing cases). Union Camp challenges the last four elements of the EEOC's claim.

1. Unwelcome Harassment

To establish a hostile workplace claim, the EEOC necessarily must show that Ms. Robertson was subjected to unwelcome sexual harassment. Union Camp argues that the EEOC has failed to meet this burden because the incidents which the EEOC alleges [*1374] occurred were not explicitly sexual in nature. Although this non-explicit type of harassment has not been extensively litigated in the Eleventh Circuit, courts in the Southern District of Georgia consistently have defined hostile environment harassment broadly. *See, e.g.,* Mills v. Amoco Performance Products, Inc., 872 F. Supp. 975, 987 (S.D. Ga. 1994) ("Hostile environment sexual harassment en-

tails a pattern of conduct in the workplace [**37] that unreasonably interferes with an employee's job performance by creating a hostile, intimidating, or offensive work environment.").

Courts in other jurisdictions that have addressed this issue have not required explicit sexual overtones. *See, e.g.,* Doe v. City of Belleville, 119 F.3d 563, 1997 WL 400219, at *10 (7th Cir. 1997) ("Harassment lacking in sexual overtones may nonetheless support a claim for sex discrimination when it is visited upon worker of one gender and not the other."); Schweitzer-Reschke v. Avnet, Inc., 874 F. Supp. 1187, 1194 (D. Kan. 1994) ("Conduct complained of need not be clearly sexual in nature to be relevant to a charge of hostile environment sexual harassment."); *accord* Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1377 (8th Cir. 1996). In hostile work environment claims based on race, it has long been the rule that the harassment need not be explicitly racial in nature. Similarly, the Court concludes that Title VII does not require that the harassment be explicitly sexual in nature, or have explicit sexual overtones. This is true because "Congress intended to define discrimination in the broadest possible terms, so it did not enumerate specific [**38] discriminatory practices nor elucidate the parameter of such nefarious activities . . . ." Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1377 (8th Cir. 1996). The critical issue is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Harris v. Forklift Sys., Inc., 510 U.S. 17, 25, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993) (Ginsburg, J., concurring).

2. Based on Sex

The above discussion flows directly into the next element of the EEOC's claim. Union Camp argues that the EEOC cannot prevail because it cannot prove that the harassment encountered by Ms. Robertson was based on sex. The Eleventh Circuit requires a showing that "but for the fact of her sex, [the victim] would not have been the object of harassment." *See* Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982); *accord* Cummings v. Walsh Construction Co., 561 F. Supp. 872, 877 (S.D. Ga. 1983). This Court is persuaded that the EEOC has submitted sufficient evidence that Ms. Robertson would not have been harassed but for the fact that she is a woman for the issue of causation to go to a jury in this action.

Union [**39] Camp's central argument is that others in the department were subject to pranks, and thus, both male and female employees were treated equally. It is true that where unwelcome harassment is "directed to both sexes and is equally offensive, the conduct cannot be said to be based on gender." Cummings, 561 F. Supp. at 877. The Record reveals, however, that the harassment in this case was not directed at both sexes equally and was not equally offensive.

Although there is evidence that isolated practical jokes were played on one or two other employees at the fire department, including Chief Hennie, the harassment experienced by Ms. Robertson went far beyond an occasional prank. The EEOC has submitted evidence sufficient for a jury to conclude that Ms. Robertson was teased, intimidated and isolated on a regular basis in a workplace dominated entirely by members of another gender. She had stickers placed on her locker and other equipment suggesting that she was inferior, she was given faulty equipment with which to work, she was picked at during her lunch break, and she was even locked out of the locker/shower/bathroom facility. Chief Wendelken's interrogation of Ms. Robertson and demands [**40] that she articulate the offensive and arousing nature of the swimsuit calendars reveals a further lack of respect for Ms. Robertson as the sole female member of the department.

Moreover, the affidavits of her co-workers provide evidence that the "picking at" of Ms. Robertson was more than merely innocent, harmless horseplay. More than one co-worker expressed his opinion based on his [*1375] experience in the department that Ms. Robertson was the victim of incidents of teasing and intimidation because she is a woman. More than one co-worker confessed that he would not like to have been treated the way Ms. Robertson was treated. Finally, there is evidence that Assistant Chief Wendelken was more critical of her performance and that Chief Hennie did not want her in the all-male department.

All of this evidence buttresses Ms. Robertson's subjective belief that she was the victim of harassment based on her sex. Taken as a whole, the allegations provide support for a jury conclusion that Ms. Robertson's harassers "did not treat male employees in a similar fashion." Henson, 682 F.2d at 903; *accord* McCoy v. Johnson Controls World Svcs., Inc., 878 F. Supp. 229, 232 (S.D. Ga. 1995). The evidence [**41] suggests differential treatment of men and women, and an animus toward Ms. Robertson's gender.

The Court does not agree with Union Camp's contention that the EEOC "now appears to assert that every exchange Robertson had with a male co-worker, after which Robertson was unhappy in any way, constituted 'sexual harassment' or gender-based harassment of some kind." (Def. Mot. Summ. J. at 5). To be sure, disputes and unpleasantness between employees of the opposite sex, even where they involve vulgarities and sexual comments, do not necessarily give rise to a Title VII violation. *See* Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430-31 (7th Cir. 1995). This is true because "the

law obviously cannot require a company to insure that its employees will be liked by their peers." *Reed v. Delta Air Lines, Inc.*, 19 F.3d 19, 1994 WL 56930, at *4 (6th Cir. 1994) (text in Westlaw).

Courts long have made clear, however, that [HN10]where a work environment is dominated by members of one gender and the workplace environment is hostile to the other gender by treating that other gender as inferior, Title VII affords protection. *See Fredette v. BVP Management Associates*, 112 F.3d 1503, 1509 & [**42] n.15 (11th Cir. 1997) (noting that courts have long supported claims under Title VII where the work environment is dominated by a gender opposite of that of the victim, but holding same-sex harassment may also present a legitimate claim). The EEOC has alleged numerous facts from which a jury could find that the Union Camp fire department offered such an anti-female hostile work environment.

3. *Affecting a Term or Condition of Employment*

Union Camp argues that the EEOC cannot prove that Ms. Robertson's work environment was "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Harris*, 510 U.S. at 21. Although no tangible psychological injury to the victim is required under the *Harris* standard, there is little doubt that Ms. Robertson suffered such trauma here. She left the workplace on long-term disability due to the stress caused by her work environment--she subjectively perceived the environment as abusive.

The EEOC cannot recover based on Ms. Robertson's subjective belief alone, however; rather, the EEOC also must demonstrate [**43] that Ms. Robertson's reaction to the workplace hostility was objectively reasonable. *See Harris*, 510 U.S. at 22. The EEOC has made a sufficient showing here. The EEOC has provided the Court with evidence that, on a regular, or even daily basis, Ms. Robertson was subjected to harassment in the form of intimidation, teasing and isolation. Such harassment allegedly occurred when Ms. Robertson received and performed job assignments, when she took her lunch and other breaks, and even when she attempted to utilize the locker/shower/bathroom facilities. The Court is persuaded that an objectively reasonable person could perceive the environment as hostile. There is sufficient evidence for a conclusion that the conduct was frequent, humiliating and unreasonably interfered with Ms. Robertson's work performance. *Accord Harris*, 510 U.S. at 23.

Statements by Ms. Robertson's co-workers further buttress a conclusion that the terms and conditions of Ms. Robertson's employment were altered. Had the harassment of Ms. Robertson not been severe and pervasive, the Court doubts that the shift firefighters, [*1376] who worked a different schedule from the day shift staff, would have been aware of the hostility. [**44] Providing further corroboration is Union Camp's decision to place memos, albeit ambivalently worded, in the personnel files of Assistant Chief Wendelken, Mr. Lewis and Mr. Spence regarding their conduct toward Ms. Robertson.

Union Camp relies on *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995), as support for the proposition that the alleged harassment at issue here was not sufficiently pervasive or severe to add up to a viable sexual harassment claim. In *Baskerville*, a female secretary brought a Title VII action against her employer alleging harassment including, *inter alia*, episodes in which a manager referred to the secretary regularly as "pretty girl" and requested that "all pretty girls run around naked," made grunting "um, um, um," noises at the secretary, and alluded to his practice of masturbation. 50 F.3d at 430. The Seventh Circuit held that such conduct was not so severe and pervasive as to constitute sexual harassment, overturning a jury award of damages to the secretary. In so doing, the court concluded that at least some of the alleged incidents contained "the sexual charge of an Abbott and Costello movie[,]" reasoning that although "it is [**45] no doubt distasteful to a sensitive woman to have such a silly man as one's boss, . . . only a woman with Victorian delicacy--a woman mysteriously aloof from contemporary American popular culture . . . would find [the manager's] patter . . . distressing." *Id.* at 431.

Union Camp argues that, consistent with *Baskerville*, "the antics at Union Camp's Fire Department . . . only give rise to an episode of 'Our Gang,' without Alfalfa to spice things up." (Pl.['s] Br. Supp. Mot. Summ. J. at 13). Without passing on the wisdom of the *Baskerville* court's reasoning [8] or it's analogy, [9] or the judgment of Union Camp's counsel in relying on that reasoning and embellishing the analogy, [10] this Court concludes, consistent with the courts in the Southern District of Georgia, that even if there arguably remains a doubt that the misconduct at the fire department was sufficiently severe or pervasive, the benefit of that doubt should go to Ms. Robertson for purposes of this summary judgment motion. *Accord Quarles*, 949 F. Supp. 846 at 851 (giving the benefit of the doubt as to this element to the plaintiff) (citing *Harris* and *Meritor*). Such deference is necessary because courts [**46] in this District find sexual harassment "intolerable in any situation, but especially within the workplace." *Dees v. Johnson Controls World Svcs., Inc.*, 938 F. Supp. 861, 865 (S.D. Ga. 1996); *accord Quarles*, 949 F. Supp. at 850; *Hodges v. Stone Sa-*

vannah River Pulp & Paper Corp., 892 F. Supp. 1571, 1576 (S.D. Ga. 1995).

8 This Court does not consider itself to be "mysteriously aloof from contemporary American popular culture," sex-saturated or otherwise, or possessing only "Victorian delicacy," yet it finds the conduct alleged in *Baskerville* to be patently offensive, particularly in the workplace, and particularly emanating from a supervisor.

9 This Court cannot recall a single Abbott and Costello movie containing behavior similar to that alleged in *Baskerville*.

10 While the Court's knowledge of "Our Gang" is more limited, the Court finds no comedy in the EEOC's allegation that Ms. Robertson was repeatedly teased and isolated in the workplace to the point that she suffered an emotional breakdown, whether or not Alfalfa was present to spice things up.

[**47] *4. Employer Responsibility*

Union Camp asserts that the EEOC cannot prove the final element of its case that Union Camp knew or should have known of the harassment and failed to take prompt and appropriate remedial action. The Court disagrees.

As early as March 1993, Ms. Robertson began complaining to Ms. Morgan regarding problems she was experiencing in the workplace. Union Camp took no action with regard to these early signs of harassment, other than to suggest use of an alternate locker facility, and to refer Ms. Morgan to EAP. Even if Ms. Robertson's complaints were coupled with insecurities regarding her ability to perform her job or other, unrelated complaints, the Court finds that there is sufficient evidence from which a jury could conclude that Union Camp knew or should have known of the alleged harassment as early as [*1377] March of 1993. Moreover, in her March 10 referral phone call to Vivian Hathaway at EAP, Ms. Morgan advised Ms. Hathaway that Ms. Robertson was feeling harassed and vulnerable as a woman in the workplace. In subsequent conversations, Ms. Hathaway informed Ms. Morgan that the male firefighters were making the work environment difficult for Ms. Robertson and [**48] detailed Ms. Robertson's complaints. Ms. Morgan's solution was to suggest that Ms. Robertson transfer back to the security department. Furthermore, even if there is a dispute as to whether Union Camp was alerted expressly to Ms. Robertson's complaints, that the hostility toward Ms. Robertson was pervasive enough to be known to the shift firefighters, whose work schedules did not frequently overlap with the day firefighters, suggests to this Court that Union Camp management should have been aware of the harassment.

With regard to Ms. Robertson's February 1994 complaint, Union Camp took the following remedial actions. Assistant Chief Wendelken removed the swimsuit calendars. Ms. Morgan interviewed the fire department staff regarding the calendar incident and investigation. Ms. Morgan distributed literature regarding sexual harassment and appropriate workplace conduct, and held a meeting or two with the department employees. Finally, following Ms. Robertson's filing of the EEOC Charge, Ms. Morgan put memos regarding the unprofessional conduct in Mr. Lewis', Mr. Spence's and Assistant Chief Wendelken's personnel files. Thus, it cannot be said that Union Camp did nothing.

This Court is [**49] not persuaded, however, that Union Camp's response was reasonably calculated to end the alleged harassment faced by Ms. Robertson. *See* Munn, 906 F. Supp. at 1583 (holding that appropriateness of remedial action taken by employer is valid consideration in evaluating a sexual harassment claim). Ms. Morgan's investigation notes reveal mistreatment of Ms. Robertson that goes far beyond swimsuit calendars in the locker room. Moreover, several co-workers had observed Assistant Chief Wendelken condoning and, indeed, inciting Mr. Lewis' and Mr. Spence's harassment of Ms. Robertson. Ms. Morgan herself noted in the personnel file memos that there was evidence to support these allegations, although she appears to have rejected its validity. Mr. Wendelken remained as Ms. Robertson's supervisor. Furthermore, the personnel file memos were written only after Ms. Robertson filed a charge with the EEOC. Their vague wording does not suggest resolution of Ms. Robertson's complaints. The rebuttal letters written by Assistant Chief Wendelken and Mr. Lewis should have triggered alarm bells at Union Camp that the workplace tensions were far from resolved. At the very least, further investigation of the [**50] conflict was warranted. In fact, both men urged Ms. Morgan to conduct a more detailed investigation. Assistant Chief Wendelken expressed his belief that he would have difficulty performing his job with Ms. Robertson present and the issues unresolved. Union Camp failed to recognize the signals that the conflict was not ameliorated, however, and Ms. Robertson was thrown right back into the fire, so to speak, to be faced with the same (or worse) hostile environment that she had been fighting prior to Union Camp's "remedies."

The cursory actions taken by Union Camp can be contrasted with the more thorough actions taken in case law in which courts in this District have concluded that an employer's response to a complaint of harassment was appropriate. *See, e.g.,* Clark v. Johnson Controls World Svcs., Inc., 939 F. Supp. 884, 890 (S.D. Ga. 1996) (employer suspended supervisor pending investigation); Dees, 938 F. Supp. at 867 (employer conducted thorough

investigation within a reasonable time, interviewed the alleged victim in detail off-site, issued formal reprimands, placed one employee on probation and fired two others).

Thus, while it is true that courts should not sit as super-personnel [**51] departments and second guess the wisdom of an employer's management decisions, it is clear that in this case a genuine dispute of material fact exists as to whether Union Camp's efforts regarding the 1994 complaint were reasonably calculated to end the harassment faced by Ms. Robertson. *Accord* Munn, 906 F. Supp. at 1583.

In sum, while the Court expresses no opinion as to whether the evidence mandates a conclusion that a hostile environment existed at the Union Camp fire department so as to invoke the protections of Title VII, the Court [*1378] holds that the evidence is more than sufficient to create a genuine issue of material fact precluding summary judgment. *Accord* Allen v. Tyson Foods, Inc., 121 F.3d 642, 647-48 (11th Cir. 1997).

IV. Union Camp Is Entitled to Summary Judgment on Plaintiff's Disparate Treatment Claim

Union Camp argues that the EEOC cannot prevail in its disparate treatment claim because it cannot show that Ms. Robertson was treated less favorably than her male counterparts because of her sex. The Court agrees.

[HN11]Disparate treatment can be proved with direct or indirect evidence. *See* Meeks v. Computer Data Assoc., Int'l, 15 F.3d 1013, 1019 (11th Cir. [**52] 1994). The EEOC concedes that this is an indirect evidence case. (Pl.['s] 2d. Resp. to Def.['s] Mot. Summ. J. at 8). An indirect evidence case involves a three-tiered analysis. Tier one requires the EEOC to establish a prima facie case by a preponderance of the evidence that (1) Ms. Robertson was indeed female; (2) she was qualified; (3) despite her qualifications she suffered an adverse employment action; and (4) a similarly situated male did not. *See* Hodges, 892 F. Supp. at 1578 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)). Once the EEOC has successfully made a prima facie showing, tier two shifts the burden of production to Union Camp to articulate, not prove, a legitimate, non-discriminatory reason for the treatment alleged. *See* Hodges, 892 F. Supp. at 1577 (citing *McDonnell Douglas*). Union Camp's burden in this regard is exceedingly light. *See* Quarles, 949 F. Supp. at 853 (citing *Meeks*). Should Union Camp carry this burden, the EEOC has the opportunity at tier three to demonstrate by a preponderance of the evidence that the reasons proffered by Union Camp are not true reasons, but merely pretext [**53] for discrimination. *See* Hodges, 892 F. Supp. at 1577-78. Despite the shifting burdens of proof, the ultimate burden of persuasion remains at all times with the EEOC. *See id.* (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1980)).

A. Mr. Lewis and Ms. Robertson Received Equal Overtime and Training Opportunities

The EEOC contends that Ms. Robertson was treated less favorably than her male co-workers, and specifically Mr. Lewis, in that she received fewer overtime opportunities, and that there was a difference in training given to Ms. Robertson and Mr. Lewis. Assuming without deciding that the EEOC has established the first three prongs of a prima facie case with its assertions, [11] Union Camp has submitted hard evidence in the form of overtime and training records which show that Ms. Robertson was not treated less favorably than Mr. Lewis. Thus, the EEOC's claim of disparate treatment must fail on prong four.

11 In its motion for summary judgment, Union Camp argues that the EEOC cannot make out prong three of its prima facie case because the loss of overtime and training opportunities alleged here do not constitute adverse employment actions as a matter of law. The Fifth Circuit has held that actions that at most "restricted promotional opportunities" at some indeterminate point in the future do not constitute adverse employment actions in the disparate treatment or retaliation context. *See* Dollis v. Rubin, 77 F.3d 777, 779-82 (5th Cir. 1995); *accord* Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997) (holding that Title VII was designed to address only "ultimate" employment decisions such as hiring, granting leave, firing, promoting and compensating), *cert. denied*, 139 L. Ed. 2d 260, 118 S. Ct. 336, 1997 WL 428570 (U.S. 1997). The Eleventh Circuit has not yet addressed whether an employer's denial of "intermediate" opportunities for advancement, as distinguished from an outright denial of a promotion, constitutes an adverse employment action. Because this Court determines that the EEOC's disparate treatment claim fails on other grounds, it declines to adopt the "ultimate" adverse employment decision case law at this time.

[**54] During 1994, Ms. Robertson was absent frequently in the few months in which she worked, thus missing out on overtime and training opportunities. During 1993, Ms. Robertson was *offered* one-half hour more overtime than Mr. Lewis. Ms. Robertson actually worked twelve fewer overtime hours than Mr. Lewis because she declined approximately fifteen of the hours offered. With regard to 1992, Union Camp has submitted records es-

tablishing that Ms. Robertson's [*1379] fewer overtime hours worked were due to periods of sick leave and light duty, and her ineligibility for overtime due to her having worked fewer than 40 hours in certain weeks. Union Camp submitted further records revealing that Mr. Lewis and Ms. Robertson both received 135 hours of formal training and testing during the nearly two-year period in which they both were employed at the fire department. Aside from Ms. Robertson's statements of her belief that Mr. Lewis was favored or that Assistant Chief Wendelken failed to follow proper overtime procedures, the EEOC has not submitted any evidence contradicting Union Camp's overtime and training records. Thus, insofar as the EEOC claims disparate treatment in overtime and training opportunities, [**55] that claim must fail.

B. Alleged Differing Job Assignments Were Not Pretext

With regard to job assignments, the EEOC alleges that Ms. Robertson was denied equal opportunity and that such denials of opportunity hindered her progress on a promotion track to shift firefighter. The EEOC contends that Mr. Lewis was given the choice assignments instead of Ms. Robertson even though Ms. Robertson was the more senior employee. The evidence available to the Court casts doubt on whether Union Camp did in fact favor Mr. Lewis. [12] Nonetheless, giving Plaintiff the benefit of the doubt as to whether Mr. Lewis was so favored, Union Camp counters that Mr. Lewis had superior qualifications and performance evaluations such that a decision to favor him was not pretext. The position of shift firefighter has not been vacant at any time relevant to this action.

12 Ms. Robertson has stated that Mr. Lewis received job assignments that enhanced his skills, as well as jobs involving less climbing or walking than those assigned to her. Union Camp denies these allegations. It appears from the work logs submitted by Union Camp that both Mr. Lewis and Ms. Robertson received varied job assignments. It would be difficult to predict the training opportunities provided by those tasks or the length of time required to complete them. With regard to the increased walking or climbing in jobs assigned to Ms. Robertson, Assistant Chief Wendelken has denied that he has any idea when he assigns a job how much walking or climbing it will entail.

[**56] The Court recognizes there is some evidence that Assistant Chief Wendelken "gave Therese some of the worst jobs to perform". (Pl.['s] Ex. D(4)). Mr. Lewis himself admitted to Ms. Morgan that he performed "important work" while Ms. Robertson "gets to file stuff." (Morgan I Dep. Ex. 19(e)). The Court concludes, however, that the EEOC has failed to carry its burden of persuasion that Union Camp's proffered reasons were indeed pretext when it allegedly denied Ms. Robertson job assignments.

Mr. Lewis had shown an aggressive interest in shift work from the start of his employment at the fire department whereas Ms. Robertson's interest developed at a later time and appears to have been inconsistent. While there may be some disagreement regarding Ms. Robertson's desire to become a shift firefighter, other evidence further suggests that Union Camp did not favor Mr. Lewis out of any discriminatory motive. First, Ms. Robertson was paid more than both Mr. Lewis and Mr. Spence. While not dispositive of the Court's decision here, the greater pay gives rise to an inference that Ms. Robertson was not discriminated against. *Cf.* Proud v. Stone, 945 F.2d 796, 797-98 (4th Cir. 1991) (in age discrimination [**57] case, holding that the fact that the supervisor who fired the victim was the same individual who hired him six months earlier with full knowledge of his age gave rise to a "strong" and "compelling" inference that discrimination was not the determining factor for the supervisor's decision). Similar to *Proud*, it does not make sense that Union Camp would pay a higher wage to a worker it dislikes.

Second, although Ms. Robertson had six months greater seniority within the department, Mr. Lewis received stronger performance evaluations and had substantially more practical firefighting experience acquired during his 10 years of volunteer service. Although the EEOC has submitted evidence sufficient to show that Ms. Robertson experienced a hostile work environment, such hostility does not persuade this Court that Union Camp's job assignment decisions were a pretext for discrimination for purposes of the disparate treatment claim.

[*1380] In sum, the EEOC has failed to persuade the Court that Union Camp favored Mr. Lewis in overtime and training opportunities. With regard to the remaining allegation of less favorable job assignments, although there may be a dispute as to whether Mr. Lewis did [**58] indeed receive favorable treatment, Union Camp has succeeded in offering legitimate justifications for any alleged favoritism. The EEOC has not met its overall burden of persuasion that Union Camp's motives were discriminatory. In reaching its conclusion, the Court reminds the EEOC that federal courts "do not sit as a super-personnel department that reexamines an entity's business decisions." Eldon, 939 F.2d at 1470.

V. Defendant Is Entitled to Summary Judgment on Plaintiff's Retaliation Claim

Union Camp argues that the EEOC has failed to make a case that Ms. Robertson was retaliated against for

complaining about the alleged harassment and discrimination. The Court agrees.

[HN12]To make out a prima facie case of retaliatory discharge, the EEOC must show by a preponderance of the evidence that (1) Ms. Robertson was engaged in a statutorily protected activity; (2) an adverse employment action occurred simultaneously with or subsequent to the protected activity; and (3) the adverse action was causally related to the plaintiff's protected activity. *See* Coutu v. Martin County Bd. of County Comm'rs, 47 F.3d 1068, 1074 (11th Cir. 1995); *Goldsmith v. City of Atlanta*, 996 F.2d [**59] 1155, 1163 (11th Cir. 1993). Union Camp concedes the first element of this test, but asserts that the EEOC cannot establish the remaining two prongs. Specifically, Union Camp argues that Ms. Robertson was not the subject of any adverse employment action by Union Camp at any time in which she was employed in the fire department.

To resolve this issue, the Court first looks to the conduct that the EEOC alleges constitutes retaliation. The EEOC contends that following her complaints to Ms. Morgan, Ms. Robertson was ostracized, her performance and break-time were monitored more closely or altered by Assistant Chief Wendelken, she was interrogated by Chief Hennie regarding her complaint about the swimsuit calendars, scolded by Assistant Chief Wendelken for taking too long a break on one occasion, and denied equal opportunities in overtime, training and job assignments. In view of the Court's decision that Ms. Robertson was not denied equal opportunity in overtime, training and job assignments, the Court will consider only the remaining assertions of retaliation.

As regarding the increased hostility and monitoring, the Court follows well-established employment discrimination case law which [**60] makes clear that Union Camp did not retaliate against Ms. Robertson in any legal sense triggering the protections of Title VII. In no case in this Circuit has the Court found an adverse employment action to encompass a situation where a supervisor has instructed employees to ignore an employee who engaged in protected activity. *See* Clark, 939 F. Supp. at 891 (holding allegations that supervisor stared at the plaintiff and that co-workers shunned her following her sexual harassment complaint were insufficient to meet the adverse employment action prong of plaintiff's retaliation claim), *aff'd*, 124 F.3d 222 (11th Cir. 1997). Nor is there case law supporting a retaliation claim resulting from increased monitoring of an employee following his or her complaints.

The EEOC appears to contend that hostility toward and increased monitoring of Ms. Robertson following her complaints to Ms. Morgan caused her to suffer an emotional breakdown, and consequently leave her job. Thus, the adverse employment action suffered by Ms. Robertson consisted of a constructive discharge. The EEOC's theory is novel. The legal standard in this Circuit for a constructive discharge is whether or not the employer's [**61] action would make a reasonable person in the employee's position feel compelled to resign. *See* Hodges, 892 F. Supp. at 1581 (citing *Mitchell v. Humana Hospital-Shoals*, 942 F.2d 1581, 1583 (11th Cir. 1991)). Viewing the allegations in the light most favorable to Ms. Robertson, this Court concludes that they are insufficient to create a genuine dispute of material fact in this case. *Accord* Clark, 939 F. Supp. at 891; *Munday v. Waste Mgmt. of North Am., Inc.*, 126 F.3d 239, 1997 WL 562173, *4 (4th Cir. 1997) (holding that [*1381] supervisor's actions in yelling at plaintiff truck driver, directing other employees to ignore her and spy on her, and assigning her a route other than the one she requested, all resulting in her departure from the workplace on job stress-related disability leave, did not give rise to a constructive discharge retaliation claim). This Court's decision is necessary because, as noted earlier, "the law cannot require a company to insure that its employees will be liked by their peers." *Reed*, 1994 WL 56930, at *4. [13]

13 Because this Court can envision a situation in which an employer's post-complaint conduct (such as isolating, spying on, or monitoring an employee) so severely interferes with an employee's ability to perform his or her job that it alters the terms and conditions of employment, the Court declines to adopt a *per se* rule that only "ultimate" employment actions can constitute an adverse employment decision. *But cf.* Mattern, 104 F.3d at 707-08 (5th Cir. 1997) (holding that "Title VII was designed to address ultimate employment decisions" such as hiring granting leave, firing, promoting, and compensating, "not to address every decision made by employer that arguably might have some tangential effect upon those ultimate decisions") (quoting Dollis, 77 F.3d at 781-82 and *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981)); *Reed*, 1994 WL 56930, at *4 (6th Cir. 1994); *Wilson v. Southern Nat'l Bank*, 900 F. Supp. 803, 811 (W.D.N.C. 1995), *aff'd*, 92 F.3d 1184 (4th Cir. 1996). Rather, the Court agrees that Title VII should be read to encompass all personnel actions which alter the terms and conditions of employment, "not only those with an impact on the employee's permanent employment record." *Hayes v. Shalala*, 902 F. Supp. 259, 267 (D.D.C. 1995); *accord* Palmer v. Shultz, 259 U.S. App. D.C. 246, 815 F.2d 84, 98 (D.C. Cir. 1987).

[**62] It is apparent that Assistant Chief Wendelken played a role in promoting hostility toward

Ms. Robertson and that he more closely documented her activities following her complaints. It also seems that he scolded her on one occasion for taking a break equal in length to Mr. Lewis and Mr. Spence. The Court is also mindful of the statements by Ms. Robertson's co-workers alluding to the fact that Mr. Wendelken had a vindictive personality. Absent any allegation that Assistant Chief Wendelken disciplined or otherwise took an adverse action against Ms. Robertson as a result of her complaints, however, such hostility is more appropriately addressed in the context of the EEOC's hostile work environment claim. Similarly, the Court is not persuaded that the confrontation between Chief Hennie and Ms. Robertson regarding the swimsuit calendars constituted retaliation. There is no evidence that Ms. Robertson's employment status was altered, or that she ever received a reprimand on her record or was adversely reported to management as a result of the closer monitoring. At no point was Ms. Robertson's job in danger. While the EEOC has made a sufficient showing that Ms. Robertson worked in an abusive [**63] environment, and that the abuse continued after her complaints were filed, the remedy for that abuse, again, is through her hostile workplace harassment claim. The allegations that she was ignored and more closely monitored are part and parcel of that claim.

CONCLUSION

As noted earlier, courts in the Southern District of Georgia dispose of employment discrimination claims at the summary judgment stage only with extreme caution. Exercising that caution, the Court concludes that there is a genuine dispute of material fact as to whether Ms. Robertson was sexually harassed in the workplace. Accordingly, the Court must **DENY** summary judgment as to that claim. Caution alone cannot save the EEOC's disparate treatment and retaliation claims, however. Thus, summary judgment is **GRANTED** as to those claims.

SO ORDERED, this 2ND day of December, 1997.

WILLIAM T. MOORE, JR.

UNITED STATES DISTRICT JUDGE

SOUTHERN DISTRICT OF GEORGIA

LEXSEE

Caution
As of: May 06, 2010

Kerry Ellison, Plaintiff-Appellant, v. Nicholas F. Brady, * Secretary of the Treasury, Defendant-Appellee

* Nicholas F. Brady is substituted for James A. Baker III as Secretary of the Treasury, pursuant to Rule 43(c)(1) of the Federal Rules of Appellate Procedure.

No. 89-15248

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

924 F.2d 872; 1991 U.S. App. LEXIS 875; 54 Fair Empl. Prac. Cas. (BNA) 1346; 55 Empl. Prac. Dec. (CCH) P40,520; 91 Cal. Daily Op. Service 605; 91 Daily Journal DAR 958

April 19, 1990, Argued and Submitted, San Francisco, California
January 23, 1991, Filed

SUBSEQUENT HISTORY: Dissent Amended, February 5, 1991.

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of California; John P. Vukasin, District Judge, Presiding; D.C. No. CV-87-4987-JPV.

DISPOSITION: Reversed and Remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employee challenged the judgment of the United States District Court for the Northern District of California that granted summary judgment to appellee employer in the sexual harassment action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e.

OVERVIEW: Appellant employee challenged the district court's judgment in favor of appellee employer in the claim brought under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e. The district court held that appellant did not state a prima facie case of sexual harassment arising from a hostile working environment because the co-worker's offensive conduct was "isolated and genuinely trivial." On review, the court established the reasonable victim standard for sexual harassment. Applying the standard to appellant's case, the court concluded that a reasonable woman could consider the co-worker's behavior to be sufficiently severe and pervasive to alter the conditions of appellant's employment and create an abusive working environment. The court also found that genuine issues of material fact remained concerning whether the appellee's response to the co-worker's conduct was sufficient under Title VII. The district court was directed to consider the reasonableness of the appellee's decision to remedy the harassment by transferring the co-worker and appellant to different locations. The case was reversed and remanded.

OUTCOME: The court reversed the summary judgment in favor of appellee employer in the sexual harassment action brought under Title VII of the Civil Rights Act of 1964. A reasonable victim could consider the conduct of appellant employee's co-worker sufficiently severe and pervasive to create a hostile working environment. Also, appellee may not have properly remedied the harassment. The case was remanded.

CORE TERMS: sexual harassment, hostile, sexual, working environment, harassment, workplace, harasser, woman, abusive, pervasive, severe, supervisor, co-worker, sex, discriminatory, female, conditions of employment, mere presence, gender, lunch, offensive, male, rape, summary judgment, work performance, psycho-

logical, unreasonably, prima facie case, sex discrimination, guidelines

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1]The appeals court reviews summary judgments de novo.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN2]Virtually no legislative history provides guidance to courts interpreting the prohibition of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN3]Sexual harassment constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN4]Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e, makes it an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C.S. § 2000e-2(a)(1).

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Quid Pro Quo
[HN5]Courts have recognized different forms of sexual harassment. In "quid pro quo" cases, employers condition employment benefits on sexual favors. In "hostile environment" cases, employees work in offensive or abusive environments.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Burdens of Proof > Severe & Pervasive Standards
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN6]A hostile environment exists when an employee can show: (1) that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (2) that this conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Civil Procedure > Appeals > Standards of Review > De Novo Review
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN7]The appeals court will review de novo a district court's final conclusion that conduct is not severe enough or pervasive enough to constitute an abusive environment.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN8]Courts may properly look to guidelines issued by the Equal Employment Opportunity Commission for guidance when examining hostile environment claims of sexual harassment.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > Elements
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN9]The Equal Employment Opportunity Commission guidelines describe hostile environment harassment as conduct (which) has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. § 1604.11(a)(3).

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview

[HN10]The Equal Employment Opportunity Commission, in accord with a substantial body of judicial decisions, has concluded that Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e, affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Burdens of Proof > Severe & Pervasive Standards
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN11]To state a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e, sexual harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > Elements
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > Sexual Harassment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN12]The Equal Employment Opportunity Commission guidelines indicate that sexual harassment violates Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e, where conduct creates an intimidating, hostile, or offensive environment or where it unreasonably interferes with work performance. 29 C.F.R. § 1604.11(a)(3).

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > General Overview
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > General Overview
[HN13]Conduct which unreasonably interferes with work performance can alter a condition of employment and create an abusive working environment.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > Elements
Labor & Employment Law > Discrimination > Actionable Discrimination
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Federal & State Interrelationships
[HN14]It is the harasser's conduct which must be pervasive or severe, not the alteration in the conditions of employment. Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation. Although an isolated epithet by itself fails to support a cause of action for a hostile environment, Title VII of the Civil Rights Act of 1964's, 42 U.S.C.S. § 2000e, protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Civil Enforcement Actions
[HN15]The required showing of severity or seriousness of the harassing conduct in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e, varies inversely with the pervasiveness or frequency of the conduct.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Civil Enforcement Actions
[HN16]In evaluating the severity and pervasiveness of sexual harassment, the court should focus on the perspective of the victim. EEOC Compl. Manual § 615, para. 3112, C at 3242 (1988).

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Civil Enforcement Actions
[HN17]In sexual harassment cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e, the courts prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > Elements
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Burdens of Proof > Employee Burdens

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > Sexual Harassment
[HN18]In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hypersensitive employee, female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN19]Where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN20]As the views of reasonable women change, so too does the Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e, standard of acceptable behavior.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > Elements
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > Same-Sex Harassment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > Sexual Harassment
[HN21]The reasonable victim standard classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Federal & State Interrelationships
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN22]Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e, is not a fault-based tort scheme. Title VII is aimed at the consequences or effects of an employment practice and not at the motivation of co-workers or employers.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN23]Adopting the victim's perspective in hostile work environment cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e, ensures that courts will not sustain ingrained notions of reasonable behavior fashioned by the offenders.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Federal & State Interrelationships
[HN24]Congress designed Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e, to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employer Liability > Supervisors
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Federal & State Interrelationships
[HN25]Employers are not strictly liable for sexual harassment by supervisors under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e.

Business & Corporate Law > Agency Relationships > Authority to Act > Actual Authority > General Overview
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employer Liability > General Overview
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Federal & State Interrelationships
[HN26]Employers can be liable for sexual harassment without actual notice of the alleged discriminatory conduct. Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e. Courts should look to agency principles to determine liability.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > Antiharassment Policy
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employer Liability > Coworkers

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employer Liability > Supervisors

[HN27]Employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known, under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Correction & Prevention

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > Antiharassment Policy

[HN28]The Equal Employment Opportunity Commission guidelines recommend that an employer's remedy for hostile work environment sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e, should be "immediate and appropriate." 29 C.F.R. § 1604.11(d).

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Correction & Prevention

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > Antiharassment Policy

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Exhaustion of Remedies

[HN29]The Equal Employment Opportunity Commission explains that an employer's action is appropriate where it fully remedies the sexually harassing conduct without adversely affecting the terms or conditions of the charging party's employment in some manner (for example, by requiring the charging party to work in a less desirable location). EEOC Compl. Manual § 615.4(a)(9)(iii), para. 3103, at 3213 (1988).

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > General Overview

[HN30]With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer or its agents or supervisory employees knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > Elements

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Correction & Prevention

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > Antiharassment Policy

[HN31]Remedies for stopping sexual harassment should be reasonably calculated to end the harassment. An employer's remedy should persuade individual harassers to discontinue unlawful conduct.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Correction & Prevention

[HN32]Remedies for ending sexual harassment should be assessed proportionately to the seriousness of the offense.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > Elements

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Correction & Prevention

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > Antiharassment Policy

[HN33]Employers should impose sufficient penalties on employees to assure a workplace free from sexual harassment. In essence, the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment. In evaluating the adequacy of the remedy, the court may also take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct. Indeed, meting out punishments that do not take into account the need to maintain a harassment-free working environment may subject the employer to suit by the Equal Employment Opportunity Commission.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > Elements

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Correction & Prevention

[HN34]The victim of sexual harassment should not be punished for the conduct of the harasser.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Correction & Prevention
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > Antiharassment Policy
[HN35]A victim of sexual harassment should not have to work in a less desirable location as a result of an employer's remedy for sexual harassment. EEOC Compl. Man. § 615.4(a)(9)(iii), para. 3103, at 3213 (1988).

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Correction & Prevention
[HN36]To avoid liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e, for failing to remedy a hostile environment, employers may even have to remove employees from the workplace if their mere presence would render the working environment hostile.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN37]The court examines whether the mere presence of a harasser would create a hostile environment from the perspective of a reasonable woman.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Correction & Prevention
[HN38]If harassers are not removed from the workplace when their mere presence creates a hostile environment, employers have not fully remedied the harassment.

Civil Procedure > Remedies > Damages > Punitive Damages
Civil Rights Law > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Remedies > General Overview
[HN39]Title VII of the Civil Rights of 1964, 42 U.S.C.S. § 2000e, does not provide for compensatory or punitive damages.

COUNSEL: Terrence A. Beard, Oakland, California, for the Plaintiff-Appellant.

Stephen L. Schirle, Assistant United States Attorney, San Francisco, California, for the Defendant-Appellee.

JUDGES: Robert R. Beezer and Alex Kozinski, Circuit Judges, and Albert Lee Stephens, ** District Judge. Stephens, District Judge, dissenting. Opinion by Judge Breezer. Dissent by Judge Stephens.

** The Honorable Albert Lee Stephens, Senior United States District Judge for the Central District of California, sitting by designation.

OPINION BY: BEEZER

OPINION

[*873] BEEZER, Circuit Judge

Kerry Ellison appeals the district court's order granting summary judgment to the Secretary of the Treasury on her sexual harassment action brought under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e (1982). This appeal presents two important issues: (1) what test should be applied to determine whether conduct is sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment, and (2) what remedial actions can shield employers from liability for sexual harassment by [**2] co-workers. The district court held that Ellison did not state a prima facie case of hostile environment sexual harassment. We reverse and remand.

Both issues require a detailed analysis of the facts, which we consider in the light most favorable to Ellison, the non-moving party. *Sierra Club v. Penfold*, 857 F.2d 1307, 1320 (9th Cir. 1988). [HN1]We review summary judgments de novo. *Id.*

I

Kerry Ellison worked as a revenue agent for the Internal Revenue Service in San Mateo, California. During her initial training in 1984 she met Sterling Gray, another trainee, who was also assigned to the San Mateo office. The two co-workers never became friends, and they did not work closely together.

Gray's desk was twenty feet from Ellison's desk, two rows behind and one row over. Revenue agents in the San Mateo office often went to lunch in groups. In June of 1986 when no one else was in the office, Gray asked Ellison to lunch. She accepted. Gray had to pick up his son's forgotten lunch, so they stopped by Gray's house. He gave Ellison a tour of his house.

Ellison alleges that after the June lunch Gray started to pester her with unnecessary questions and hang around her desk. On October 9, 1986, [**3] Gray asked Ellison out for a drink after work. She declined, but she suggested that they have lunch the following week. She did not want to have lunch alone with him, and she tried to stay away from the office during lunch time. One day

during the following week, Gray [*874] uncharacteristically dressed in a three-piece suit and asked Ellison out for lunch. Again, she did not accept.

On October 22, 1986 Gray handed Ellison a note he wrote on a telephone message slip which read:

> I cried over you last night and I'm totally drained today. I have never been in such constant term oil (sic). Thank you for talking with me. I could not stand to feel your hatred for another day.

When Ellison realized that Gray wrote the note, she became shocked and frightened and left the room. Gray followed her into the hallway and demanded that she talk to him, but she left the building.

Ellison later showed the note to Bonnie Miller, who supervised both Ellison and Gray. Miller said "this is sexual harassment." Ellison asked Miller not to do anything about it. She wanted to try to handle it herself. Ellison asked a male co-worker to talk to Gray, to tell him that she was not interested in him and to leave [**4] her alone. The next day, Thursday, Gray called in sick.

Ellison did not work on Friday, and on the following Monday, she started four weeks of training in St. Louis, Missouri. Gray mailed her a card and a typed, single-spaced, three-page letter. She describes this letter as "twenty times, a hundred times weirder" than the prior note. Gray wrote, in part:

> I know that you are worth knowing with or without sex. . . . Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style and elan. . . . Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks . . . I will [write] another letter in the near future. [1]

Explaining her reaction, Ellison stated: [**5] "I just thought he was crazy. I thought he was nuts. I didn't know what he would do next. I was frightened."

1 In the middle of the long letter Gray did say "I am obligated to you so much that if you want me to leave you alone I will. . . . If you want me to forget you entirely, I can not do that."

She immediately telephoned Miller. Ellison told her supervisor that she was frightened and really upset. She requested that Miller transfer either her or Gray because she would not be comfortable working in the same office with him. Miller asked Ellison to send a copy of the card and letter to San Mateo.

Miller then telephoned her supervisor, Joe Benton, and discussed the problem. That same day she had a counseling session with Gray. She informed him that he was entitled to union representation. During this meeting, she told Gray to leave Ellison alone.

At Benton's request, Miller apprised the labor relations department of the situation. She also reminded Gray many times over the next few weeks that he must not contact Ellison in any way. Gray subsequently transferred to the San Francisco office on November 24, 1986. Ellison returned from St. Louis in late November and did not discuss the matter further with Miller.

After three weeks in San Francisco, Gray filed union grievances requesting a return to the San Mateo office. The IRS and the union settled the grievances in Gray's [**6] favor, agreeing to allow him to transfer back to the San Mateo office provided that he spend four more months in San Francisco and promise not to bother Ellison. On January 28, 1987, Ellison first learned of Gray's request in a letter from Miller explaining that Gray would return to the San Mateo office. The letter indicated that management decided to resolve Ellison's problem with a six-month separation, and that it would take additional action if the problem recurred.

After receiving the letter, Ellison was "frantic." She filed a formal complaint alleging sexual harassment on January 30, 1987 with the IRS. She also obtained permission to transfer to San Francisco temporarily when Gray returned.

Gray sought joint counseling. He wrote Ellison another letter which still sought to [*875] maintain the idea that he and Ellison had some type of relationship. [2]

2 It is unclear from the record on appeal whether Ellison received the third letter.

The IRS employee investigating the allegation agreed with Ellison's supervisor that [**7] Gray's conduct constituted sexual harassment. In its final decision, however, the Treasury Department rejected Ellison's complaint because it believed that the complaint did not describe a pattern or practice of sexual harassment covered by the EEOC regulations. After an appeal, the EEOC affirmed the Treasury Department's decision on a different ground. It concluded that the agency took adequate action to prevent the repetition of Gray's conduct.

Ellison filed a complaint in September of 1987 in federal district court. The court granted the government's motion for summary judgment on the ground that Ellison had failed to state a prima facie case of sexual harassment due to a hostile working environment. Ellison appeals.

II

Congress added the word "sex" to Title VII of the Civil Rights Act of 1964 [3] at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2,577-2,584 (1964). [HN2]Virtually no legislative history provides guidance to courts interpreting the prohibition of sex discrimination. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986), the Supreme Court held that [HN3]sexual harassment constitutes sex discrimination in violation of Title VII.

3 [HN4]That statute makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1)(1982).

[**8] [HN5]

Courts have recognized different forms of sexual harassment. In "quid pro quo" cases, employers condition employment benefits on sexual favors. In "hostile environment" cases, employees work in offensive or abusive environments. [4] A. Larson, *Employment Discrimination* § 41.61 at 8-151 (1989). This case, like *Meritor*, involves a hostile environment claim.

4 Some courts have entertained causes of action for sexual harassment which do not fall squarely within the quid pro quo cases or the hostile environment cases. For example, some courts have classified harassment based on the victim's gender as sexual harassment where the conduct or language is not sexual in nature. *See, e.g., Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988). Our examples are illustrative and not exclusive because we realize that sexual harassment is a rapidly expanding area of the law.

The Supreme Court in *Meritor* held that Mechelle Vinson's working conditions constituted a hostile environment in violation of Title [**9] VII's prohibition of sex discrimination. Vinson's supervisor made repeated demands for sexual favors, usually at work, both during and after business hours. Vinson initially refused her employer's sexual advances, but eventually acceded because she feared losing her job. They had intercourse over forty times. She additionally testified that he "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions." *Meritor*, 477 U.S. at 60. The Court had no difficulty finding this environment hostile. *Id.* at 67.

Since *Meritor*, we have not often reached the merits of a hostile environment sexual harassment claim. In *Jordan v. Clark*, 847 F.2d 1368, 1373 (9th Cir. 1988), *cert. denied sub nom., Jordan v. Hodel*, 488 U.S. 1006, 109 S. Ct. 786, 102 L. Ed. 2d 778 (1989), we explained that [HN6]a hostile environment exists when an employee can show (1) that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, [5] (2) that this conduct was unwelcome, [*876] and (3) that the conduct was sufficiently severe or pervasive to alter the conditions [**10] of the victim's employment and create an abusive working environment.

5 Here, the government argues that Gray's conduct was not of a sexual nature. The three-page letter, however, makes several references to sex and constitutes verbal conduct of a sexual nature. We need not and do not decide whether a party can state a cause of action for a sexually discriminatory working environment under Title VII when the conduct in question is not sexual. *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990)(conduct need not be sexual); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988)(conduct need not be sexual).

In *Jordan*, we reviewed for clear error the district court's determination that an employee was not subjected to particular unwelcome advances. *Id.* at 1375. We explained that [HN7]we will review de novo a district court's final conclusion that conduct is not severe enough or pervasive enough to constitute an abusive environment. *Id.* at n.7. We affirmed the district court's [**11] judgment in *Jordan* because we did not find its factual findings clearly erroneous. *Id. See also Vasconcelos v. Meese*, 907 F.2d 111, 112 (9th Cir. 1990)(affirming district court's decision that the working environment was not sexually hostile because the district court's factual findings were not clearly erroneous).

We had another opportunity to examine a hostile working environment claim of sexual harassment in *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989). In that case the district court found a hostile working environment where the hotel's male chief of engineering frequently made sexual comments and sexual advances to the maids, and where a female supervisor called her female employees "dogs" and "whores." *Id.* at 1508. Upon a de novo review of the facts found by the district court, we agreed that the conduct was sufficiently

severe and pervasive to alter the conditions of employment and create a hostile working environment.

III

The parties ask us to determine if Gray's conduct, as alleged by Ellison, was sufficiently severe or pervasive to alter the conditions of Ellison's employment and create an abusive working environment. [**12] The district court, with little Ninth Circuit case law to look to for guidance, held that Ellison did not state a prima facie case of sexual harassment due to a hostile working environment. It believed that Gray's conduct was "isolated and genuinely trivial." We disagree.

We begin our analysis of the third part of the framework we set forth in *Jordan* with a closer look at *Meritor*. The Supreme Court in *Meritor* explained that [HN8]courts may properly look to guidelines issued by the Equal Employment Opportunity Commission (EEOC) for guidance when examining hostile environment claims of sexual harassment. 477 U.S. at 65. [HN9]The EEOC guidelines describe hostile environment harassment as "conduct [which] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3). [HN10]The EEOC, in accord with a substantial body of judicial decisions, has concluded that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." 477 U.S. at 65.

The Supreme Court cautioned, however, that not all harassment affects [**13] a "term, condition, or privilege" of employment within the meaning of Title VII. For example, the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" is not, by itself, actionable under Title VII. *Id.* at 67. [HN11]To state a claim under Title VII, sexual harassment "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Id.*

The Supreme Court drew its limiting language from *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 32 L. Ed. 2d 343, 92 S. Ct. 2058 (1972), the first case to recognize a hostile racial environment claim under Title VII. The *Rogers* phrasing limits hostile environment claims to cases where conduct alters the conditions of employment and creates an abusive working environment. [HN12]The EEOC guidelines, drawing upon *Rogers* and other decisions, indicate that sexual harassment violates Title VII where conduct [*877] creates an intimidating, hostile, or offensive environment *or* where it unreasonably interferes with work performance. 29 C.F.R. § 1604.11(a)(3).

We do not think that these standards are inconsistent. The Supreme Court used the words [**14] "abusive" and "hostile" synonymously in *Meritor*. 477 U.S. at 66. The *Meritor* Court also approved of and paid detailed attention to the EEOC's guidelines, and it implicitly adopted the EEOC's position that sexual harassment which unreasonably interferes with work performance violates Title VII. Similarly, although we only expressly incorporated the limiting language from *Rogers* in the third part of our framework in *Jordan*, that part also encompasses the EEOC's requirements in 29 C.F.R. § 1604.11(a)(3). [HN13]Conduct which unreasonably interferes with work performance can alter a condition of employment and create an abusive working environment. *Contra* Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 Harv. Women's Law J. 35, 60 (1990)(arguing that the *Meritor* court opted for the strict standard enunciated in *Rogers* instead of the more lenient EEOC standard).

Although *Meritor* and our previous cases establish the framework for the resolution of hostile environment cases, they do not dictate the outcome of this case. Gray's conduct falls somewhere between forcible rape and the mere utterance of an epithet. 477 U.S. at 60, 67. His conduct [**15] was not as pervasive as the sexual comments and sexual advances in *Hacienda Hotel*, which we held created an unlawfully hostile working environment. 881 F.2d 1504.

The government asks us to apply the reasoning of other courts which have declined to find Title VII violations on more egregious facts. In *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 212 (7th Cir. 1986), the Seventh Circuit analyzed a female employee's working conditions for sexual harassment. It noted that she was repeatedly propositioned and winked at by her supervisor. When she asked for assistance, he asked "what will I get for it?" Co-workers slapped her buttocks and commented that she must moan and groan during sex. The court examined the evidence to see if "the demeaning conduct and sexual stereotyping caused such anxiety and debilitation to the plaintiff that working conditions were 'poisoned' within the meaning of Title VII." *Id.* at 213. The court did not consider the environment sufficiently hostile. *Id.* at 214.

Similarly, in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041, 95 L. Ed. 2d 823, 107 S. Ct. 1983 (1987), the Sixth Circuit refused to find a hostile environment where the [**16] workplace contained posters of naked and partially dressed women, and where a male employee customarily called women "whores," "cunt," "pussy," and "tits," referred to plaintiff as "fat ass," and specifically stated, "All that bitch needs is a good lay." Over a strong dissent, the majority held that the sexist remarks and the

pin-up posters had only a de minimis effect and did not seriously affect the plaintiff's psychological well-being.

We do not agree with the standards set forth in *Scott* and *Rabidue*, [6] and we choose not to follow those decisions. [7] Neither *Scott's* search for "anxiety and debilitation" sufficient to "poison" a working environment [*878] nor *Rabidue's* requirement that a plaintiff's psychological well-being be "seriously affected" follows directly from language in *Meritor*. [8] [HN14]It is the harasser's conduct which must be pervasive or severe, not the alteration in the conditions of employment. Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation. *Accord, EEOC Policy Guidance on Sexual Harassment*, 8 Fair Employment Practices Manual (BNA) [**17] 405:6681, 6690, n. 20 (March 19, 1990). Although an isolated epithet by itself fails to support a cause of action for a hostile environment, Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance.

6 We note that the Sixth Circuit has called *Rabidue* into question in at least two subsequent opinions. In Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987), a panel of the Sixth Circuit expressly adopted one of the main arguments in the *Rabidue* dissent, that sexual harassment actions should be viewed from the victim's perspective. In Davis v. Monsanto Chemical Co., 858 F.2d 345, 350 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110, 109 S. Ct. 3166, 104 L. Ed. 2d 1028 (1989), the Sixth Circuit once again criticized Rabidue's limited reading of Title VII. *See also* Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990)(explicitly rejecting *Rabidue* and holding that derogatory language directed at women and pornographic pictures of women serve as evidence of a hostile working environment).

[**18]

7 We note that unlike this case, the plaintiffs in *Scott* and *Rabidue* alleged that a hostile working environment contributed to their discharge. We need not and do not address how or whether a discharge would alter our analysis.

8 As we explained earlier, the Supreme Court in *Meritor* implicitly adopted the EEOC's position that sexual harassment which unreasonably interferes with work performance violates Title VII. 477 U.S. at 65. Conduct can unreasonably interfere with work performance without causing debilitation and without seriously affecting an employee's psychological well-being. Perhaps the confusion in *Scott* and *Rabidue* flows from a quotation in *Meritor* from Rogers. In its analysis, the *Rogers* court explained that "one can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." Meritor, 477 U.S. at 66, *quoting* Rogers, 454 F.2d at 238. The *Rogers* court did *not* hold that a hostile environment only exists when the emotional and psychological stability of workers is completely destroyed.

[**19] We have closely examined *Meritor* and our previous cases, and we believe that Gray's conduct was sufficiently severe and pervasive to alter the conditions of Ellison's employment and create an abusive working environment. We first note that [HN15]the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct. *See* King v. Board of Regents of University of Wisconsin System, 898 F.2d 533, 537 (7th Cir. 1990)("although a single act can be enough, . . . generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident.") *Accord* Andrews, 895 F.2d at 1484; Carrero v. New York City Housing Authority, 890 F.2d 569, 578 (2d Cir. 1989); EEOC Compliance Manual, § 615, para. 3112, C at 3243 (CCH 1988). For example, in Vance v. Southern Bell Telephone and Telegraph Co., 863 F.2d 1503, 1510 (11th Cir. 1989), the court held that two incidents in which a noose was found hung over an employee's work station were sufficiently severe to [**20] constitute a jury question on a racially hostile environment.

Next, we believe that [HN16]in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. *King*, 898 F.2d at 537; EEOC Compliance Manual (CCH) § 615, para. 3112, C at 3242 (1988)(courts "should consider the victim's perspective and not stereotyped notions of acceptable behavior.") If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.

[HN17]We therefore prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. *See, e.g.*, Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988)("A male

supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a [**21] 'great figure' or 'nice legs.' The female subordinate, however, may find such comments offensive"); Yates, 819 F.2d at 637, n.2 ("men and women are vulnerable in different ways and offended by different behavior"). *See also* Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment* [*879] *Law*, 99 Yale L. J. 1177, 1207-1208 (1990)(men tend to view some forms of sexual harassment as "harmless social interactions to which only overly-sensitive women would object"); Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1203 (1989)(the characteristically male view depicts sexual harassment as comparatively harmless amusement).

We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. [9] For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. [10] Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. [**22] Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

9 One writer explains: "While many women hold positive attitudes about uncoerced sex, their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters. Moreover, American women have been raised in a society where rape and sex-related violence have reached unprecedented levels, and a vast pornography industry creates continuous images of sexual coercion, objectification and violence. Finally, women as a group tend to hold more restrictive views of both the situation and type of relationship in which sexual conduct is appropriate. Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience." Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1205 (1989).

[**23]

10 United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1988* at 299, table 3.19 (1989). In 1988, an estimated 73 of every 100,000 females in the country were reported rape victims. Federal Bureau of Investigation, *Uniform Crime Reports for 1988* at 16 (1989).

[HN18]In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee, we hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman [11] would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. [12] Andrews, 895 F.2d at 1482 (sexual harassment must detrimentally affect a reasonable person of the same sex as the victim); Yates, 819 F.2d at 637 (adopting "reasonable woman" standard set out in Rabidue, 805 F.2d 611, 626 (Keith, J. dissenting)); Comment, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1459 [**24] (1984); *cf.* State v. Wanrow, 88 Wash. 2d 221, 239-241, 559 P.2d 548, 558-559 (1977)(en banc) (adopting reasonable woman standard for self defense).

11 Of course, [HN19]where male employees allege that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man.

12 We realize that the reasonable woman standard will not address conduct which some women find offensive. Conduct considered harmless by many today may be considered discriminatory in the future. Rogers, 454 F.2d at 238. Fortunately, the reasonableness inquiry which we adopt today is not static. [HN20]As the views of reasonable women change, so too does the Title VII standard of acceptable behavior.

We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. The reasonable woman standard does not establish a higher level [**25] of protection for women than men. *Cf.* Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225-1227 (9th Cir. 1971)(invalidating under Title VII paternalistic state labor laws restricting employment opportunities for women). Instead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men. By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can [*880] work towards ensuring that neither men nor women will have to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

We note that [HN21]the reasonable victim standard we adopt today classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment. Well-intentioned compliments by co-workers or supervisors can form the basis of a sexual harassment cause of action if a reasonable victim of the same sex as the plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment. [**26] [13] That is because [HN22]Title VII is not a fault-based tort scheme. "Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation" of co-workers or employers. Rogers, 454 F.2d at 239; *see also* Griggs v. Duke Power Co., 401 U.S. 424, 432, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971)(the absence of discriminatory intent does not redeem an otherwise unlawful employment practice). To avoid liability under Title VII, employers may have to educate and sensitize their workforce to eliminate conduct which a reasonable victim would consider unlawful sexual harassment. *See* 29 C.F.R. § 1604.11(f) ("Prevention is the best tool for the elimination of sexual harassment.")

13 If sexual comments or sexual advances are in fact welcomed by the recipient, they, of course, do not constitute sexual harassment. Title VII's prohibition of sex discrimination in employment does not require a totally desexualized work place.

The facts of this case illustrate the importance of considering the victim's perspective. Analyzing the [**27] facts from the alleged harasser's viewpoint, Gray could be portrayed as a modern-day Cyrano de Bergerac wishing no more than to woo Ellison with his words. [14] There is no evidence that Gray harbored ill will toward Ellison. He even offered in his "love letter" to leave her alone if she wished. Examined in this light, it is not difficult to see why the district court characterized Gray's conduct as isolated and trivial.

14 E. Rostand, *Cyrano de Bergerac* (B. Hooker trans. 1963).

Ellison, however, did not consider the acts to be trivial. Gray's first note shocked and frightened her. After receiving the three-page letter, she became really upset and frightened again. She immediately requested that she or Gray be transferred. Her supervisor's prompt response suggests that she too did not consider the conduct trivial. When Ellison learned that Gray arranged to return to San Mateo, she immediately asked to transfer, and she immediately filed an official complaint.

We cannot say as a matter of law that Ellison's reaction [**28] was idiosyncratic or hyper-sensitive. We believe that a reasonable woman could have had a similar reaction. After receiving the first bizarre note from Gray, a person she barely knew, Ellison asked a co-worker to tell Gray to leave her alone. Despite her request, Gray sent her a long, passionate, disturbing letter. He told her he had been "watching" and "experiencing" her; he made repeated references to sex; he said he would write again. Ellison had no way of knowing what Gray would do next. A reasonable woman could consider Gray's conduct, as alleged by Ellison, sufficiently severe and pervasive to alter a condition of employment and create an abusive working environment.

Sexual harassment is a major problem in the workplace. [15] [HN23]Adopting the victim's [*881] perspective ensures that courts will not "sustain ingrained notions of reasonable behavior fashioned by the offenders." Lipsett, 864 F.2d at 898, *quoting*, Rabidue, 805 F.2d at 626 (Keith, J., dissenting). Congress did not enact Title VII to codify prevailing sexist prejudices. To the contrary, [HN24]"Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage [**29] employment opportunities for women." Andrews, 895 F.2d at 1483. We hope that over time both men and women will learn what conduct offends reasonable members of the other sex. When employers and employees internalize the standard of workplace conduct we establish today, the current gap in perception between the sexes will be bridged.

15 Over 40 percent of female federal employees reported incidents of sexual harassment in 1987, roughly the same number as in 1980. United States Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* 11 (1988). Victims of sexual harassment "pay all the intangible emotional costs inflicted by anger, humiliation, frustration, withdrawal, dysfunction in family life," as well as medical expenses, litigation expenses, job search expenses, and the loss of valuable sick leave and annual leave. *Id.* at 42. Sexual harassment cost the federal government $ 267 million from May 1985 to May 1987 for losses in productivity, sick leave costs, and employee replacement costs. *Id.* at 39.

[**30] IV

We next must determine what remedial actions by employers shield them from liability under Title VII for sexual harassment by co-workers. The Supreme Court in *Meritor* did not address employer liability for sexual harassment by co-workers. In that case, the Court discussed employer liability for a hostile environment created by a supervisor.

The Court's discussion was brief, and it declined to issue a definitive rule. 477 U.S. at 72. On one hand, it held that [HN25]employers are not strictly liable for sexual harassment by supervisors. *Id.* On the other hand, it stated that [HN26]employers can be liable for sexual harassment without actual notice of the alleged discriminatory conduct. *Id.* It agreed with the EEOC that courts should look to agency principles to determine liability. *Id.*

We applied *Meritor* in *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989). We held that "[HN27]employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Id.* at 1515-1516. Because management level employees at the hotel took no action to redress the sexual [**31] harassment of which they knew and other harassment of which they should have known, we held the employer liable. *Id.* at 1516. We have not addressed what remedial actions taken by employers can shield them from liability for sexual harassment by co-workers.

[HN28]The EEOC guidelines recommend that an employer's remedy should be "immediate and appropriate." 29 C.F.R. § 1604.11(d). [16] Employers have a duty to "express[] strong disapproval" of sexual harassment, and to "develop[] appropriate sanctions." 29 C.F.R. § 1604.11(f). [HN29]The EEOC explains that an employer's action is appropriate where it "fully remedies the conduct without adversely affecting the terms or conditions of the charging party's employment in some manner (for example, by requiring the charging party to work . . . in a less desirable location)." EEOC Compliance Manual (CCH) § 615.4(a)(9)(iii), para. 3103, at 3213 (1988).

16 That regulation states: "[HN30]With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."

[**32] The Fourth Circuit has required that a remedy be "reasonably calculated to end the harassment." *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983). It has held that an employer properly remedied sexual harassment by fully investigating the allegations, issuing written warnings to refrain from discriminatory conduct, and warning the offender that a subsequent infraction will result in suspension. *Swentek v. USAIR, Inc.*, 830 F.2d 552 (4th Cir. 1987).

Similarly, in *Barrett v. Omaha National Bank*, 726 F.2d 424, 427 (8th Cir. 1984), the Eighth Circuit held that an employer properly remedied a hostile working environment by fully investigating, reprimanding a harasser for grossly inappropriate conduct, placing the offender on probation for ninety days, and warning the offender that any further misconduct would result in discharge. The court concluded that Title VII [*882] does not require employers to fire all harassers.

We too believe that [HN31]remedies should be "reasonably calculated to end the harassment." *Katz*, 709 F.2d at 256. An employer's remedy should persuade individual harassers to discontinue unlawful conduct. We do not think that all harassment warrants dismissal, *Barrett*, [**33] 726 F.2d at 427; [HN32]rather, remedies should be "assessed proportionately to the seriousness of the offense." *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 (5th Cir. 1987). [HN33]Employers should impose sufficient penalties to assure a workplace free from sexual harassment. In essence, then, we think that the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment. [17] In evaluating the adequacy of the remedy, the court may also take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct. Indeed, meting out punishments that do not take into account the need to maintain a harassment-free working environment may subject the employer to suit by the EEOC.

17 We do not think that the appropriate inquiry is what a reasonable employer would do to remedy the sexual harassment. *Contra Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989). Although employers are statutorily obligated to provide a workplace free from sexual harassment, they may be reluctant, for business reasons, to punish high ranking and highly productive employees for sexual harassment. In addition, asking what a reasonable employer would do runs the risk of reinforcing any prevailing level of discrimination by employers and fails to focus directly on the best way to eliminate sexual harassment from the workplace.

[**34] Here, Ellison's employer argues that it complied with its statutory obligation to provide a workplace free from sexual harassment. It promptly investigated Ellison's allegation. When Ellison returned to San Mateo from her training in St. Louis, Gray was no longer working in San Mateo. When Gray returned to San Mateo, the government granted Ellison's request to transfer temporarily to San Francisco.

We decline to accept the government's argument that its decision to return Gray to San Mateo did not create a hostile environment for Ellison because the government granted Ellison's request for a temporary transfer to San Francisco. Ellison preferred to work in San Mateo over San Francisco. We strongly believe that [HN34]the victim of sexual harassment should not be punished for the conduct of the harasser. We wholeheartedly agree with the EEOC that [HN35]a victim of sexual harassment should not have to work in a less desirable location as a result of an employer's remedy for sexual harassment. EEOC Compliance Manual (CCH) § 615.4(a)(9)(iii), para. 3103, at 3213 (1988).

Ellison maintains that the government's remedy was insufficient because it did not discipline Gray and because it allowed Gray to [**35] return to San Mateo after only a six-month separation. Even though the hostile environment had been eliminated when Gray began working in San Francisco, we cannot say that the government's response was reasonable under Title VII. The record on appeal suggests that Ellison's employer did not express strong disapproval of Gray's conduct, did not reprimand Gray, did not put him on probation, and did not inform him that repeated harassment would result in suspension or termination. *Cf.* Swentek, 830 F.2d 552; Barrett, 726 F.2d 424. Apparently, Gray's employer only told him to stop harassing Ellison. [18] Title VII requires more than a mere request to refrain from discriminatory conduct. DeGrace v. Rumsfeld, 614 F.2d 796, 805 n. 5 (1st Cir. 1980). Employers send the wrong message to potential harassers when they do not discipline employees for sexual harassment. If Ellison can prove on remand that Gray knew or should have known that his conduct was unlawful and that the government failed to take even the mildest form of disciplinary action, the district court should hold that the government's initial remedy was insufficient under Title VII. At this point, genuine issues [*883] of material [**36] fact remain concerning whether the government properly disciplined Gray.

18 Neither the counseling session with Miller nor Gray's transfer to San Francisco was a disciplinary act by the IRS.

Ellison further maintains that her employer's decision to allow Gray to transfer back to the San Mateo office after a six-month cooling-off period rendered the government's remedy insufficient. She argues that Gray's *mere presence* would create a hostile working environment.

We believe that in some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment. *See* Paroline v. Unisys Corp., 879 F.2d 100, 106-107 (4th Cir. 1989). [HN36]To avoid liability under Title VII for failing to remedy a hostile environment, employers may even have to remove employees from the workplace if their mere presence would render the working environment hostile. [19] Once again, [HN37]we examine whether the mere presence of a harasser would create a hostile environment from the [**37] perspective of a reasonable woman.

19 [HN38]If harassers are not removed from the workplace when their mere presence creates a hostile environment, employers have not fully remedied the harassment. When employers cannot schedule harassers to work at another location or during different hours, employers may have to dismiss employees whose mere presence creates a hostile environment. We acknowledge that in rare instances dismissal may be necessary when harassers did not realize that their conduct was unlawful. However, we think that only in very, very few cases will harassers be unaware that their conduct is unlawful when that conduct is so serious that a reasonable victim would thereafter consider the harasser's mere presence sexual harassment. In those few instances, we think it only proper to conclude that the harasser should have known that his or her conduct was unlawful.

In order to avoid the loss of well-intentioned productive employees, employers must educate and sensitize their workforce.

The district court did not [**38] reach the issue of the reasonableness of the government's remedy. Given the scant record on appeal, we cannot determine whether a reasonable woman could conclude that Gray's mere presence at San Mateo six months after the alleged harassment would create an abusive environment. Although we are aware of the severity of Gray's conduct (which we do not consider to be as serious as some other forms of harassment), we do not know how often Ellison and Gray would have to interact at San Mateo.

Moreover, it is not clear to us that the six-month cooling-off period was reasonably calculated to end the harassment or assessed proportionately to the seriousness of Gray's conduct. There is evidence in the record which suggests that the government intended to transfer Gray to San Francisco permanently and only allowed Gray to return to San Mateo because he promised to drop some union grievances. We do know that the IRS did not request Ellison's input or even inform her of the proceedings before agreeing to let Gray return to San Mateo. This failure to even attempt to determine what impact Gray's return would have on Ellison shows an insufficient regard for the victim's interest in avoiding a hostile [**39] working environment. On remand, the district

court should fully explore the facts concerning the government's decision to return Gray to San Mateo. [20]

20 We note that if the district court decides that the government's actions were not reasonably calculated to end the harassment or assessed proportionately to the seriousness of the conduct, Ellison's relief will be primarily injunctive. [HN39]Title VII does not provide for compensatory or punitive damages. *See Williams v. United States General Services Administration*, 905 F.2d 308, 311 (9th Cir. 1990).

In the event that the district court decides to award Ellison equitable relief, the court should not fail to consider any relevant commitments made by the government in Gray's settlement agreement.

V

We reverse the district court's decision that Ellison did not allege a prima facie case of sexual harassment due to a hostile working environment, and we remand for further proceedings consistent with this opinion. Although we have considered the [**40] evidence in the light most favorable to Ellison because the district court granted the government's motion for summary judgment, [*884] we, of course, reserve for the district court the resolution of all factual issues.

REVERSED and REMANDED.

DISSENT BY: STEPHENS

DISSENT

STEPHENS, District Judge, dissenting:

This case comes to us on appeal in the wake of the granting of a summary judgment motion. There was no trial, therefore no opportunities for cross examination of the witnesses. In addition, there are factual gaps in the record that can only lead by speculation. Consequently, I believe that it is an inappropriate case with which to establish a new legal precedent which will be binding in all subsequent cases of like nature in the Ninth Circuit. I refer to the majority's use of the term "reasonable woman," a term I find ambiguous and therefore inadequate.

Nowhere in section 2000e of Title VII, the section under which the plaintiff in this case brought suit, is there any indication that Congress intended to provide for any other than equal treatment in the area of civil rights. The legislation is designed to achieve a balanced and generally gender neutral and harmonious workplace which would improve production [**41] and the quality of the employees' lives. In fact, the Supreme Court has shown a preference against systems that are not gender or race neutral, such as hiring quotas. *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989). While women may be the most frequent targets of this type of conduct that is at issue in this case, they are not the only targets. I believe that it is incumbent upon the court in this case to use terminology that will meet the needs of all who seek recourse under this section of Title VII. Possible alternatives that are more in line with a gender neutral approach include "victim," "target," or "person."

The term "reasonable man" as it is used in the law of torts, traditionally refers to the average adult person, regardless of gender, and the conduct that can reasonably be expected of him or her. For the purposes of the legal issues that are being addressed, such a term assumes that it is applicable to all persons. Section 2000e of Title VII presupposes the use of a legal term that can apply to all persons and the impossibility of a more individually tailored standard. It is clear that the authors of the majority opinion intend a difference [**42] between the "reasonable woman" and the "reasonable man" in Title VII cases on the assumption that men do not have the same sensibilities as women. This is not necessarily true. A man's response to circumstances faced by women and their effect upon women can be and in given circumstances may be expected to be understood by men.

It takes no stretch of the imagination to envision two complaints emanating from the same workplace regarding the same conditions, one brought by a woman and the other by a man. Application of the "new standard" presents a puzzlement which is born of the assumption that men's eyes do not see what a woman sees through her eyes. I find it surprising that the majority finds no need for evidence on any of these subjects. I am not sure whether the majority also concludes that the woman and the man in question are also reasonable without evidence on this subject. I am irresistibly drawn to the view that the conditions of the workplace itself should be examined as affected, among other things, by the conduct of the working there as to whether the workplace as existing is conducive to fulfilling the goals of Title VII. In any event, these are unresolved factual issue which preclude summary judgment.

The focus on the victim of the sexually discriminatory conduct has its parallel in rape trials in the focus put by the defense on the victim's conduct rather than on the unlawful conduct of the person accused. Modern feminists have pointed out that concentration by the defense upon evidence concerning the background, appearance and conduct of women claiming to have been raped must be carefully controlled by the court to avoid effectively shifting the burden of proof to the victim. It is the accused, not the victim, that should be subjected to scru-

tiny. [1] Many state legislatures have responded to this viewpoint, and rules governing the presentation of evidence in rape cases have evolved accordingly. [2] See generally, Galvin, Shielding Rape Victims in the State and Federal Courts: a Proposal for the Second Decade, 70 Minn. L. Rev. 763 (April 1986). [*885] [**43]

1 *Cf.* *People v. Rioz*, 161 Cal. App. 3d 905, 909-910, 207 Cal. Rptr. 903, 916 (1984) (evidence of whether the victim engaged in sexual activity with numerous men, even for pecuniary gain, is controlled by the procedural safeguards in evidentiary law).

2 *See* Fed. R. Civ. Pro. 412; Vhay, The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment, 55 U. Chi. L. Rev. 328, 345, n. 78 (Winter 1988); Fechner, Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts, 23 U. Mich. J. L. Ref. 475, 495 (Spring 1990).

It is my opinion that the case should be reversed with instructions to proceed to trial. This would certainly lead to filling in the factual gaps left by the scanty record, such as what happened at the time of or after the visit of Ellison to [**44] Gray's house to cause her to be subsequently fearful of his presence. The circumstances existing in the work place where only men are employed are different than they are where there are both male and female employees. The existence of the differences is readily recognizable and the conduct of employees can be changed appropriately. This is what Title VII requires. Whether a man or a woman has sensibilities peculiar to the person and what they are is not necessarily known. Until they become known by manifesting themselves in an obvious way, they do not become part of the circumstances of the work place. Consequently, the governing element in the equation is the workplace itself, not concepts or viewpoints of individual employees. This does not conflict with existing legal concepts.

The creation of the proposed "new standard" which applies only to women will not necessarily come to the aid of all potential victims of the type of misconduct that is at issue in this case. I believe that a gender neutral standard would greatly contribute to the clarity of this and future cases in the same area.

Summary judgment is not appropriate in the case. [**45]

LEXSEE

Caution
As of: May 06, 2010

James GAY, Leonard Whitman, Frederick McDowell, Douglas Lee, Gary Dennis and Loyal Graham, on behalf of themselves and all persons similarly situated, Plaintiffs-Appellants, v. WAITERS' AND DAIRY LUNCHMEN'S UNION, LOCAL NO. 30; Dining Room Employees Union, Local No. 9; Hotel and Restaurant Employees & Bartenders Union, Local No. 2; The St. Francis Hotel Corporation, a Delaware corporation; Hilton Hotels Corp., a Delaware corporation d/b/a San Francisco Hilton & Tower, Defendants-Appellees

No. 80-4120

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

694 F.2d 531; 1982 U.S. App. LEXIS 16392; 30 Fair Empl. Prac. Cas. (BNA) 605; 30 Empl. Prac. Dec. (CCH) P33,026

February 8, 1982, Argued and Submitted
August 24, 1982, Decided

SUBSEQUENT HISTORY: [**1] As Amended December 2, 1982.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff black employees sought review of a judgment of the United States District Court for the Northern District of California, which ruled for defendants, union and employers, in plaintiffs' employment discrimination action brought under 42 U.S.C.S. § 1981.

OVERVIEW: Plaintiff black employees filed an employment discrimination action under 42 U.S.C.S. § 1981 against defendants, union and employers. The district court ruled for defendants, and the court affirmed the decision. The court held that § 1981 was limited to claims of intentional discrimination. The court held that the focus of the judicial inquiry was whether plaintiffs had proven by a preponderance of the evidence facts from which the court had to infer, absent rebuttal, that defendants were more likely than not motivated by a discriminatory animus. The court found that plaintiffs did not produce any evidence of overt or intentional discrimination. The court found that because plaintiffs did not produce sufficient evidence of the dates that they orally applied, it was impossible to determine whether job openings existed at those times. The court held that plaintiffs failed to make a prima facie case of disparate treatment under the McDonnell-Douglas test. The court held that plaintiffs' statistical evidence had to be considered for both the class and individual claims. The court found that the statistical and circumstantial evidence combined did not establish disparate treatment.

OUTCOME: The court affirmed the district court's judgment that held in favor of defendants, union and employers, in plaintiff black employees' employment discrimination action. The court found that plaintiffs did not prove the necessary link of timeliness between their applications and job vacancies, and the statistical data in combination with the circumstantial evidence was insufficient to establish disparate treatment.

CORE TERMS: waiter, prima facie case, hotel's, statistical, intentional discrimination, disparate treatment, hired, discriminatory, hiring, discriminatory intent, opening, circumstantial evidence, standard of review, matter of law, statistical evidence, disparate impact, statistic, burden of production, restaurant, subjective, banquet, vacancy, infer, employment discrimination, manager,

filled, written application, standard deviations, qualifications, promotion

LexisNexis(R) Headnotes

Civil Rights Law > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Proof of Discrimination
Labor & Employment Law > Discrimination > Racial Discrimination > Coverage & Definitions
[HN1]42 U.S.C.S. § 1981 is limited to claims of intentional discrimination.

Labor & Employment Law > Affirmative Action > General Overview
Labor & Employment Law > Discrimination > National Origin Discrimination > Enforcement
Labor & Employment Law > Discrimination > National Origin Discrimination > Remedies
[HN2]Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000(e) et seq., prohibits employment discrimination on account of race, sex, religion, and national origin. 42 U.S.C.S. § 2000(e)-2(a). 42 U.S.C.S. § 1981, which provides that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens, is limited to a prohibition of racial discrimination. Title VII and § 1981 are thus overlapping, but independent remedies for racial discrimination in employment.

Labor & Employment Law > Discrimination > Disparate Impact > Defenses & Exceptions > Business Necessity & Job Relatedness
Labor & Employment Law > Discrimination > Disparate Impact > Employment Practices > Selection Procedures > Neutral Factors
Labor & Employment Law > Discrimination > Disparate Impact > Proof > Burden Shifting
[HN3]A prima facie "disparate impact" case under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000(e) et seq., may be established without any proof of intentional discrimination: where a business practice, neutral on its face, is shown to have a substantial, adverse impact on some group protected by Title VII the plaintiff has made out a prima facie case, and the burden shifts to the defendant to establish that the practice is justified by "business necessity." Good intent or absence of intent is no defense to such disparate impact Title VII claims.

Labor & Employment Law > Discrimination > Disparate Impact > Defenses & Exceptions > Business Necessity & Job Relatedness
Labor & Employment Law > Discrimination > Disparate Impact > Proof > Burden Shifting
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
[HN4]In disparate impact cases, the employer bears some burden of justifying the business practice in terms of business need. The court has alluded to this as a "burden of proof." In disparate treatment cases, on the other hand, it is clear that the burden which shifts to the defendant upon the establishment of a prima facie case is a burden of production only; the burden of persuasion remains with the plaintiff at all times.

Labor & Employment Law > Discrimination > Disparate Impact > Employment Practices > Selection Procedures > Neutral Factors
Labor & Employment Law > Discrimination > Disparate Impact > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Disparate Impact > Statutory Application > Reconstruction Statutes (secs. 1981, 1983 & 1985)
[HN5]A prima facie case of racial discrimination in cases brought under 42 U.S.C.S. § 1981, like cases brought under the equal protection clause and 42 U.S.C.S. § 1983, requires proof of intentional discrimination. A plaintiff suing under § 1981 may not avail himself of the more liberal Griggs standard for establishing a prima facie case of employment discrimination upon a showing of disparate impact alone.

Civil Rights Law > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Proof of Discrimination
Civil Rights Law > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Protected Parties
Labor & Employment Law > Discrimination > Disparate Treatment > Statutory Application > Reconstruction Statutes (secs. 1981, 1983 & 1985)
[HN6]A violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. §2000(e) et seq., can be established by means other than an unrebutted showing of disproportionate impact. An alternative, equally valid theory of liability is that of "disparate treatment": that an individual was singled out and treated less favorably than others similarly situated on account of race or any other criterion impermissible under the statute. By their very nature, these claims require proof of intentional discrimination. Whether brought under Title VII, the equal protection clause or 42 U.S.C.S. § 1981, therefore,

claims of disparate racial treatment require proof of intentional racial discrimination.

Evidence > Inferences & Presumptions > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Ultimate Burden of Persuasion
Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
[HN7]The plaintiff in a disparate treatment case under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000(e) et seq., like most civil plaintiffs, bears the ultimate burden of persuasion on the issue of discriminatory intent.

Evidence > Inferences & Presumptions > General Overview
Labor & Employment Law > Affirmative Action > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof
[HN8]The burden of production in a disparate treatment case under Title VII, 42 U.S.C.S. § 2000(e) et seq., sometimes referred to as the burden of going forward with evidence sufficient to avoid a directed verdict or judgment as a matter of law, shifts. A prima facie case of disparate treatment under Title VII is established by proof of facts supporting an inference of intentional discrimination. This initial burden of production is "not onerous," and is met upon a showing of actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such action was based upon race or another impermissible criterion. The plaintiff's immediate burden of production may be discharged by proof of the four elements articulated in McDonnell Douglas or by an alternative presentation of evidence supporting an inference of discrimination. The McDonnell Douglas criteria are not the only mode of establishing a prima facie case of intentional discrimination under Title VII.

Civil Rights Law > Civil Rights Acts > Civil Rights Act of 1964
Evidence > Inferences & Presumptions > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN9]The complainant in a trial under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000(e) et seq., must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Circumstantial & Direct Evidence
Labor & Employment Law > Discrimination > Disparate Treatment > Statutory Application > Reconstruction Statutes (secs. 1981, 1983 & 1985)
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN10]Since a prima facie 42 U.S.C.S. § 1981 case, like a prima facie disparate treatment case under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000(e) et seq., requires proof of intentional discrimination, the focus of the judicial inquiry must be whether the plaintiff has proven by a preponderance of evidence facts from which the court must infer, absent rebuttal, that the defendant was more likely than not motivated by a discriminatory animus. Under both statutes, the court must make a sensitive inquiry into the direct and circumstantial evidence of discrimination offered by the plaintiff in order to determine if the facts so proved allow a legally-permissible inference of discriminatory intent. Accordingly, it is not inappropriate to allow § 1981 claimants to avail themselves of Title VII discriminatory treatment standards in proving a prima facie case.

Constitutional Law > Equal Protection > Level of Review
Labor & Employment Law > Discrimination > Disparate Impact > Employment Practices > Selection Procedures > Neutral Factors
Labor & Employment Law > Discrimination > Disparate Impact > Statutory Application > Reconstruction Statutes (secs. 1981, 1983 & 1985)
[HN11]Equal protection rather than standards under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000(e) et seq., apply to employment discrimination claims brought under 42 U.S.C.S. § 1981.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
Labor & Employment Law > Discrimination > Disparate Treatment > Statutory Application > Reconstruction Statutes (secs. 1981, 1983 & 1985)
Labor & Employment Law > Discrimination > Reconstruction Statutes (secs. 1981, 1983 & 1985)

[HN12]A plaintiff may establish a prima facie case of intentional discrimination in employment under 42 U.S.C.S. § 1981 upon proof of facts which would establish a prima facie case of disparate treatment under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000(e) et seq., pursuant to the four McDonnell Douglas elements or otherwise.

Civil Rights Law > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Proof of Discrimination
Civil Rights Law > Private Discrimination
Evidence > Inferences & Presumptions > General Overview
[HN13]A plaintiff's burden in a 42 U.S.C.S. § 1981 action may differ in some respects from that of a plaintiff in an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000(e) et seq.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Labor & Employment Law > Discrimination > Disparate Treatment > Statutory Application > Reconstruction Statutes (secs. 1981, 1983 & 1985)
[HN14]A finding of fact within the meaning of Fed. R. Civ. P. 52(a) may be set aside or reversed on appeal only if the appellate court determines that the finding is clearly erroneous. A finding of fact is clearly erroneous only when, although there is evidence in the record to support it, the court of appeals is left with the "definite and firm conviction" that a mistake has been committed.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Civil Procedure > Appeals > Standards of Review > De Novo Review
Labor & Employment Law > Discrimination > Disparate Impact > General Overview
[HN15]The appellate court applies the clearly erroneous standard to the district court's findings on the facts supporting the four McDonnell Douglas elements, as well as the factual question of the extent of any adverse impact demonstrated by the plaintiff's statistical evidence. These factual findings include the four McDonnell Douglas elements themselves, which are, after all, factual determinations. The district court's findings on what facts were established by a preponderance of the evidence must be accepted on appeal unless clearly erroneous, but the court's determination whether the facts so proved are sufficient to establish an inference of discrimination, in other words whether the plaintiff's proof establishes a prima facie case thus shifting the burden of production to the defendant, is a legal conclusion freely reviewable on appeal.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
[HN16]The district court's factual assessment of the plaintiff's evidence in a civil rights discrimination claim, including the court's findings as to whether the plaintiff has proved any or all of the four factual McDonnell Douglas criteria, may not be upset on appeal unless clearly erroneous.

Evidence > Inferences & Presumptions > General Overview
Labor & Employment Law > Discrimination > Disparate Impact > General Overview
[HN17]Proof of the four McDonnell-Douglas elements warrants an inference of discriminatory intent unless the defendant presents at least some evidence in rebuttal.

Civil Rights Law > General Overview
Evidence > Inferences & Presumptions > General Overview
Labor & Employment Law > Discrimination > Racial Discrimination > Federal & State Interrelationships
[HN18]The employment discrimination plaintiff must carry the initial burden by offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion.

Civil Rights Law > Civil Rights Acts > Civil Rights Act of 1964
Evidence > Procedural Considerations > Burdens of Proof > Ultimate Burden of Persuasion
Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
[HN19]The role of the McDonnell Douglas prima facie case is closely analogous to its role in general civil litigation: it presents the legal question whether the plaintiff has met his burden of production, coming forward with sufficient probative evidence to permit a rational jury, or court, to find the material facts in his favor, thus avoiding a directed verdict or motion for judgment as a matter of law. A prima facie case of intentional discrimination is established if the plaintiff proves facts from which one can infer, if such actions remain unexplained, that it is more likely than not that the defendant's conduct was racially motivated. As an inference, it can but need not result in an ultimate judgment for the plaintiff. In other

words, a prima facie case under McDonnell Douglas is one in which the plaintiff has met his immediate burden of production, but not necessarily his ultimate burden of persuasion.

Civil Rights Law > General Overview
Evidence > Inferences & Presumptions > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
[HN20]The legal and factual components of a district court's ruling on the McDonnell Douglas prima facie case are severable. The factual inquiry is relatively simple: what facts has the plaintiff proved? The second inquiry, a more difficult one, is a legal inquiry: are these facts sufficient to support an inference of intentional discrimination? By its very nature, this second inquiry involves the legal consequences attendant to the proof of certain basic or subsidiary facts, that is, the legal sufficiency of the evidence. The question whether the plaintiff has established a prima facie case is a question addressed to the district court not in its role as factfinder, but in its role as legal decisionmaker. The court must decide, at the close of the plaintiff's case-in-chief or otherwise, whether the plaintiff's evidence is legally sufficient to shift the burden of production to the defendant or, conversely, whether the defendant is entitled to judgment as a matter of law, without regard to whatever proof he has, or may, offer in rebuttal.

Evidence > Inferences & Presumptions > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
Labor & Employment Law > Discrimination > Racial Discrimination > Coverage & Definitions
[HN21]Proof of the four McDonnell Douglas elements is prima facie, but not conclusive, proof of discriminatory intent because, in light of experience, courts presume that these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Thus, the allocation of burdens and the creation of a presumption is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.

Evidence > Inferences & Presumptions > General Overview
[HN22]A prima facie case, even if a presumption, is a legal device operating to shift the burden of production.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Evidence > Procedural Considerations > Burdens of Proof > Burden Shifting
Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
[HN23]Courts infer intentional discrimination from proof of certain basic or subsidiary facts. But if the defendant successfully meets his burden of production by articulating a legitimate, nondiscriminatory explanation for his conduct, the inference "is rebutted," and "drops from the case." Consequently, the prima facie McDonnell Douglas case is not the functional equivalent of a "finding of fact" of intentional discrimination. It is instead a ruling by the district court on the presumptive legal consequences of the facts proved by the plaintiff. Such determinations are not subject to the clearly erroneous standard of review.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
[HN24]The district court's findings of fact are subject to the limited clearly erroneous standard of review because the trial court, not the court of appeals, is best equipped to make factual determinations.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
[HN25]Fed. R. Civ. P. 52(a) applies even to findings of fact based upon written evidence alone, the clearly erroneous standard does not apply to inferences drawn by the district court by application of a legal standard to the facts which the district court has found. The "clearly erroneous" standard of review is applied where a trial court resolves disputed issues of fact by reference to the credibility of conflicting evidence. It has no application where the trial judge applies a legal standard to undisputed facts.

Civil Rights Law > Civil Rights Acts > Civil Rights Act of 1964
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Circumstantial & Direct Evidence
[HN26]A prima facie showing of disparate treatment may be made without any direct proof of discriminatory motivation.

Civil Procedure > Class Actions > Prerequisites > General Overview

Civil Rights Law > Civil Rights Acts > Civil Rights Act of 1964
Labor & Employment Law > Discrimination > Disparate Treatment > Class Actions
[HN27]There is a limited exception to the rule that the plaintiff in a disparate treatment lawsuit must demonstrate that he or she applied for the position sought. The necessary prerequisite to such a claim is proof of a "consistently enforced discriminatory policy" which discourages applicants from even attempting to apply.

Labor & Employment Law > Affirmative Action > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN28]The function of the McDonnell Douglas prima facie case is to eliminate the two most common reasons why an applicant may be rejected: an absolute or relative lack of qualifications, or lack of an open position. Upon proof of facts sufficient to disprove these two most common reasons for a rejection, courts infer, in light of their experience, that the employment decision was "more likely than not" based upon race.

Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Adverse Employment Actions > Discharges & Failures to Hire
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN29]Where the position in question had already been filled when the plaintiff applied, the failure to prove the existence of a job opening is a failure as a matter of law to make out a prima facie case of disparate treatment under McDonnell Douglas. In a failure to promote case, requiring the job to remain open in the same sense as in a failure to hire case frustrates the McDonnell Douglas test. There is "flexibility" of the McDonnell Douglas test and a position need not necessarily "remain open" under McDonnell Douglas when several applicants apply for a job that will necessarily be filled by one of them at a predetermined time. There may be circumstances where, due to the specific facts involved, some flexibility is required in determining whether, as a practical matter, a job opening occurring after an application is made is an open position under McDonnell Douglas. Nevertheless, absent this very narrow and specific exception, the job opening requirement of Chavez is the law of the circuit.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
Labor & Employment Law > Discrimination > Racial Discrimination > Coverage & Definitions
[HN30]Proof of the four McDonnell Douglas criteria is not the only way to establish a prima facie case of disparate treatment, and the McDonnell Douglas approach is to be applied flexibly.

Civil Rights Law > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Circumstantial & Direct Evidence
[HN31]If reliable, generalized statistical data is relevant and admissible at the prima facie case stage of a disparate treatment employment discrimination lawsuit. This is true whether or not the statistical data introduced is sufficient of itself to establish a prima facie case. Since the question is one of inferring discriminatory intent, the district court should make a sensitive inquiry into such circumstantial and direct evidence of intent as may be available, including any reliable statistical data offered by the plaintiff, in order to determine whether the facts so proved constitute prima facie evidence of discriminatory intent.

Civil Rights Law > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
[HN32]The legal standard to be applied to generalized statistical data in a disparate treatment employment discrimination lawsuit is simply whether the facts proved are sufficient to permit the court to infer, absent explanation, that the employment decision was more likely than not the product of intentional discrimination. Of course, if the claim analyzed is individual rather than class, the statistics must be relevant to the particular plaintiff's claim. But all evidence, both direct and circumstantial, statistical and nonstatistical, relevant to that question should be assessed on a cumulative basis.

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
Labor & Employment Law > Discrimination > Racial Discrimination > Coverage & Definitions
[HN33]Regarding the percentage of blacks hired compared to the percentage of blacks available, courts should be "extremely cautious" of drawing any inferences from standard deviations in the range of 1 to 3.

Labor & Employment Law > Affirmative Action > Court & Government Imposed Plans
Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
Labor & Employment Law > Discrimination > Racial Discrimination > Proof > Burdens of Proof > Employee Burdens
[HN34]Whatever the impact demonstrated by a plaintiff's statistical evidence is in fact, the legal question is whether that impact is sufficiently gross or stark that a court must infer that it was intended by the defendant. That an employer was aware of, or totally indifferent to the racially discriminatory impact of its hiring policies is not of itself sufficient to establish a prima facie case and shift the burden of explanation to the defendant. After all, discriminatory intent "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected a particular course of action at least in part "because of" not merely "in spite of," its adverse effects upon an identifiable group.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Racial Discrimination > Coverage & Definitions
[HN35]In order to establish a prima facie case of disparate treatment based solely on statistical evidence, the plaintiff must produce statistics showing "a clear pattern, unexplainable on grounds other than race." But such cases are rare. Absent a "stark" pattern, impact alone is not determinative, and the court must look to other evidence. It is vitally important, therefore, to remember that "statistically significant" results are not necessarily "legally significant" results. The probability of random occurrence of a value is not the obverse of the probability that is the result of deliberate action. Simply put, statistics demonstrating that chance is not the more likely explanation are not by themselves sufficient to demonstrate that race is the more likely explanation for an employer's conduct.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Circumstantial & Direct Evidence
Labor & Employment Law > Discrimination > Racial Discrimination > Coverage & Definitions
[HN36]A plaintiff may establish a prima facie case of disparate treatment, even without direct proof of the four McDonnell Douglas elements, with a combination of direct, circumstantial and statistical evidence of discrimination.

Civil Rights Law > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
[HN37]As a legal matter, the historical context out of which the challenged practices arise is relevant and should be considered by the trier of fact in a civil rights discrimination claim.

Civil Rights Law > Civil Rights Acts > Civil Rights Act of 1964
Labor & Employment Law > Discrimination > Racial Discrimination > Coverage & Definitions
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN38]The use of "subjective" employment criteria is not per se unlawful.

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN39]Subjective decision-making strengthens an inference of discrimination from general statistical data.

Labor & Employment Law > Affirmative Action > General Overview
Labor & Employment Law > Discrimination > Actionable Discrimination
Labor & Employment Law > Discrimination > Racial Discrimination > Proof > Burdens of Proof > General Overview
[HN40]While a court should properly consider whether an employer has adhered to a particular practice with full knowledge of its foreseeable effects upon the racial balance of the work force, and should also consider especially dramatic increases in minority hiring as circumstantial evidence of prior intentional discrimination, these are simply factors to be considered in making a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. Their weight depends upon all of the circumstances involved in the case.

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview

[HN41]Subjective hiring practices are not unlawful per se merely because they are susceptible to discriminatory application and, indeed, may be considered legitimate, nondiscriminatory reasons for an applicant's rejection.

Civil Rights Law > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Protected Parties
Civil Rights Law > Private Discrimination
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN42]Neither Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000(e) et seq., nor 42 U.S.C.S. § 1981 imposes a duty upon employers to adopt a hiring procedure that maximizes hiring of minority employees.

JUDGES: Wallace and Kennedy, Circuit Judges, and Crocker, * District Judge.

* Honorable Myron D. Crocker, United States District Judge, Eastern District of California, sitting by designation.

OPINION BY: WALLACE

OPINION

[*534] WALLACE, Circuit Judge:

This case presents several significant issues concerning the order and allocation of proof, the proper role of statistical evidence, and the appropriate standard of appellate review in employment discrimination actions brought pursuant to 42 U.S.C. § 1981. Plaintiff-appellant Gay, along with three other black male waiters (the waiters), [1] filed the original complaint in this action on March 28, 1973, alleging discrimination on the basis of race in the hiring, promotion, and transfer of black male waiters and applicants by the Waiters' & Dairy Lunchmen's Union (the union) and several well-known San Francisco hotels and restaurants. The waiters sued individually and on behalf of a class of all similarly situated persons, seeking monetary and equitable relief under Title VII of the [**2] Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Over five years ago we addressed the question whether this case could be maintained as a class action under Fed.R.Civ.P. 23(b)(2), reversing the district court's denial of the waiters' motion for class certification. [2] 549 F.2d 1330 (9th Cir. 1977). Following our remand to the district court, the waiters filed an amended complaint adding the Hilton Hotels Corporation (the Hilton) as a defendant and alleging new claims under section 1981. Subsequently, all Title VII claims were dismissed by the district court and all defendants except the Hilton and the St. Francis Hotels Corporation (the St. Francis) settled. The remaining claims were tried before the district court in October of 1979. On February 6, 1980, the district court entered judgment for the hotels on the waiters' individual and class claims, filing exhaustive findings of fact and conclusions of law in a thoughtful 30-page opinion. 489 F. Supp. 282 (N.D.Cal. 1980). [3] The waiters appeal pursuant to 28 U.S.C. § 1291, and we affirm.

1 The individual claim of a fifth waiter was dismissed by the district court on August 8, 1979, and is not at issue here.

[**3]

2 The denial of a motion for class certification is no longer appealable prior to final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978). On June 22, 1979, the district court in this case certified a plaintiff class consisting of all black males working or seeking employment as waiters who were denied employment or promotions, fired, or otherwise discriminated against on account of race by any of the defendants. Neither of the remaining defendants challenges this determination in this appeal.

3 The waiters in their amended complaint asserted a claim against the hotels under 42 U.S.C. § 1985(3) for an alleged conspiracy with the union. Following trial, the district court entered judgment for the hotels on this claim. *Gay v. Waiters' & Dairy Lunchmen's Union, Local 30*, 489 F. Supp. 282, 294 (N.D.Cal.1980). The waiters have not raised the issue on appeal.

[*535] I

The facts are well-summarized in the district court's opinion. We repeat only those which are relevant to the [**4] legal issues raised in this appeal.

The St. Francis and the Hilton are large, luxury hotels in downtown San Francisco. Each operates several restaurants, ranging in nature from simple coffee shops to elegant dinner restaurants, as well as banquet departments that provide food services for a variety of special functions and offer room service. The hiring practices of both hotels are similar. Preference is given to those currently employed as buspersons in filling waiter vacancies in any of the hotels' restaurants. When a vacancy is not filled by promotion, the personnel department notifies the union of the vacancy and posts a notice of opening in the hotel. Only occasionally, if at all, has the general public been notified of the existence of open waiter positions, either through newspaper advertisements or solicitations to employment agencies.

Both hotels insist that a person seeking employment as a waiter first file a written application with the per-

sonnel department. The St. Francis, however, generally refuses to schedule appointments with the personnel office for persons seeking waiter positions when no opening then exists. The district court found that applicants appearing [**5] for appointments with the St. Francis's personnel department were asked to complete written application forms, although written applications were accepted even when no waiter vacancies existed. 489 F. Supp. at 287. The Hilton ostensibly requires all applicants to file written applications with the personnel office prior to being considered for waiter positions. The record, however, clearly reveals that many applicants for waiter positions were hired by the Hilton's restaurant managers before the personnel department was notified of the vacancy, and that several were hired without being required to file written applications.

The hotels each receive approximately 6,000 applications per year, an average of between 12 and 15 applications for every waiter position which becomes open. Both retain written applications in an active file for a period between six months and one year. These retained applications, however, are only sporadically referred to when vacancies occur, 489 F. Supp. at 296, because the hotels consider reference to previously filed applications time-consuming and inefficient, and typically fill open waiter positions very quickly. With few [**6] exceptions, applicants are hired only if a vacancy occurs within one to three days of their application. *Id.* n.10. All applicants are interviewed by the manager of the hotel restaurant seeking to fill a vacancy. The restaurant managers make the final hiring decisions based upon the interviews and their resulting impressions of such factors as prior job experience and job stability, appearance and demeanor. These criteria are not contained in any job description or other document, and their implementation is left entirely to the discretion of the individual restaurant managers. *Id.* at 300.

The waiters consist of four individual plaintiffs and four class plaintiffs. All the individual plaintiffs "were experienced waiters qualified for employment at either the St. Francis or the Hilton." *Id.* at 291. Three of the four individual plaintiffs worked at various times as banquet or extra banquet waiters at the St. Francis, one worked in a similar position at the Hilton, and one of the four worked at both hotels. The district court found that only one of the individual plaintiffs ever filed a written application for a permanent waiter position with either hotel. All made periodic [**7] oral requests for permanent positions; the district court expressly found that in some of the years in question, two of the individual plaintiffs made such oral requests repeatedly. However, the district court determined that with respect to both hotels, the evidence was insufficient to permit a finding as to the date of any of these oral job [*536] requests; therefore, the district court found that it was not possible to determine from the record whether vacancies existed at the time that any of the individual plaintiffs orally requested permanent positions. *Id.* at 295-96. Accordingly, the district court held that the waiters had failed to establish a prima facie case of intentional discrimination on their individual claims. *Id.*

Concluding that proof of intentional discrimination is required for section 1981 claims, *id.* at 299-300, the district court held that the class had failed to prove a prima facie case of an alleged pattern or practice of purposeful discrimination against black male waiter applicants. The district judge concluded that the circumstantial evidence was wanting and that the statistical presentation was insufficient to raise a prima facie [**8] case, *id.* at 311, and entered judgment for the hotels on the class claims.

The waiters appeal the district court's judgment only with respect to their claims arising under 42 U.S.C. § 1981. Although their attack on the district court's judgment is limited to these claims, it is vigorous and extremely wide in scope. Among other things, the waiters contend that the district court erred in concluding that discrimination actions brought pursuant to section 1981 require proof of discriminatory intent. Assuming that proof of discriminatory intent is a requisite element in a prima facie section 1981 case, they then argue that their statistical evidence of racially-imbalanced hiring decisions, standing alone, was sufficient to establish a prima facie case of discriminatory intent. Alternatively, they argue that the district court erred by failing to consider, with respect to their individual claims, relevant testimonial and other circumstantial evidence of discrimination introduced during trial. Finally, the waiters insist that their statistical and circumstantial evidence of discrimination, viewed together, established a prima facie case of intentional discrimination [**9] as a matter of law on both the individual and class claims, and that this prima facie case was never rebutted by either of the hotels. They therefore ask us to reverse the district court's judgment and direct entry of judgment in their favor.

The waiters' first argument, that a prima facie case of discrimination under section 1981 should not require proof of a discriminatory purpose, can be disposed of summarily. We held nearly two years ago that [HN1]section 1981 is limited to claims of intentional discrimination. *Craig v. County of Los Angeles*, 626 F.2d 659 (9th Cir. 1980), *cert. denied*, 450 U.S. 919, 101 S. Ct. 1364, 67 L. Ed. 2d 345 (1981) (*Craig*). We have since followed *Craig* repeatedly. *See e.g.*, *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 928 (9th Cir. 1982). The Second Circuit recently reached the same result, *Guardians Ass'n v. Civil Service Comm'n*, 633 F.2d 232, 268 (2d Cir. 1980), *cert. granted*, 454 U.S. 1140, 102 S.

Ct. 997, 71 L. Ed. 2d 291 (1982), as did the Third Circuit *en banc*, *Croker v. Boeing Co.*, 662 F.2d 975, 989 (3d Cir. 1981). The Supreme Court [**10] has now taken this position. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982).

II

In order to decide the remaining issues, we must first focus briefly on the relationship, and differences, between Title VII and section 1981. [HN2]Title VII prohibits employment discrimination on account of race, sex, religion, and national origin. 42 U.S.C. § 2000e-2(a). Section 1981, which provides that all persons "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," is limited to a prohibition of racial discrimination. *Runyon v. McCrary*, 427 U.S. 160, 167-68, 96 S. Ct. 2586, 2592-2593, 49 L. Ed. 2d 415 (1976). Title VII and section 1981 are thus overlapping, but independent remedies for racial discrimination in employment. *Johnson v. Railway Express Agency*, 421 U.S. 454, 461, 95 S. Ct. 1716, 1720, 44 L. Ed. 2d 295 (1975). While some of the difficult issues the courts have faced recently could have been avoided had Congress repealed section 1981, at least as applied to employment, when it enacted Title VII in [**11] 1964, Congress chose not to do so. *Id.* at 459, 95 S. Ct. at 1719. It [*537] is therefore the duty of the federal courts to apply these statutes in light of their separate language and legislative histories, promoting consistency between the two only to the extent that doing so does not conflict with the language or purpose of either.

Our decision in *Craig* reflects the major differences between section 1981 and Title VII. The latter is an ambitious, prophylactic measure designed to outlaw artificial, unnecessary barriers to employment which act as "built-in head winds" against the progress of minority groups. Title VII was designed to bar not only overt employment discrimination, "but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158 (1971). [HN3]A prima facie "disparate impact" case under Title VII may therefore be established without any proof of intentional discrimination: where a business practice, neutral on its face, is shown to have a substantial, adverse impact on some group protected by Title VII, the plaintiff has made out a prima [**12] facie case, and the burden [4] shifts to the defendant to establish that the practice is justified by "business necessity." *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1275-80 (9th Cir. 1981). Good intent or absence of intent is no defense to such disparate impact Title VII claims. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 349, 97 S. Ct. 1843, 1861, 52 L. Ed. 2d 396 (1977) *(Teamsters)*; *Griggs v. Duke Power Co., supra*, 401 U.S. at 432, 91 S. Ct. at 854.

4 We have stated that in rebutting a prima facie case [HN4]in such disparate impact cases, "the employer bears some burden of justifying the business practice in terms of business need." *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1275 (9th Cir. 1981). We have alluded to this as a "burden of proof." *Id.* at 1271. In disparate treatment cases, on the other hand, it is clear that the burden which shifts to the defendant upon the establishment of a prima facie case is a burden of *production* only; the burden of persuasion remains with the plaintiff at all times. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 257, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207 (1981) (*Burdine*).

[**13] Section 1981, on the other hand, does not embody the same broad, prophylactic purpose as does Title VII. There are very real historical and practical differences between the two statutes. *Davis v. County of Los Angeles*, 566 F.2d 1334, 1348-51 (9th Cir. 1977) (Wallace, J., dissenting), *vacated as moot*, 440 U.S. 625, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979); *see General Building Contractors Ass'n v. Pennsylvania, supra*, 102 S. Ct. at 3146-48. We therefore held in *Craig* that [HN5]a prima facie case of racial discrimination in cases brought under section 1981, like cases brought under the equal protection clause and 42 U.S.C. § 1983, *see Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), requires proof of intentional discrimination. *Craig, supra*, 626 F.2d at 668. A plaintiff suing under section 1981 may not avail himself of the more liberal *Griggs* standard for establishing a prima facie case of employment discrimination upon a showing of disparate impact alone.

[HN6]A Title VII violation, of course, can be established by means other than an unrebutted [**14] showing of disproportionate impact. *See Teamsters, supra*, 431 U.S. at 335-36 n.15, 97 S. Ct. at 1854 n.15. An alternative, equally valid theory of liability is that of "disparate treatment": that an individual was singled out and treated less favorably than others similarly situated on account of race or any other criterion impermissible under the statute. By their very nature, these claims require proof of intentional discrimination. *Id.* ("proof of discriminatory motive is critical"). Whether brought under Title VII, the equal protection clause or section 1981, therefore, claims of disparate racial treatment require proof of intentional racial discrimination. The district court correctly recognized this parallel between these otherwise dissimilar constitutional and statutory provisions. *See* 489 F. Supp. at 295.

[HN7]The plaintiff in a Title VII disparate treatment case, like most civil plaintiffs, bears the ultimate burden of *persuasion* on the issue of discriminatory intent. [*538] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981) (*Burdine*). But [HN8]the [**15] burden of *production*, sometimes referred to as the burden of going forward with evidence sufficient to avoid a directed verdict or judgment as a matter of law, shifts. *Id.* at 253-56, 101 S. Ct. at 1093-95. A prima facie case of disparate treatment under Title VII is established by proof of facts supporting an *inference* of intentional discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 567, 576, 98 S. Ct. 2943, 2949, 57 L. Ed. 2d 957 (1978) (*Furnco*). This initial burden of production is "not onerous," *Burdine, supra*, 450 U.S. at 253, 101 S. Ct. at 1093, and is met upon a "showing of actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such action was based upon" race or another impermissible criterion. *Furnco, supra*, 438 U.S. at 576, 98 S. Ct. at 2949. The plaintiff's immediate burden of production may be discharged by proof of the four elements articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (*McDonnell Douglas*), [5] or by an alternative [**16] presentation of evidence supporting an inference of discrimination. The Supreme Court has consistently emphasized that the *McDonnell Douglas* criteria are not the only mode of establishing a prima facie case of intentional discrimination under Title VII. *See* Burdine, *supra*, 450 U.S. at 253-54 n.6, 101 S. Ct. at 1093-94 n.6; *Furnco, supra*, 438 U.S. at 577, 98 S. Ct. at 2949; *Teamsters, supra*, 431 U.S. at 358, 97 S. Ct. at 1866; *McDonnell Douglas, supra*, 411 U.S. at 802 n.13, 93 S. Ct. at 1824 n.13.

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> [HN9]The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
>
> McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973) (footnote omitted).

[**17] While Title VII disparate impact cases are of little help to us in this case, the reasoning used to analyze the required prima facie showing in a Title VII disparate treatment case is of great assistance because it is nearly identical to the inquiry necessary in a section 1981 case. [HN10]Since a prima facie section 1981 case, like a prima facie disparate treatment case under Title VII, requires proof of intentional discrimination, the focus of the judicial inquiry must be whether the plaintiff has proven by a preponderance of evidence facts from which the court must infer, absent rebuttal, that the defendant was more likely than not motivated by a discriminatory animus. Under both statutes, the court must make a sensitive inquiry into the direct and circumstantial evidence of discrimination offered by the plaintiff in order to determine if the facts so proved allow a legally-permissible inference of discriminatory intent. Accordingly, it is not inappropriate to allow section 1981 claimants to avail themselves of Title VII discriminatory treatment standards in proving a prima facie case. *See* Hudson v. IBM Corp., 620 F.2d 351, 354 (2d Cir.), *cert. denied*, 449 U.S. 1066, 101 S. Ct. 794, 66 L. Ed. 2d 611 (1980). [**18]

Our statement in *Craig* that [HN11]"equal protection rather than Title VII standards apply to employment discrimination claims brought under § 1981," *Craig, supra*, 626 F.2d at 668, is not to the contrary. The comment was part of our reasoning that discriminatory intent is required in a section 1981 case. Thus in *Craig*, we were distinguishing the Title VII standards set down in *Griggs*, a disparate impact case, from the equal protection requirement of proving a discriminatory purpose established in *Washington v. Davis, supra*, 426 U.S. at 238-42, 96 S. Ct. at 2046-2048. We have since clearly stated that "the *McDonnell Douglas* criteria provide a useful guide to a plaintiff's burden in a section 1981 . . . non-class employment discrimination suit." Tagupa v. Board of Directors, 633 F.2d 1309, 1312 [*539] (9th Cir. 1980) (footnotes omitted). We hold, therefore, that [HN12]a plaintiff may establish a prima facie case of intentional discrimination in employment under section 1981 upon proof of facts which would establish a prima facie case of disparate treatment under Title VII, pursuant to the four *McDonnell Douglas* elements [**19] or otherwise.

Yet we expressly do not hold that *Burdine, Furnco* and *McDonnell Douglas* must be blindly followed in all aspects of section 1981 cases. [HN13]"[A] plaintiff's

burden in a 1981 . . . action may differ in some respects from that of a plaintiff in an action brought under Title VII. . . ." *Tagupa v. Board of Directors, supra*, 633 F.2d at 1312. The two statutes, as we stated earlier, are markedly dissimilar in several important respects. We here deal only with a plaintiff's burden to demonstrate a prima facie case under section 1981, and need go no further.

III

Before turning to the waiters' arguments on the merits we are confronted with the question of the appropriate standard of review for the issues raised in this appeal. Applying the criteria articulated in *McDonnell Douglas, supra*, 411 U.S. at 802 & n.13, and *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307, 97 S. Ct. 2736, 2741, 53 L. Ed. 2d 768 (1977), the district court determined that the waiters failed to establish a prima facie case of intentional discrimination. 489 F. Supp. at 295-96 (individual claims); *id.* at 311 [**20] (class claims). The St. Francis characterizes this determination as a finding of fact, and argues that we may therefore reverse the district court's judgment consistent with Fed.R.Civ.P. 52(a) only if we conclude that this so-called finding was clearly erroneous. [6] The waiters, on the other hand, argue that the clearly erroneous standard properly applies to questions of fact resolved by the district court by reference to the credibility of conflicting documentary, testimonial or circumstantial evidence, but that the determination whether an employment discrimination plaintiff has established a prima facie case of intentional discrimination under *McDonnell Douglas* is a question of law for the district court, reviewable on appeal free of the clearly erroneous standard. Thus, the question squarely presented is whether, in a section 1981 case alleging disparate treatment in employment, the district court's determination that the plaintiff failed to establish a prima facie case of intentional discrimination under *McDonnell Douglas* and its progeny is a finding of fact within the meaning of Fed.R.Civ.P. 52(a). If so, [HN14]such a finding may be set aside or reversed on appeal only if [**21] the appellate court determines that the finding is clearly erroneous. A finding of fact is clearly erroneous only when, although there is evidence in the record to support it, the court of appeals is left with the "definite and firm conviction" that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 541, 92 L. Ed. 746 (1948); *Edinburgh Assurance Co. v. R.L. Burns Corp.*, 669 F.2d 1259, 1261 (9th Cir. 1982).

6 The Hilton does not join the St. Francis in this argument, but instead maintains that the district court's findings on whether the plaintiff established the four factual *McDonnell Douglas* criteria, *see* Note 5, *supra*, cannot be disturbed unless clearly erroneous. The Hilton relies on our decision in *McLean v. Phillips-Ramsey, Inc.*, 624 F.2d 70, 71 (9th Cir. 1980) (per curiam). As the following text makes clear, we agree.

The answer to this inquiry is not crystal clear. There is some [**22] language in two cases which can be perceived as suggesting a rule different from that established by our earlier precedent. To see whether the conflict is real or only apparent, we must review our decisions on this issue.

In a series of cases beginning in 1977, [HN15]we have applied the clearly erroneous standard to the district court's findings on the facts supporting the four *McDonnell Douglas* elements, as well as the factual question of the extent of any adverse impact demonstrated by the plaintiff's statistical evidence. *E.g.*, *Chavez v. Tempe Union High School Dist.*, 565 F.2d 1087 (9th Cir. 1977); *White v. City of San Diego*, 605 F.2d 455 (9th Cir. 1979); [*540] *McLean v. Phillips-Ramsey, Inc.*, 624 F.2d 70 (9th Cir. 1980) (per curiam); *Hagans v. Andrus*, 651 F.2d 622 (9th Cir.), *cert. denied*, 454 U.S. 859, 102 S. Ct. 313, 70 L. Ed. 2d 157 (1981); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981). These factual findings include the four *McDonnell Douglas* elements themselves, which are, after all, factual determinations. [7] These cases lead to the conclusion [**23] that the district court's findings on what facts were established by a preponderance of the evidence must be accepted on appeal unless clearly erroneous, but that the court's determination whether the facts so proved were sufficient to establish an inference of discrimination, in other words whether the plaintiff's proof established a prima facie case thus shifting the burden of production to the defendant, is a legal conclusion freely reviewable on appeal.

7 *See* Note 5, *supra*.

In these cases we applied the clearly erroneous standard of review to the facts found by the district court by reference to the credibility of conflicting documentary, testimonial and circumstantial evidence. In *Chavez v. Tempe Union High School Dist., supra*, a high school English teacher alleged that she was denied the position of language department chairperson on account of national origin in violation of Title VII. She raised both disparate treatment and disparate impact claims. 565 F.2d at 1090. [**24] The district judge determined that the plaintiff had failed to establish a prima facie case of disparate treatment based upon his finding that at the time of the plaintiff's application, the position had already been filled. *Id.* We affirmed. After concluding as a matter of law that "the failure to prove the existence of a job opening is a fatal defect in a prima facie case of overt discrimination," *id.* at 1091, we addressed the district court's findings of fact. We held that the district court

"was not clearly erroneous in determining as a factual matter" that the principal's selections of department chairpersons were automatically approved. *Id.* We further held that the district court's finding of fact "as to the actual date of Chavez' application" was clearly erroneous, but that "the district judge's factual determination that at the time of Chavez' application, the position was already filled . . . was not clearly erroneous." Id. at 1092. In view of our earlier holding that a prima facie disparate treatment case requires a showing of job availability, therefore, we held that Chavez had failed to establish a prima facie case. *Id.*

[**25] We did not, however, hold or imply that the district court's determination that the facts proved by the plaintiff were insufficient to establish a prima facie case was a finding of fact reversible only if clearly erroneous. Indeed, we distinguished between the district court's finding on the factual question of job availability and the court's "conclusion as a matter of law that the [school] district had not violated Chavez' civil rights." Id. at 1090. We applied this same distinction to Chavez' disparate impact claim. Chavez argued that the neutral practices employed by the district, specifically the failure to advertise chairperson positions and the district's failure to follow its own standards for qualifications, had a disproportionate adverse impact on minorities. We pointed out that the facts showed that Chavez "had a fair opportunity to obtain a position as acting department head," and that "Chavez ha[d] not shown that the failure of the district to follow its own standards had a disproportionately unfavorable impact on minorities." Id. at 1094. Accordingly, we "conclude[d] that Chavez ha[d] failed to establish a prima facie case [**26] of discrimination under Title VII . . . ." Id. at 1095. Thus, nothing in *Chavez* suggests that the determination whether the amount of disproportionate impact established by a *Griggs* plaintiff is sufficient to raise a prima facie case is a finding of fact subject to the clearly erroneous standard of review.

In *White v. City of San Diego, supra*, a female city accountant alleged that the city's failure to promote her violated Title VII on both disparate treatment and disparate impact theories of sexual discrimination. While addressing her disparate treatment [*541] claim we again distinguished between the four factual *McDonnell Douglas* elements and the subsequent conclusion whether the plaintiff's proof of those or alternative facts was sufficient to permit an inference of intentional discrimination under *Furnco*. "Thus, however we view the City's subsequent . . . hirings, they cannot, on these *facts*, raise an *inference* of discrimination on the basis of sex." 605 F.2d at 459 (emphasis added).

In our analysis of her *Griggs* disparate impact claim, we addressed the standard of review issue expressly. White [**27] argued that the clearly erroneous standard did not apply because her claim was that the trial court improperly applied the law to undisputed facts. Id. at 459. We concluded, however, that her claim was actually that the district court erred in weighing her statistical proof. The district court found that her statistics were unreliable and the sample sizes she offered were too small. Id. at 460. We appropriately deferred to the district court's fact-finding function with respect to this statistical evidence. Id. at 460-61. Thus, although we applied the clearly erroneous standard to the district court's "factual assessment" of statistical data, *id.*, we did not apply that standard to the district court's determination that the data failed to establish a prima facie case. *See also Frausto v. Legal Aid Society*, 563 F.2d 1324, 1328-29 (9th Cir. 1977) (concluding that the district court did not clearly err in finding that plaintiff's statistical data showed higher proportion of minority employees than in qualified, available population). We followed both *White* and *Chavez* in *Hagans v. Andrus, supra*, [**28] where we reviewed the district court's determination that the plaintiff failed to establish a prima facie case as a freely reviewable conclusion of law, 651 F.2d at 624, but separately reviewed the court's findings of fact under the clearly erroneous standard. Id. at 626-27.

In two other cases we made the *Chavez* distinction clearly and expressly. In *McLean v. Phillips-Ramsey, Inc., supra*, a disparate treatment case, the district court dismissed the action at the close of the plaintiff's case-in-chief. "In support of its *conclusion* that McLean had not established a *prima facie* case, the district court *found* that" McLean had failed to prove several of the four factual *McDonnell Douglas* criteria. 624 F.2d at 71 (emphasis added). We reversed. We wrote that "these findings may not be disturbed unless clearly erroneous," *id.*, but "conclude[d] that the district court's findings [were] clearly erroneous." *Id.* In *Fernandez v. Wynn Oil Co., supra*, 653 F.2d at 1275, the district court found that the plaintiff had failed to demonstrate she was qualified for the position in question [**29] and, alternatively, that the individual eventually chosen for the job had superior qualifications. Citing *McLean*, we held that "unless these findings are clearly erroneous, they must not be disturbed on appeal." *Id. See also Pack v. Energy Research & Development Adm'n*, 566 F.2d 1111, 1113 (9th Cir. 1977) (per curiam) (clearly erroneous standard applied to district court finding that plaintiff was considered for position sought). We then held that the record supported both findings. We did not, however, apply the clearly erroneous standard to the question whether these findings supported the district court's conclusion that no prima facie case had been made out. We deferred to the trial court's ability to resolve disputed issues of fact, but analyzed the legal issue without any reference to the clearly erroneous standard.

> Fernandez has therefore failed to demonstrate that the district court clearly erred in failing to find her qualified for the DIO position. If an applicant is not qualified for the job in question, she has failed to establish a prima facie case.

Fernandez v. Wynn Oil Co., supra, 653 F.2d at 1275 (citations [**30] omitted).

In sum, these cases establish that [HN16]the district court's factual assessment of the plaintiff's evidence, including the court's findings as to whether the plaintiff has proved any or all of the four factual *McDonnell Douglas* criteria, may not be upset on appeal unless clearly erroneous. They do not support the proposition that the district court's determination that the [*542] plaintiff failed to establish a prima facie case is a finding of fact subject to the clearly erroneous standard of review. [8]

> 8 In other recent employment discrimination cases we have failed to mention the appropriate standard of review for this issue. *See, e.g.,* O'Brien v. Sky Chefs, Inc., 670 F.2d 864 (9th Cir. 1982); Nanty v. Barrows Co., 660 F.2d 1327 (9th Cir. 1981); Lynn v. Regents of the University of California, 656 F.2d 1337 (9th Cir. 1981); Correa v. Nampa School Dist. No. 131, 645 F.2d 814 (9th Cir. 1981).

The first case which presents [**31] us with some difficulty is Golden v. Local 55, Int'l Ass'n of Firefighters, 633 F.2d 817 (9th Cir. 1980). Four rulings by the district court were contested on appeal. The third was that the union did not breach its duty of fair representation and, in the fourth, "the court found that the union had not violated Title VII." Id. at 820. Without citation of authority, we stated that "the standard for reviewing rulings three and four is whether the findings are consistent with Fed.R.Civ.P. 52(a)." *Id.* Notwithstanding this statement, however, we appear to have applied a substantial evidence standard of review. "We find substantial evidence to support the conclusion of 'no Title VII violation' under both [disparate impact and disparate treatment] theories." Id. at 821. *See also* id. at 823 ("We find substantial evidence, however, to support the conclusion that no disparate impact was shown."). At any rate, *Golden* can be harmonized in part with our earlier cases. The district court found that the promotion examination in question "did not have a discriminatory impact on minorities." Id. at 823. [**32] Under White v. City of San Diego, supra, 605 F.2d at 460, this is a factual assessment of the weight of statistical data, subject to the clearly erroneous standard of review. In addition, the fact that two of our cases decided subsequent to *Golden* have followed the earlier holdings, *see* Hagans v. Andrus, supra, 651 F.2d at 622; Fernandez v. Wynn Oil Co., supra, 653 F.2d at 1273, demonstrates that this case does not present a complete departure from the weight of our precedent.

The only other case found in our circuit which may be read to apply the clearly erroneous standard to the district court's conclusion that the plaintiff has proved facts sufficient to establish a prima facie case of intentional discrimination is Piva v. Xerox Corp., 654 F.2d 591 (9th Cir. 1981), which involved an allegation of disparate treatment based upon sex. [9] There, we first briefly summarized the shifting burdens of production involved in *McDonnell Douglas* lawsuits, and then wrote:

> In this circuit, the trial court's conclusions regarding the success or failure of the plaintiff and defendant in meeting these [**33] burdens are reviewed under the clearly erroneous test. *Golden v. Local 55, [supra].* This standard of review is particularly appropriate where, as in this case, the underlying facts are in dispute and the validity of the proffered statistical evidence is in question. *See White v. City of San Diego, [supra].*

Id. at 594 (footnote omitted). On its face, this language appears to be inconsistent with our prior line of cases from *Chavez* to *Fernandez*. Two authorities are cited: *Golden*, which as indicated earlier may be questionable precedent, and *White*, which is consistent with our holdings from *Chavez* to *Fernandez*. To attempt to harmonize in part, we could point to portions of *Piva* in which the clearly erroneous test was properly applied to the district court's findings on the *McDonnell Douglas* factual criteria. *See* id. at 595, 598. To this extent, *Piva* would be consistent with our earlier precedent. Nevertheless, there is an inconsistency in our cases, leaving us the burden to determine which to follow.

> 9 Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), might also be read to support the use of the clearly erroneous standard, but the case actually applied the clearly erroneous standard only to factual inquiries. Even though we stated that "we must first determine whether the district court's finding that appellants failed to present a prima facie case of discrimination is clearly erroneous," id. at 1272, we applied that standard only to the district judge's ruling on the

proper interpretation of the plaintiff's statistical evidence. *Id.* at 1274-75.

[**34] In order to decide this case, we choose to follow the longer and more established [*543] line of cases. Applying the clearly erroneous standard to the district court's determination that an employment discrimination plaintiff failed to establish a prima facie case of disparate treatment appears to us to be inconsistent with the theoretical [10] and functional [11] role of the *McDonnell Douglas* burden-shifting procedure, with [*544] the Supreme Court's analysis and holding in *Furnco*, [12] and with the purpose of Rule 52(a). [13] For these reasons, it could be argued that the vitality of *Golden* and *Piva* [*545] are largely undercut by the reasoning of Supreme Court decisions and the logical application of a governing rule. [14] In addition, while we recognize the apparent conflict, it is unnecessary for our court to resolve the issue en banc to decide this case. If we freely review the district judge's conclusion that no prima facie case has been demonstrated and conclude that he was correct, we would, obviously, come to the same [*546] conclusion if we followed the more restrictive clearly erroneous standard of review. Since the Supreme Court has stated [**35] that "[a] *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination," *Furnco, supra*, 438 U.S. at 579, 98 S. Ct. 2950, we are content in this case to apply the *de novo* standard of review.

10 The Supreme Court in *McDonnell Douglas* characterized the issue before it as the "order and allocation of proof" in disparate treatment lawsuits. *McDonnell Douglas, supra*, 411 U.S. at 800, 93 S. Ct. at 1823. This characterization is particularly relevant to our decision here. As the Second Circuit has recognized, *McDonnell Douglas* says nothing directly about the need to prove discriminatory intent. "The evident thought was that [HN17]proof of the four elements warranted an inference of such intent unless the defendant presented at least some evidence in rebuttal." *Lieberman v. Gant*, 630 F.2d 60, 63 (2d Cir. 1980) (footnote omitted). We agree. The importance of *McDonnell Douglas* "lies, not in its specification of the discrete elements of proof there required," but rather in the principle that [HN18]the employment discrimination plaintiff "must carry the initial burden by offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358, 97 S. Ct. 1843, 1866, 52 L. Ed. 2d 396 (1977) (*Teamsters*).

Viewed in this light, [HN19]the role of the *McDonnell Douglas* prima facie case is closely analogous to its role in general civil litigation: it presents the legal question whether the plaintiff has met his burden of production, coming forward with sufficient probative evidence to permit a rational jury, or court, to find the material facts in his favor, thus avoiding a directed verdict or motion for judgment as a matter of law. A prima facie case of intentional discrimination is established if the plaintiff proves facts "from which one can infer, if such actions remain unexplained, that it is more likely than not" that the defendant's conduct was racially motivated. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576, 98 S. Ct. 2943, 2949, 57 L. Ed. 2d 957 (1978) (*Furnco*). As an inference, it can but need not result in an ultimate judgment for the plaintiff. In other words, a prima facie case under *McDonnell Douglas* is one in which the plaintiff has met his immediate burden of production, but not necessarily his ultimate burden of persuasion. *See Burdine, supra*, 450 U.S. at 253-56, 101 S. Ct. at 1093-95.

It is evident, therefore, that [HN20]the legal and factual components of a district court's ruling on the *McDonnell Douglas* prima facie case are severable. The factual inquiry is relatively simple: what facts has the plaintiff proved? The second inquiry, a more difficult one, is a legal inquiry: are these facts sufficient to support an inference of intentional discrimination? By its very nature, therefore, this second inquiry involves the legal consequences attendant to the proof of certain basic or subsidiary facts, *i.e.*, the *legal sufficiency* of the evidence. The question whether the plaintiff has established a prima facie case is a question addressed to the district court not in its role as factfinder, but in its role as legal decisionmaker. The court must decide, at the close of the plaintiff's case-in-chief or otherwise, whether the plaintiff's evidence is legally sufficient to shift the burden of production to the defendant or, conversely, whether the defendant is entitled to judgment as a matter of law, without regard to whatever proof he has, or may, offer in rebuttal. *See Hagans v. Andrus*, 651 F.2d 622, 626 (9th Cir.), *cert. denied*, 454 U.S. 859, 102 S. Ct. 313, 70 L. Ed. 2d 157 (1981).

This theoretical role of the prima facie case is logically and legally consistent with the Court's repeated admonitions that the four *McDonnell Douglas* elements are not "an inflexible formulation," *Teamsters, supra*, 431 U.S. at 358, 97 S.

Ct. at 1866, and that the *McDonnell Douglas* model is not the only means of establishing a prima facie case of intentional discrimination. In several cases we have held that a plaintiff established a prima facie case even though the district court found that one or more of the *McDonnell Douglas* criteria had not been proved. *E.g.*, *O'Brien v. Sky Chefs, Inc., supra*, 670 F.2d at 867 (qualifications); *Hagans v. Andrus, supra*, 651 F.2d at 624-26 (Job opening); *McLean v. Phillips-Ramsey, Inc., supra*, 624 F.2d at 72 (job opening). If the district court's conclusion that no prima facie case had been established was reversible only if clearly erroneous, however, we would not have been free to rule that these plaintiffs had met their immediate burden of production as a matter of law. In other words, while we must defer to the facts found by the district court, deferring to the district court's conclusion whether a prima facie case has been raised would be inconsistent with *McDonnell Douglas* itself by operating, in effect, to "freeze" disparate treatment law to those four specific factual elements, which both the Supreme Court and this court have properly recognized were "never intended to be rigid, mechanized, or ritualistic." *Furnco, supra*, 438 U.S. at 577, 98 S. Ct. at 2949.

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11 Applying the clearly erroneous standard as suggested in *Piva* would be inconsistent with the functional role of the *McDonnell Douglas* burden-shifting procedure. The three-step process governs the order and allocation of proof in Title VII disparate treatment cases; it is not an end in itself. Rather, it "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco, supra*, 438 U.S. at 577, 98 S. Ct. at 2949. [HN21]Proof of the four *McDonnell Douglas* elements is prima facie, but not conclusive, proof of discriminatory intent because, in light of experience, courts "presume [that] these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id., citing Teamsters, supra*, 431 U.S. at 358 n.44, 97 S. Ct. at 1866 n.44. Thus, "the allocation of burdens and the creation of a presumption . . . is intended *progressively to sharpen the inquiry* into the elusive factual question of intentional discrimination." *Burdine, supra*, 450 U.S. at 255 n.8, 101 S. Ct. at 1094 n.8 (emphasis added).

Some language in *Burdine* suggests that a prima facie case of disparate treatment raises not an inference but rather a presumption of intentional discrimination, and that absent rebuttal, the trial court must enter judgment for the plaintiff. *See id.* at 254 & n.7, 101 S. Ct. at 1094 & n.7. It is not clear whether this language merely clarifies the use of the term "inference" in *Teamsters* and *Furnco*, or whether it elevates what was an inference into a "legally mandatory, rebuttable presumption." *Id.* However, the difference is not relevant to the appropriate standard of review. Whether an inference or a presumption, the *McDonnell Douglas* prima facie case involves the legal consequences attendant to proof of certain facts. If intentional discrimination is inferred or presumed it is because courts infer or presume from proof of certain facts that, absent explanation, the challenged employment decision was more likely than not the product of discriminatory animus. [HN22]A prima facie case, even if a presumption, is a legal device operating to shift the burden of production. *See Legille v. Dann*, 178 U.S. App. D.C. 78, 544 F.2d 1, 5 (D.C.Cir.1976) ("Rebuttable presumptions are rules of law attaching to proven evidentiary facts certain procedural consequences as to the opponent's duty to come forward with other evidence.") (footnotes omitted).

The inference or presumption created by proof of facts legally sufficient to shift the burden of production to the defendant is the first step in the "progressively sharpened inquiry" described in *Burdine*. As explained, however, it is not essentially a factual question. In light of their experience, and in order to allocate efficiently the proof introduced at trial, [HN23]courts infer intentional discrimination from proof of certain basic or subsidiary facts. But if the defendant successfully meets his burden of production by articulating a legitimate, nondiscriminatory explanation for his conduct, the inference "is rebutted," *Burdine, supra*, 450 U.S. at 255, 101 S. Ct. at 1094, and "drops from the case." *Id.* at 255 n.10, 101 S. Ct. at 1094 n.10. Consequently, the prima facie *McDonnell Douglas* case is not the functional equivalent of a "finding of fact" of intentional discrimination. It is instead a ruling by the district court on the presumptive legal consequences of the facts proved by the plaintiff. Such determinations are not subject to the clearly erroneous standard of review. *See Pullman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781, 1790, 72 L. Ed. 2d 66 (1982) ("Discriminatory intent [under § 703(h) of Title VII] means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive.").

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12 The Supreme Court clearly held in *Furnco*: "A *McDonnell Douglas* prima facie showing *is not the equivalent of a factual finding of discrimination* . . . . Rather, it is simply proof of actions taken by an employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Furnco, supra*, 438 U.S. at 579-80, 98 S. Ct. at 2950-2951 (emphasis added). *Cf.* *Glasson v. City of Louisville*, 518 F.2d 899, 903 (6th Cir.) (whether termed ultimate facts or conclusions of law, determinations by district court which attach legal significance to historical facts are reviewable free of clearly erroneous standard), *cert. denied*, 423 U.S. 930, 96 S. Ct. 280, 46 L. Ed. 2d 258 (1975); *Stevenot v. Norberg*, 210 F.2d 615, 619 (9th Cir. 1954) (same).

While the Court may not yet have decided the question conclusively, *see* *Burdine, supra*, 450 U.S. at 260 n.12, 101 S. Ct. at 1097 n.12, *Furnco* does provide significant guidance. Indeed, the balance of the Court's opinion in *Furnco* supports our position. The Court recited the facts of the case in detail, 438 U.S. at 569-72, 98 S. Ct. at 2945-2947, and observed that the court of appeals had not found any of the district court's findings of fact to be clearly erroneous, *id.* at 570, 98 S. Ct. at 2946. The Court treated other questions which would be factual matters under our decision in *McLean v. Phillips-Ramsey, Inc., supra*, such as whether the plaintiffs applied for or were qualified for the positions sought, as findings of fact subject to the clearly erroneous standard. 438 U.S. at 573 n.4, 98 S. Ct. at 2947 n.4. In addition, the Court wrote that "from these *factual findings*, the District Court *concluded*" that no prima facie case has been made out, *id.* at 572, 98 S. Ct. at 2947 (emphasis added), and that the court of appeals "was justified in concluding that as a matter of law respondents made out a prima facie case of discrimination under *McDonnell Douglas*." *Id.* at 575, 98 S. Ct. at 2948. Finally, the Court wrote:

> *We think the Court of Appeals went awry, however, in apparently equating a prima facie showing under McDonnell Douglas with an ultimate finding of fact as to discriminatory refusal to hire under Title VII; the two are quite different and that difference has a direct bearing on the proper resolution of this case.* The Court of Appeals, as we read its opinion, thought Furnco's hiring procedures not only must be reasonably related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider the qualifications of the largest number of minority applicants. We think the imposition of that second requirement simply finds no support either in the nature of the prima facie case or the purpose of Title VII.

Id. at 576-77, 98 S. Ct. at 2949 (emphasis added).

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13 [HN24]The district court's findings of fact are subject to the limited clearly erroneous standard of review because the trial court, not the court of appeals, is best equipped to make factual determinations. *See* *Hill York Corp. v. American Int'l Franchises, Inc.*, 448 F.2d 680, 691 (5th Cir. 1971). The cold, lifeless appellate record hardly permits us the same opportunity as the trial court "to judge of the credibility of the witnesses," Fed.R.Civ.P. 52(a), or to resolve factual disputes on which the evidence may admit alternative solutions. We do not lightly substitute our judgment for that of the district court on factual matters because we are in a less favorable position to judge. *See* *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S. Ct. 1562, 1576, 23 L. Ed. 2d 129 (1969).

We have, therefore, generally limited application of the clearly erroneous standard to situations in which we should appropriately defer to the district judge's superior fact-finding expertise. We have properly attempted to avoid applying the clearly erroneous standard to situations in which the district court is not better equipped to make the determination at issue. As we suggested in our decision in *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962), in which we held that [HN25]Rule 52(a) applies even to findings of fact based upon written evidence alone, the clearly erroneous standard does not apply to inferences drawn by the district court by application of a legal standard to the facts which the dis-

trict court has found. *Id.* at 113-15. And as we wrote more recently in *In re J. A. Thompson & Son, Inc.*, 665 F.2d 941, 951 (9th Cir. 1982): "The 'clearly erroneous' standard of review is applied where a trial court resolves disputed issues of fact by reference to the credibility of conflicting evidence. It has no application where the trial judge applies a legal standard to undisputed facts."

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14 Nor do we believe that *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982) (*Pullman-Standard*), requires a different result. There, the Supreme Court held that a district court's finding on whether the differential impact of a seniority system reflected a discriminatory intent is a factual finding subject to the clearly erroneous standard of Rule 52(a). The case is not directly in point. It was not a section 1981 case or even a disparate treatment case; rather it concerned proof that differences in employment conditions under a seniority system resulted from an intent to discriminate. Section 703(h) of Title VII, which prohibits discriminatory seniority systems, provides an exception to the general rule that discrimination in employment can be shown under the disparate-impact theory, a theory that does not require a showing of intent. *See Pullman-Standard, supra*, 102 S. Ct. at 1784. The Court required a showing of actual intent to discriminate via the seniority system and stated that, in the context presented, discriminatory intent was not "a legal presumption to be drawn from a factual showing of something less than actual motive." *Id.* at 1791.

The issue whether actual discriminatory intent exists in the adoption or operation of a seniority system is not necessarily the same as the issue whether discriminatory intent has been proved under the Title VII disparate-treatment model or under section 1981. Moreover, the intent issue, in whichever context it arises, is not necessarily the same as the issue whether a prima facie case of discrimination has been made out by the plaintiff. Further, whether a prima facie case of discrimination has been made out is more properly defined as a legal presumption to be drawn from a variety of factual showings. The *Pullman-Standard* opinion specifically observes that actual intent to discriminate in connection with a seniority system is not a legal presumption to be drawn from some lesser showing. Finally, we would be hesitant to conclude that *Pullman-Standard* requires a different result in light of *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978), which supports the argument that the appropriate standard of review is *de novo*. *See* Note 12, *supra*.

[**40] IV

The waiters characterize this case as "emblematic of the 'modern' employment discrimination lawsuit." It is clear from the record that the waiters were unable to produce any "smoking gun" evidence of overt discrimination: they did not establish the existence of "all-white" departments, come forward with testimony of racial epithets or other clear indications of discriminatory motivation, or produce any direct evidence of intentional discrimination. This failure was not fatal to their case, however, since it is settled that [HN26]a prima facie showing of disparate treatment may be made without any direct proof of discriminatory motivation. Yet we disagree with the waiters' basic argument on appeal: that the facts they did prove were sufficient to establish a prima facie case of disparate treatment as a matter of law. The waiters insist that their evidence demonstrated a "significant underrepresentation" of blacks by both hotels over the course of nearly a decade; the application of numerous "subjective employment practices" that "inevitably invite" discrimination; the treatment of black applicants in a way "that could only lead . . . to discouragement and surrender"; and a "resolute [**41] refusal" by the hotels to "give a damn about the situation or to take any steps of a remedial nature." Yet the waiters have failed to meet their burden of demonstrating that any of the district court's material findings of fact were clearly erroneous, and have failed to convince us that the district court erred when it concluded from these facts that they failed to establish a prima facie case.

The district court found that the waiters were qualified for the positions sought, that they worked as banquet or extra banquet waiters at both hotels on a temporary or part-time basis and frequently made oral inquiries concerning permanent positions, but that they did not produce sufficient evidence to permit a finding as to the date when they orally applied. It was therefore "not possible . . . to determine whether openings existed at the time when any of [the waiters] applied." 489 F. Supp. at 295. Based upon the waiters' own exhibits, the court found that the vast majority of black applicants did not apply for a waiter position at or about the time a non-black was hired. *Id.* In almost all cases, no black had applied for a waiter position ultimately filled by a non-black [**42] within one month of the successful non-black applicant. *Id.* at 295, 296.

These findings of fact are not disputed by the waiters. They argue that the district court erred in concluding from these facts that they failed to establish a prima facie

case of intentional discrimination. As an initial matter, the waiters argue that the district court incorrectly required them to establish that they had filed *written* applications. This argument is unpersuasive. The district court's opinion in no way relied upon the waiters' failure to prove that they had filed written applications. Somewhat similarly, the waiters argue that under *Teamsters* they need not have applied for the positions at all, in writing or otherwise, because they were deterred from doing so. This argument is also unpersuasive. *Teamsters*, a class action, provides [HN27]a limited exception to the rule that the plaintiff in a disparate treatment lawsuit must demonstrate that he or she applied for the position sought. The necessary prerequisite to such a claim is proof of a "consistently enforced discriminatory policy" which discourages applicants from even attempting to apply. *Teamsters, supra*, 431 U.S. at 365, 97 S. Ct. at 1869. [**43] *See Tagupa v. Board of Directors, supra*, 633 F.2d at 1312 n.2. There was no such proof in this case.

The waiters' major argument is that their evidence was sufficient to satisfy *McDonnell Douglas*. They argue correctly that [*547] the district court found that job openings did, in fact, exist. *See* 489 F. Supp. at 296 ("in the general period in which the individual claimants were interested in employment . . . waiters were being hired"). The district court was not clearly erroneous in making this finding. In view of the fact that the St. Francis hired 390 waiters between 1970 and 1979, *see id.* at 308, and the Hilton hired 206 waiters between 1974 and 1979, *see id.* at 309, it would belie reality to find that there were no vacancies in waiter positions at the hotels. The waiters, however, insist that such a "general availability" of jobs is sufficient to satisfy the second *McDonnell Douglas* criterion -- that the plaintiff "applied and was qualified for a job for which the employer was seeking applicants." They contend that where, as here, knowledge of job vacancies is not made generally available, [**44] applicants cannot be expected to make carefully-timed applications.

The waiters have cited some cases from other circuits which may support their position. In *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975), the court held that the plaintiff had established a prima facie case of intentional sex discrimination under *McDonnell Douglas* upon proof that (1) she was qualified for a position, (2) she applied for the job, and (3) openings were filled "within six months" after application. Although the waiters were unable to establish the exact day upon which they applied, their proof clearly established the years in which they applied and that waiters were being hired regularly during those years. Two other cases upon which they rely contain language supporting their position, but are clearly distinguishable on the facts. In *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1016-17 (2d Cir. 1980), *cert. denied*, 452 U.S. 940, 101 S. Ct. 3083, 69 L. Ed. 2d 954 (1981), the Second Circuit reversed a judgment of the district court that the plaintiffs had failed to establish a prima facie case since no jobs were available when [**45] they applied. The court wrote that it was irrelevant that the plaintiffs' failed to apply often enough or at the correct times," *id.*, but only because the employer admitted routinely hiring persons for specific openings before they became available and were announced. In *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 347-48 (10th Cir. 1975), the court held that to establish a prima facie case, a plaintiff need not "point to a specific opening." However, the court expressly limited its holding to promotion cases. "Clearly this [job opening requirement] applies to new employment and is different from an employee who is seeking promotion. The former takes place on a particular day, whereas in the promotion area it invariably arises during a lengthy period of time." *Id.* at 348. Finally, a brief dictum in the Supreme Court's opinion in *Furnco* might appear to indicate that proof of "general job availability" is sufficient to establish a prima facie *McDonnell Douglas* case. The Court stated that the plaintiffs had established a prima facie case upon proof of, among other things, that they were "qualified in every respect for jobs which were [**46] *about to be open.*" *Furnco, supra*, 438 U.S. at 576, 98 S. Ct. at 2949 (emphasis added).

These cases do not persuade us to dispense with the "job opening" requirement. *Chavez v. Tempe Union High School Dist., supra*, 565 F.2d at 1087. [HN28]The function of the *McDonnell Douglas* prima facie case is to eliminate the two most common reasons why an applicant may be rejected: an absolute or relative lack of qualifications, or lack of an open position. *Teamsters, supra*, 431 U.S. at 358 n.44, 97 S. Ct. at 1866 n.44; *see also Burdine, supra*, 450 U.S. at 253-54, 101 S. Ct. at 1093-94. Upon proof of facts sufficient to disprove these two most common reasons for a rejection, courts infer, in light of their experience, that the employment decision was "more likely than not" based upon race. *Furnco, supra*, 438 U.S. at 577, 98 S. Ct. at 2949. If we were to permit a prima facie case to be established solely upon proof that jobs, in general, were available within some unspecified time from the unspecified date at which a plaintiff applied for a position, we would be permitting a plaintiff to raise an inference [**47] of discrimination where he or she has failed [*548] to disprove one of the two common and neutral reasons for a rejection. Thus, we would be permitting an inference of discrimination in situations in which it was not "more likely than not" that the employment decision was based upon race.

Our cases are not to the contrary. In *Chavez v. Tempe Union High School Dist., supra*, 565 F.2d at

1087, [HN29]where the position in question had already been filled when the plaintiff applied, we held that "the failure to prove the existence of a job opening" is a failure as a matter of law to make out a prima facie case of disparate treatment under *McDonnell Douglas*. Id. at 1091. In a failure to promote case, we observed that requiring the job to remain open in the same sense as in a failure to hire case would frustrate the *McDonnell Douglas* test. Hagans v. Andrus, supra, 651 F.2d at 625. We emphasized the "flexibility" of the *McDonnell Douglas* test and held that a position need not necessarily "remain open" under *McDonnell Douglas* when several applicants apply for a job that will necessarily be filled by one of them at a predetermined [**48] time. In one job application case, we did hold that there may be circumstances where, due to the specific facts involved, some flexibility is required in determining whether, as a practical matter, a job opening occurring after an application is made is an open position under *McDonnell Douglas*. *See* McLean v. Phillips-Ramsey, Inc., supra, 624 F.2d at 70. Nevertheless, absent this very narrow and specific exception, the job opening requirement of *Chavez* is the law of this circuit.

In this case, the waiters' own evidence demonstrated that "with only a few exceptions, waiters were hired within a few days of the date of their application." 489 F. Supp. at 296 (footnote omitted). Their own evidence showed that with even fewer exceptions, no black applicant applied at either of the hotels within a month of the date that a non-black was hired. Yet on direct examination, none of the individual plaintiffs was able to recall when he applied for permanent positions at either of the hotels. Having failed to establish the date upon which they applied, and having failed to establish that *any* black applicant applied at the time a job was open or, if the [**49] *McLean* exception were to apply, that a job vacancy occurred within a reasonable time, the plaintiffs failed to establish a prima facie case of intentional discrimination. The district court correctly concluded that the waiters failed to prove that their inability to secure jobs at either hotel was "more likely than not" based upon racial discrimination.

With respect to the Hilton, this conclusion is reinforced by the evidence showing that none of the individual plaintiffs ever applied for waiter positions which were subsequently filled by non-blacks. This does not mean, however, as the Hilton argues, that the waiters failed to raise a prima facie case under our decision in Tagupa v. Board of Directors, supra, in which we held that the plaintiff had not applied for the position in question because he had failed to "complete the application process." 633 F.2d at 1312. There, the application materials the plaintiff furnished, in response to an advertisement, did not include any reference to the job qualifications sought by the employer and requested clearly in the advertisement. The Hilton argues that the individual plaintiffs failed to complete [**50] the application process under *Tagupa* simply because they failed to submit written applications. It is true that the district court found that "all applicants [at the Hilton] must file an application." 489 F. Supp. at 288. Insofar as this finding implies that the Hilton refused to consider a person for any waiter position in the absence of a written application, however, it is clearly erroneous. The Hilton's own witnesses testified that restaurant managers or department heads often sent prospective hirees to the personnel department before the personnel department ever learned of the existence of a job opening. Indeed, they even testified that the hotel's banquet department managers frequently hired waiters for permanent positions without ever notifying the personnel department of the existence of a job opening. Three of the [*549] individual plaintiffs worked on a part-time basis in the Hilton's banquet department and, significantly, the Hilton does not challenge the district court's finding that all were qualified for permanent employment. Combined with the district court's finding that these individuals repeatedly inquired about permanent positions, this [**51] is sufficient to demonstrate that they applied for the job within the meaning of *Tagupa*.

Even had the waiters established a prima facie case, however, the evidence was sufficient to support the conclusion that the Hilton rebutted any inference of discrimination. Appellant Whitman "made oral job requests to the Hilton's banquet manager" during 1975, but received no offer. 489 F. Supp. at 290. This was his sole effort to gain employment at the Hilton. Yet the plaintiffs' own evidence shows that no waiters were hired by the Hilton's banquet department in 1975. Appellant McDowell made repeated inquiries about a permanent job at the Hilton while working there as an extra banquet waiter during 1974. However, the banquet department hired only one new waiter during 1974, a black man. [15] Finally, appellant Dennis made oral inquiries at the Hilton beginning in October 1975, while working there as an extra banquet waiter. He also testified that he "was never able to file an application." 489 F. Supp. at 291. Yet the record shows that the Hilton refused to consider him for any further employment because of a dispute between him and a captain during a banquet. [**52] *Id.* Even more striking is the testimony of appellant McDowell that he was "treated wonderful" while working at the Hilton. This corroborates the testimony of the Hilton's own witnesses, including a black waiter and another black man (presently the manager of the Hilton's largest restaurant), that the Hilton had never discriminated against black applicants and had, in fact, been singled out for praise by black groups for its work in integration.

15 Two white waiters were promoted from busperson positions by the Hilton during 1974. The individual plaintiffs in this case cannot use these promotions to their advantage, however, because the hotels' preference for internal promotions is clearly a legitimate, nondiscriminatory policy which the waiters did not endeavor to prove merely a pretext for intentional discrimination.

Nonetheless, even if we were to assume that the waiters applied for positions at both hotels which subsequently became vacant and were filled by non-blacks, *Chavez* establishes that [**53] a job opening must exist at the time of the application. In addition, even if this were an exception allowed by *McLean*, a job opening would need to be proven to exist at least within a reasonable time of the date of the application. The district court found that the hotels routinely filled open positions extremely quickly by hiring waiters from among those who had applied within the previous several days, but that no black applicant applied within a month of the hiring of a non-black. These findings establish that the waiters failed to prove the necessary link of timeliness between an application and a vacancy, and thus failed to establish a prima facie case.

The district court also concluded that, assuming a prima facie case were established, the hotels had articulated a legitimate, nondiscriminatory reason for their conduct. As we hold that no prima facie case was proven, we need not address this issue in any detail.

V

The waiters' two remaining arguments pertain to both the individual and class claims. They maintain that (1) their statistical evidence, standing alone, was sufficient to establish a prima facie case of disparate treatment; and (2) even if not, the statistical [**54] proof in conjunction with the circumstantial evidence of discrimination presented was sufficient to establish such a prima facie case. As part of their second argument, the waiters contend that the district judge erred in failing to consider their statistical data with respect to their individual claims. As to this final challenge, the waiters are correct; the district judge erred.

[*550] The district judge closely scrutinized the statistical evidence introduced by the waiters and credited the testimony of their expert witness, but did so only with respect to the class claims. With respect to the individual claims, the district court observed that the statistical proof "may be probative," but refused to consider it: "Inasmuch as the statistical proof in this case fails to establish a prima facie case on behalf of the class . . . it is of no help to the individual claimants." 489 F. Supp. at 296 n.9. This was incorrect. We have repeatedly emphasized that [HN30]proof of the four *McDonnell Douglas* criteria is not the only way to establish a prima facie case of disparate treatment, and that the *McDonnell Douglas* approach is to be applied flexibly. In addition, [**55] we have clearly held that, [HN31]if reliable, generalized statistical data is relevant and admissible at the prima facie case stage of a disparate treatment employment discrimination lawsuit. *See, e.g.,* *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 866 (9th Cir. 1982); *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1342-43 & 1342 n.3 (9th Cir. 1981); *Heagney v. University of Washington*, 642 F.2d 1157, 1164 (9th Cir. 1981); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 762 & n.10 (9th Cir. 1980); *White v. City of San Diego, supra*, 605 F.2d at 459-60. This is true whether or not the statistical data introduced is sufficient of itself to establish a prima facie case. Since the question is one of inferring discriminatory intent, the district court should make a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 563, 50 L. Ed. 2d 450 (1977) (*Arlington Heights*), including any reliable statistical data offered by the plaintiff, in order [**56] to determine whether the facts so proved constitute prima facie evidence of discriminatory intent. [HN32]The legal standard to be applied is simply whether the facts proved are sufficient to permit the court to infer, absent explanation, that the employment decision was more likely than not the product of intentional discrimination. *Furnco, supra*, 438 U.S. at 576; *White v. City of San Diego, supra*, 605 F.2d at 458. Of course, if the claim analyzed is individual rather than class, the statistics must be relevant to the particular plaintiff's claim. But all evidence, both direct and circumstantial, statistical and nonstatistical, relevant to that question should be assessed on a cumulative basis. *EEOC v. American National Bank*, 652 F.2d 1176, 1189 (4th Cir. 1981). This error does not, however, require reversal and remand for the district judge to determine whether adding the statistical data would demonstrate a prima facie case. The district judge has already passed upon the factual aspects of the statistical data. A legal question remains. On this record, we conclude that the district court's error was harmless. With respect [**57] to both the individual and class claims, neither the statistical data standing alone, nor in combination with the circumstantial evidence of discrimination offered by the waiters, was sufficient as a matter of law to establish a prima facie case of disparate treatment.

The district judge undertook an exhaustive analysis of the statistical evidence introduced by the waiters. He determined that the appropriate comparison was between the percentage of blacks hired by the hotels and the percentage of blacks in "a labor market consisting of all males, aged 21 to 64, in the civil labor force in the

weighted San Francisco/Oakland SMSA as shown in the 1970 census." 489 F. Supp. at 307. The district judge appropriately focused on the reliability of this statistical data, and his factual assessment of the data was not clearly erroneous. *See White v. City of San Diego, supra,* 605 F.2d at 460-61. The district judge found that the relevant labor "pool" produced a black "availability figure" of 11.1%. 489 F. Supp. at 307. Because the waiters failed to support their claim that the hotels changed their hiring practices during the course of the lawsuit [**58] so as to increase the proportion of blacks hired as waiters, *id.* at 308, and because the bulk of the evidence presented by both sides related to events following the filing of the complaint, *id.* at 308 n.32, the district judge [*551] analyzed the statistical data for the entire relevant period. [16] Based upon a comparison of the actual number of blacks hired and the expected number which would have been hired had the hotels hired at a rate equivalent to the proportion of blacks in the relevant labor pool, the district judge computed the so-called "Z statistic," which measures the degree to which the expected results differ from the actual results. *Id.* at 308-09 & n.33.

16 The waiters do not challenge the admission of post-complaint statistics or the district court's analysis of the data for the entire period up to and including 1979.

This comparison revealed that the actual percentage of blacks hired by the St. Francis between 1970 and 1979 was 7.2%, [**59] while the percentage of blacks hired by the Hilton between 1974 and 1979 was 8.3%. Expressed in terms of standard deviations or the Z statistic, the variance between the percentage of blacks hired by the St. Francis and the black availability figure of 11.1% was 2.46; the correlative figure for the Hilton was 1.30. Expressed in terms of the probability of a random or chance occurrence, these standard deviations translate into a chance probability of 1.38% for the St. Francis, and 19.36% for the Hilton. *Id.* [17]

17 Apparently, there is an error in the district court's figures for the St. Francis. For 1979, the district court wrote that the St. Francis hired 13 blacks for 29 positions filled, providing final figures of 38 blacks hired out of a total of 390 during 1970-1979. *See* 489 F. Supp. at 308. However, these figures would translate into a black percentage figure of 9.7% and a Z statistic of -0.82, as opposed to the respective 7.2% and -2.46 figures provided by the district court. Quite obviously, a variance of less than 1 standard deviation between an expected figure of 11.1% and an observed figure of 9.7% is far too low to permit a court to infer that the difference was intentional.

In order to correspond with the other figures provided by the district court, the St. Francis must have hired only 3 blacks in 1979, for a total of 28 blacks during 1970-1979. During oral argument, counsel for the St. Francis pointed out this apparent error, but failed to indicate what the correct figures were. The waiters have been inconsistent. On the one hand, they argue that the "sharp increase" in minority hiring by the St. Francis during 1979 should have been considered by the trial court; they rely on the larger figures in support of this argument. On the other hand, they rely on the smaller figures, and the corresponding larger Z statistic of 2.46, in support of their analysis of the statistical data. We need not, however, decide whether the district court made a computation error. In either event, we would come to the same conclusion.

[**60] The district court concluded that these statistical disparities were not sufficiently "gross and long-lasting" to support an inference of purposeful discrimination. 489 F. Supp. at 311. The waiters, however, argue that the court erred by looking for a single, fixed Z statistic as a "cut-off point" clearly delineating intentional from unintentional discrimination. This is correct only insofar as it is a statement of the law relating to statistical proof. It would be improper to posit a quantitative threshold above which statistical evidence of disparate racial impact is sufficient as a matter of law to infer discriminatory intent, and below which it is insufficient as a matter of law. Indeed, if any rule of law can be isolated from the Supreme Court's decisions in *Castaneda v. Partida,* 430 U.S. 482, 496 n.17, 97 S. Ct. 1272, 1281 n.17, 51 L. Ed. 2d 498 (1977), and *Hazelwood School Dist. v. United States, supra,* 433 U.S. at 307, 308 n.14, 97 S. Ct. at 2741 n.14, it is that for sufficiently large samples, a variance between expected and observed results of *greater than* 2 or 3 standard deviations is sufficient to make the data "suspect" [**61] for a social scientist. However, the statistical differences which the Court in these cases held were sufficient to support an inference of intentional discrimination, respectively 12 and 5 to 6 standard deviations, are far greater than those which would be "suspect" to the social scientist, and significantly greater than the 2.46 and 1.30 standard deviations found in this case. We agree with the Fourth Circuit that [HN33]courts should be "extremely cautious" of drawing any inferences from standard deviations in the range of 1 to 3. *EEOC v. American National Bank, supra,* 652 F.2d at 1192. Indeed, the difference in this case between the expected result of 11.1% and the actual results of 7.2% and 8.3% "may be sufficiently [*552] small to weaken the [waiters'] other proof." *Hazelwood School Dist. v. United States, supra,* 433 U.S. at 311, 97 S. Ct. at 2743. The district court, therefore, properly concluded that the

degree of disparate impact shown by the waiters' statistical data was insufficient to establish a prima facie case of intentional discrimination. Although statistical data may, in a proper case, be sufficient alone to raise a prima facie [**62] case, the statistics must be considerably more stark than those involved here.

Nonetheless, the waiters insist that a prima facie case is established if the statistical evidence introduced "rejects the random hypothesis." They argue that there are only three possible explanations for any specific rejection of a minority applicant: lack of qualifications, racial discrimination, or chance. Therefore, the waiters contend that since data indicating standard deviations of between 2 and 3 is "statistically significant," and reflects probabilities of random occurrence declining from 5% at 2 standard deviations to less than 1% at 3, such data is sufficient to reject chance as a possible explanation. Since the district court found that they were qualified, and rejected the hotels' attempts to impeach the waiters' statistical evidence by demonstrating a lack of qualified blacks in the general labor pool and a relative lack of blacks in the "applicant flow," see 489 F. Supp. at 312-15, the waiters argue that race -- the only remaining explanation -- has been shown to be "more likely than not."

We disagree. It must always be remembered that "regardless of how devastating or [**63] reliable the statistics may look, the issue remains in [disparate treatment] cases whether a particular isolated historical event was discriminatory." *Ward v. Westland Plastics, Inc.*, 651 F.2d 1266, 1270 (9th Cir. 1980) (per curiam). The waiters make the same error of which they accuse the district court, namely taking a quantitative approach to the question of inferring discriminatory intent from statistical evidence. Their purely statistical analysis would almost completely blur the distinction between "impact" and "intent," and thus eliminate the legal difference between disparate impact and disparate treatment lawsuits. The latter would be transformed almost exactly into a duplicate of the statistically-oriented prima facie showing allowed under *Griggs v. Duke Power Co. See Teamsters, supra*, 431 U.S. at 335-36 n.15, 97 S. Ct. at 1854 n.15.

This would be both improper and unwise. The question whether the facts proved are sufficient to permit a legal inference of discriminatory intent cannot properly be reduced into a mere battle of statistics. "Discriminatory impact," as shown by statistical evidence, is a starting point, and an important [**64] starting point, to that inquiry, but is rarely sufficient of itself. *Arlington Heights, supra*, 429 U.S. at 252, 97 S. Ct. at 556. [HN34]Whatever the impact demonstrated by a plaintiff's statistical evidence is in fact, the legal question is whether that impact is sufficiently gross or stark that a court must infer that it was intended by the defendant. That an employer was aware of, or totally indifferent to the racially discriminatory impact of its hiring policies is not of itself sufficient to establish a prima facie case and shift the burden of explanation to the defendant. After all, discriminatory intent "implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 2296, 60 L. Ed. 2d 870 (1979) (footnotes and citation omitted). *See General Building Contractors Ass'n v. Pennsylvania, supra*, 102 S. Ct. at 3150.

[HN35]In order to establish a prima facie [**65] case of disparate treatment based solely on statistical evidence, the plaintiff must produce statistics showing "a clear pattern, unexplainable on grounds other than race." *Arlington Heights, supra*, 429 U.S. at 252, 97 S. Ct. at 556. "But such cases are rare." *Id.* Absent a "stark" pattern, "impact alone is not determinative, and the court must look to other evidence." *Id.* (footnotes [*553] omitted). It is vitally important, therefore, to remember that "statistically significant" results are not necessarily "legally significant" results. As the district court recognized, "the probability of random occurrence of a value is not the obverse of the probability that is the result of deliberate action." 489 F. Supp. at 311 n.38. Simply put, statistics demonstrating that chance is *not* the more likely explanation are not by themselves sufficient to demonstrate that race *is* the more likely explanation for an employer's conduct.

Our review does not end with our conclusion that the waiters' statistical evidence, standing alone, was insufficient to establish a prima facie case. As we explained earlier, [HN36]a plaintiff may establish a prima facie [**66] case of disparate treatment, even without direct proof of the four *McDonnell Douglas* elements, with a combination of direct, circumstantial and statistical evidence of discrimination. Indeed, the best prima facie case utilizing statistical data, one allowing the strongest inference of intentional discrimination outside of the *McDonnell Douglas* framework, is that in which the plaintiff's statistical proof is "bolstered" by other circumstantial evidence of discrimination bringing "the cold numbers convincingly to life." *Teamsters, supra*, 431 U.S. at 339, 97 S. Ct. at 1856. Statistics "come in infinite variety . . . . Their usefulness depends on all of the surrounding facts and circumstances." *Hazelwood School Dist. v. United States, supra*, 433 U.S. at 312, 97 S. Ct. at 2743, *quoting Teamsters, supra*, 431 U.S. at 340, 97 S. Ct. at 1856. We therefore turn to the waiters' final argument on the merits: that their statistical data, in conjunction with the circumstantial evidence of discrimination

they produced at trial, was sufficient to establish a prima facie case of disparate treatment.

The waiters' argument revolves around [**67] five discrete types of circumstantial evidence of discrimination. First, the waiters ask us to inquire into the "historical context out of which the challenged practices arise." [HN37]As a legal matter, the waiters are correct that such considerations are relevant and should be considered by the trier of fact. *See* Hazelwood School Dist. v. United States, *supra*, 433 U.S. at 309 n.15, 97 S. Ct. at 2742 n.15; *Arlington Heights, supra*, 429 U.S. at 267, 97 S. Ct. at 564. However, nothing in the record supports their contention that since the turn of the century, waiter jobs in San Francisco have been continually reserved for whites. The waiters rely only on secondary sources, probably hearsay, which were never introduced into evidence during trial.

Second, the waiters point to an asserted "series of obstacles" confronting applicants at the hotels, which they characterize as "something out of a Kafka novel." For instance, they refer to their trial testimony that security guards stationed immediately inside the hotel entrances often refused to let would-be applicants in, or only permitted them through after considerable difficulty. They also cite the testimony [**68] of appellant Whitman that he was given the "run-around" by the union and the hotels, each indicating that the other had to refer him before a job could be offered. These references are unpersuasive for several reasons. The district court was not required to, and did not, credit this testimony completely. *See* 489 F. Supp. at 300 ("some prospective applicants . . . encountered difficulties" in attempting to apply). Moreover, nothing in the record demonstrates that applicants at the Hilton encountered any of the asserted "obstacles"; one of the waiters' own testimony was that he encountered "no problems" in securing a job there. Finally, such isolated instances of "suspicious circumstances," even if proved, are of limited probative value. The record does not show any clear pattern of obstacles confronting black applicants as a class or any of the individual plaintiffs. Absent such a pattern, any inference of discrimination drawn from the isolated experiences they testified to is insignificant, and cannot appreciably bolster their weak statistical data.

The waiters, in addition, rely on three considerably more relevant types of circumstantial evidence of discrimination: [**69] the variety of "subjective employment practices" [*554] utilized by the hotels, the "foreseeable adverse impact" of these practices, and the sharp increases in the number of black waiters hired by both hotels, particularly the St. Francis, after the trial date was set in 1976. With respect to the subjective employment practices, the waiters point to the district court's finding that the hotels employed "vague, unwritten" hiring criteria, including appearance, demeanor and job stability, the implementation of which was left to the discretion of the individual restaurant managers. [18] *See* 489 F. Supp. at 300. They add that by leaving hiring decisions to the restaurant managers, both hotels engaged in "decentralized hiring," and further that both utilized "word-of-mouth recruitment." They insist that such subjective employment practices are *per se* suspect because of their capacity for masking racial bias. *See* Barnett v. W.T. Grant Co., 518 F.2d 543, 559 (4th Cir. 1975). With respect to the foreseeable adverse impact of these practices, the waiters contend that the hotels maintained the same hiring procedures with the knowledge that they had [**70] been challenged as racially discriminatory and had produced percentages of black waiters considerably less than the prevailing national rate. Finally, the waiters contend that the St. Francis's increased rate of black hires after the case was set for trial, particularly during 1979 in which 13 out of 29, or nearly 45% of those hired, were blacks, suggests that the hotel's earlier, lower rates were the product of intentional discrimination.

18 The waiters also argue that these subjective evaluations were made by "a predominantly white supervisorial staff." Not only is there nothing in the record to support this assertion, but it is patently false with respect to the Hilton. The Hilton's dining room managers include one Asian, one Hispanic, one Black and one Caucasian. Moreover, such proof would at best be of extremely limited probative value. The law does not infer that an individual will exercise or has exercised subjective, discretionary responsibilities in an intentionally discriminatory manner merely from the color of his skin. *See* Rich v. Martin Marietta Corp., 522 F.2d 333, 338-39 (10th Cir. 1975).

[**71] Insofar as the waiters may argue that any of these three types of circumstantial evidence alone compels an inference of intentional discrimination sufficient to establish a prima facie case, we disagree. For example, we have clearly held that [HN38]the use of "subjective" employment criteria is not *per se* unlawful. Ward v. Westland Plastics, Inc., *supra*, 651 F.2d at 1270. On the other hand, we reject the hotels' argument that this is sufficient to dispose of the waiters' claims. Even if, standing alone, each of these three types of circumstantial evidence fails to establish a prima facie case, the proper question is whether in combination they are sufficient to support an inference of intentional discrimination. Indeed, we have recently stated that [HN39]"subjective decision-making strengthens an inference of discrimination from general statistical data . . . ." O'Brien v. Sky Chefs, Inc., *supra*, 670 F.2d at 867. *See*

also Davis v. Califano, 198 U.S. App. D.C. 224, 613 F.2d 957, 965 (D.C.Cir.1979).

This circumstantial evidence, however, does not appreciably bolster the waiters' weak statistical proof. The district court stated that [**72] the hotels' "subjective" practices "may have tended to exclude blacks." 489 F. Supp. at 300. We agree that such subjective practices may provide "ready mechanisms for discrimination," *Smith v. Union Oil Co. of California*, 17 Fair Empl.Prac.Cas. 960, 991 (N.D.Cal.1977), because they may make it "easier for those who are of a mind to discriminate." *Alexander v. Louisiana*, 405 U.S. 625, 631, 92 S. Ct. 1221, 1225, 31 L. Ed. 2d 536 (1972). Yet it is clear that while each of these practices could magnify whatever racially discriminatory predispositions existed within the hotels, their mere existence does not significantly aid the waiters' effort to prove facts allowing an inference that the defendants acted with discriminatory intent. The fact that hiring criteria or practices are subjective, and are thus susceptible to discriminatory application, is only marginally relevant to the question of discriminatory intent in the absence of proof that the criteria were, in fact, applied in a discriminatory manner. [19] [*555] Holding otherwise would be the legal equivalent of the rule, overturned by the Supreme Court, that the foreseeable [**73] adverse impact of a neutral employment practice on a particular race is prima facie evidence of intentional discrimination. *See Personnel Administrator v. Feeny, supra*, 442 U.S. at 279, 99 S. Ct. at 2296. [HN40]While a court should properly consider whether an employer has adhered to a particular practice with full knowledge of its foreseeable effects upon the racial balance of the work force, *see Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65, 99 S. Ct. 2941, 2949-2950, 61 L. Ed. 2d 666 (1979), and should also consider especially dramatic increases in minority hiring as circumstantial evidence of prior intentional discrimination, *see Rich v. Martin Marietta Corp., supra*, 522 F.2d at 346, these are simply factors to be considered in making a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights, supra*, 429 U.S. at 266, 97 S. Ct. at 563. Their weight depends upon all of the circumstances involved in the case. Having made such a sensitive inquiry, we conclude that the waiters' statistical and circumstantial evidence, properly viewed together, was markedly [**74] insufficient to establish a prima facie case of disparate treatment. Although it was error for the district court to refuse to review the waiters' statistical and circumstantial evidence with respect to the individual claims, the error was harmless; the waiters' evidence does not, as a matter of law, raise an inference that race was the more likely reason for their rejection.

19 It may be that the subjective nature of an employer's hiring procedures or criteria is relevant to a demonstration of pretext by the employment discrimination plaintiff. *See Royal v. Missouri Highway & Trans. Comm'n*, 655 F.2d 159, 164 (8th Cir. 1981); *Lynn v. Regents of the University of California, supra*, 656 F.2d at 1344. This would be consistent with the principle that [HN41]subjective hiring practices are not unlawful *per se* merely because they are susceptible to discriminatory application and, indeed, may be considered legitimate, nondiscriminatory reasons for an applicant's rejection. For example, few would doubt that appearance and demeanor are qualities the lack of which should provide a restaurant with a legitimate, neutral explanation for its failure to hire a given waiter applicant. However, we need not decide in this case to which particular stage or stages of a *McDonnell Douglas* lawsuit the subjectivity of hiring criteria is relevant.

[**75] VI

We emphasize that while the requirement of proving a prima facie case of disparate treatment is not an "onerous" burden, it is a burden nonetheless. Sanctioning too low a legal standard for inferring discriminatory motivation would encourage harassing, baseless lawsuits, force employers to justify their conduct upon only the slim reed of the highly speculative inference that an employer did not act "randomly" or utilized practices that were "susceptible" to discriminatory application, and would thrust the federal courts directly into the business of prescribing detailed, objective and mandatory hiring guidelines. This is a step we would not lightly take. *See Furnco, supra*, 438 U.S. at 578, 98 S. Ct. at 2950. Here, the waiters were unable to prove the four factual *McDonnell Douglas* criteria and avail themselves of the strong inference of discriminatory intent such proof entails. Their statistical and circumstantial evidence showed that the hotels, in particular the St. Francis, entered the decade of the 1970s with levels of black waiters considerably lower than those common in other cities and in the nation as a whole, hired black waiters through the [**76] remainder of the decade at a rate somewhat lower than that which would have reflected a work force balanced according to the racial lines of the surrounding communities, and maintained hiring procedures that could have exacerbated the imbalance. But all this simply demonstrates that the hotels did not quickly embrace the concept of affirmative action for minorities and did not go out of their way to ensure that their hiring practices would maximize the number of black and minority waiters hired. It does not demonstrate circumstances from which a court must infer that the hotels more likely

than not intended to discriminate against the individual black claimants or against black applicants [*556] as a class. [HN42]Neither Title VII nor section 1981 "imposes a duty [upon employers] to adopt a hiring procedure that maximizes hiring of minority employees." *Furnco, supra*, 438 U.S. at 577-78, 98 S. Ct. at 2949-2950.

AFFIRMED.

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LEXSEE

Positive
As of: May 06, 2010

PRITHIBEE S. GHOSE, Plaintiff, - against - CENTURY 21, INC. and JAMES BETESH, Defendants.

97 Civ. 6161 (VM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

108 F. Supp. 2d 373; 2000 U.S. Dist. LEXIS 11884; 79 Empl. Prac. Dec. (CCH) P40,362

August 18, 2000, Decided
August 18, 2000, Filed

DISPOSITION: [**1] Defendants' motion of summary judgment granted in its entirety.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants, employer and employee, moved for summary judgment as to plaintiff employee's action, which alleged national origin and racial discrimination by defendants under various federal and state statutes.

OVERVIEW: Plaintiff employee brought an action against defendants, employer and employee, alleging national origin and racial discrimination by defendants. The court granted defendants' motion for summary judgment. Plaintiff failed to meet his burden to demonstrate circumstances that give rise to an inference of national origin discrimination and therefore could not establish a prima facie case of discrimination. In addition, 42 U.S.C.S. § 2000e-5(b) barred plaintiff from bringing other causes of action not included in his original Equal Employment Opportunity Commission complaint.

OUTCOME: Defendants' motion for summary judgment was granted because plaintiff failed to establish a prima facie case of discrimination and three of plaintiff's claims were barred.

CORE TERMS: national origin, summary judgment, prima facie case, retaliation, discriminatory, preclusion, hostile, fired, work environment, issue of fact, retaliatory, accent, security guard, causes of action, wrongful termination, issue of material fact, protected class, giving rise, discriminated, speculation, accusation, inferred, viewing, manager, trier, hired, state law, employment decision, fact finder, federal claim

LexisNexis(R) Headnotes

Governments > Legislation > Statutes of Limitations > Time Limitations
Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Time Limitations > General Overview
[HN1]Federal law requires timely filing of discrimination charges with the Equal Employment Opportunity Commission (EEOC). 42 U.S.C.S. § 2000e-5(b). In a state which has a fair employment agency, such as New York, charges must be filed with the EEOC within either 300 days of the alleged discrimination or 30 days of notice of termination of state proceedings, whichever occurs first. 42 U.S.C.S. § 2000e-5(e)(1). A district court lacks jurisdiction over discrimination claims that are not included in the EEOC complaint.

Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Time Limitations > General Overview

[HN2]As a general rule, where a plaintiff fails to file a timely charge with the Equal Employment Opportunity Commission (EEOC) with respect to a specific claim of discrimination, that claim is barred from future litigation. There are, however, exceptions to this rule regarding untimely claims, for a court may consider claims absent from the EEOC charge if such claims are "reasonably related" to allegations actually set forth in the charge.

Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Time Limitations > General Overview

[HN3]Three circumstances are recognized satisfying the "reasonably related" requirement for a court to consider untimely Equal Employment Opportunity Commission (EEOC) discrimination claims. The first, loose pleadings, encompasses claims in which the conduct complained of falls within the scope of the EEOC investigation that reasonably would be expected to ensue from the original charge of discrimination. Because EEOC charges are usually filed without the advice of counsel and merely in order to alert the EEOC to the alleged discrimination, loose pleadings are generally accepted.

Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Time Limitations > General Overview

[HN4]The second recognized circumstance satisfying the "reasonably related" requirement for a court to consider untimely Equal Employment Opportunity Commission (EEOC) discrimination claims is that an employer's alleged retaliatory acts following the EEOC charge normally satisfy the reasonably related requirement. Such claims of retaliation are excepted from the EEOC preclusion rule because in the typical case, employers are alleged to retaliate upon learning of the EEOC charge or investigation.

Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Time Limitations > General Overview

[HN5]The final common exception to the Equal Employment Opportunity Commission (EEOC) preclusion rule arises where subsequent discrimination of the same type alleged in the EEOC complaint occurs, and such further incidents transpire in precisely the same manner as established in the EEOC complaint. This final exception protects a plaintiff from the inconvenience and burden of having to file a separate EEOC complaint for additional instances of the same discriminatory behavior.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Civil Procedure > Summary Judgment > Standards > General Overview

[HN6]A motion for summary judgment may be granted only if, upon review of the material submitted in support of and against the motion, the court determines that there is no genuine issue of material fact to be tried, and the facts to which there is no triable issue warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56. The moving party bears the burden of demonstrating the absence of any issues of material fact. In weighing the evidence to determine if any genuine issue of fact exists, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party.

Civil Procedure > Summary Judgment > Standards > Materiality

[HN7]A court cannot determine the merits or issues of fact, or assess the credibility of evidence on a motion for summary judgment; it can only ascertain whether there are disputed issues of material fact to be decided by the eventual trier of fact.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview

[HN8]See 42 U.S.C.S. § 2000e-2(a)(1).

Labor & Employment Law > Discrimination > National Origin Discrimination > Coverage & Definitions

[HN9]National origin, under Title VII, 42 U.S.C.S. § 2000e et seq., refers to the country where a person was born, or more broadly, the country from which a person's ancestors came.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > General Overview

[HN10]To survive a motion for summary judgment on a claim under Title VII, 42 U.S.C.S. § 2000e et seq., a plaintiff must establish a prima face case of discrimination.

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview

[HN11]In order to establish a prima facie case of discrimination in violation of Title VII, 42 U.S.C.S. § 2000e et seq., a plaintiff who claims to have been discharged for discriminatory reasons must show that (1) he belongs

to a protected class; (2) he was qualified for the job from which he was fired; (3) he was fired; and (4) the discharge occurred under circumstances giving rise to an inference of discrimination.

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
[HN12]If a plaintiff successfully establishes a prima facie case of discrimination, then it becomes defendant's burden to proffer, through sufficient admissible evidence, a legitimate, non-discriminatory reason for the employee's dismissal. Upon such a showing by defendant, plaintiff then must demonstrate through admissible evidence that the employer's justification for dismissal was pretextual. Because such evidence must be sufficient to permit a rational fact finder to infer that the adverse employment decision was, more likely than not, motivated by discriminatory animus, evidence barely sufficient to establish a prima facie case may not be sufficient to establish discrimination after a defendant has offered a neutral rationale.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Scintilla Rule
Civil Procedure > Summary Judgment > Evidence
Civil Procedure > Summary Judgment > Standards > General Overview
[HN13]Although it is not the court's task to weigh or assess the credibility of the evidence submitted, summary judgment cannot be defeated by either a "scintilla of evidence" or through mere speculation; a trier of fact must be able to find for the non-movant.

Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Adverse Employment Actions > Discharges & Failures to Hire
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof
[HN14]To establish a prima facie case for a disparate treatment claim under Title VII, 42 U.S.C.S. § 2000e et seq., requires that the plaintiff was both qualified for the job and satisfied his employer's normal requirements in his work.

Civil Procedure > Summary Judgment > Standards > General Overview
[HN15]A district court should hesitate in granting summary judgment where an employer's intent is at issue.

Civil Rights Law > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Protected Parties
Labor & Employment Law > Discrimination > Public Contracts > General Overview
[HN16] 42 U.S.C.S. § 1981 prohibits discrimination on the basis of race in the making and enforcement of contracts. 42 U.S.C.S. § 1981(a). This section, however, does not prohibit discrimination based on national origin.

COUNSEL: For PRITHIBEE S. GHOSE, plaintiff: Anthony Chukwuka Ofodile, Anthony Ofodile, Esq., Brooklyn, NY. Michael R. Bressler, New York, NY.

For CENTURY 21, INC., JAMES BETESH, defendants: A. Robert Fischer, Jackson Lewis Schnitzler & Krupman, New York, NY. A. Robert Fischer, Jackson, Lewis, Schnitzler & Krupman, Stamford, CT. Patricia M. Canavan, Jackson Lewis Schnitzler & Krupman, Stamford, Ct.

JUDGES: Victor Marrero, United States District Judge.

OPINION BY: VICTOR MARRERO

OPINION

[*374] **DECISION & ORDER**

VICTOR MARRERO, United States District Judge.

Plaintiff Prithibee Ghose ("Ghose") brings this action alleging national origin and racial discrimination by defendants Century 21, Inc., a retail department store, and James Betesh ("Betesh"), an employee of the store (collectively, "Century 21"). Century 21 has moved for summary judgment on all claims set forth in the Third Amended Complaint, arguing, *inter alia*, that Ghose has not established a prima facie case of discrimination and that some of his claims are precluded because they were not filed with the Equal Employment Opportunity Commission ("EEOC"). For the [**2] reasons set forth below, the Court grants the motion in its entirety.

FACTS

Century 21 employed Ghose as a security guard in the Loss Prevention Department of its Manhattan store starting in May 1991. In the spring of 1995, in response to an increased amount of theft, Century 21 transferred Betesh from its Brooklyn store to the Manhattan location to serve as Director of Loss Prevention. In January 1996, citing problems with his conduct and performance, Century 21 fired Ghose.

Ghose, who is of Bangladeshi origin, alleges four causes of action under the following statutes: (1) 42

U.S.C. § 1981 ("Section 1981"); (2) 42 U.S.C. § 2000e *et seq.* ("Title VII"); (3) New York State Human Rights Law (N.Y. Exec. Law § 290 *et seq.*); and (4) New York City Human Rights Law (New York City Administrative Code § 8-107). Ghose alleges that Century 21, through its employees, and [*375] Betesh in particular, violated all four statutes by considering Ghose's national origin in connection with his compensation, promotion, discipline and discharge; making inappropriate and derogatory remarks about Ghose's accent and national origin; warning Ghose [**3] against associating with African-American employees; fostering a racially hostile work environment; retaliating against and harassing Ghose for registering complaints of discrimination; and failing to interview, hire or promote qualified minority workers for both management and subsidiary positions. See Compl. P18. Ghose seeks compensatory damages in the form of back pay, reinstatement, damages for emotional distress, punitive damages and attorney's fees. See Compl. PP28, 32, 35.

DISCUSSION

I. EEOC Preclusion

[HN1]Federal law requires timely filing of discrimination charges with the EEOC. See 42 U.S.C. § 2000e-5(b); Tadros v. Coleman, 898 F.2d 10, 11 (2d Cir. 1990), cert. denied, 498 U.S. 869, 112 L. Ed. 2d 149, 111 S. Ct. 186 (1990). In a state which has a fair employment agency, such as New York, charges must be filed with the EEOC within either 300 days of the alleged discrimination or 30 days of notice of termination of state proceedings, whichever occurs first. See 42 U.S.C. § 2000e-5(e)(1) (2000). A district court lacks jurisdiction over discrimination claims that [**4] are not included in the EEOC complaint. See Wilson v. Fairchild Republic Co. Inc., 143 F.3d 733, 739 (2d Cir. 1998).

The purpose of the notice provision is to encourage settlement. This objective would be undermined if new claims not presented to the EEOC were allowed to be litigated. See Miller v. ITT Corp., 755 F.2d 20, 26 (2d. Cir 1984), cert. denied, 474 U.S. 851, 88 L. Ed. 2d 122, 106 S. Ct. 148 (1985). [HN2]As a general rule, where a plaintiff fails to file a timely charge with the EEOC with respect to a specific claim of discrimination, that claim is barred from future litigation. See Butts v. City of New York Dep't of Hous. Preservation & Dev., 990 F.2d 1397, 1401 (2d Cir. 1993). There are, however, exceptions to this rule regarding untimely claims, for a court may consider claims absent from the EEOC charge if such claims are "reasonably related" to allegations actually set forth in the charge. See Shah v. New York State Dep't of Civil Serv., 168 F.3d 610, 614 (2d Cir. 1999); Kirkland v. Buffalo Bd. of Educ., 622 F.2d 1066, 1068 (2d Cir. 1980).

[HN3]Three circumstances have been recognized [**5] satisfying the "reasonably related" requirement. The first, loose pleadings, encompasses claims in which the conduct complained of falls within the scope of the EEOC investigation that reasonably would be expected to ensue from the original charge of discrimination. See Smith v. American President Lines, Ltd., 571 F.2d 102, 107, (2d Cir. 1978). Because EEOC charges are usually filed without the advice of counsel and merely in order to alert the EEOC to the alleged discrimination, loose pleadings are generally accepted. See Butts, 990 F.2d at 1397.

[HN4]Second, an employer's alleged retaliatory acts following the EEOC charge normally satisfy the reasonably related requirement. See id. at 1402; Malarkey v. Texaco, Inc., 983 F.2d 1204, 1209 (2d Cir. 1993); Owens v. New York City Hous. Auth., 934 F.2d 405, 410-11 (2d Cir. 1990), cert. denied, 502 U.S. 964, 116 L. Ed. 2d 451, 112 S. Ct. 431 (1991). Such claims of retaliation are excepted from the EEOC preclusion rule because in the typical case, employers are alleged to retaliate upon learning of the EEOC charge or investigation. [HN5]The final [**6] common exception to the EEOC preclusion rule arises where subsequent discrimination of the same type alleged in the EEOC complaint occurs, and such further incidents transpire in "precisely the same manner" as established in the EEOC complaint. See Butts, 990 F.2d at 1403. This final exception protects a plaintiff from the inconvenience and burden [*376] of having to file a separate EEOC complaint for additional instances of the same discriminatory behavior. See id.

Century 21 argues that Ghose's claims of discrimination based on his association with African-American coworkers, a hostile work environment and retaliation are precluded because these claims were not alleged in Ghose's original filing with the EEOC, which charged only racial and national origin discrimination. Ghose has not attempted to refute this argument in his opposition papers to the present motion.

Ghose's EEOC complaint, filed in January, 1996, describes in minor detail the circumstances surrounding Ghose's dismissal. It contains no references whatsoever to a hostile work environment, mistreatment for associating with African-American employees or retaliatory harassment. Furthermore, because all [**7] of Ghose's allegations occurred during his tenure at Century 21, and prior to filing with the EEOC, Ghose ostensibly could have included these charges in his EEOC complaint.

None of Ghose's three additional claims satisfies any of the recognized exceptions to the EEOC preclusion rule. The retaliatory act alleged was not Ghose's dis-

missal by Century 21, but rather "harassment" and "accusations" committed by Betesh prior to Ghose's EEOC filing. See Plaintiff's Memorandum of Law in Opposition to Motion for Summary Judgment, dated Dec. 29, 1999 ("Plaintiff's Memo"), at 4. In this respect, Ghose's retaliation claim is atypical of the common instances of retaliation sustained by case law. The Butts court, in explaining the justification for the retaliation exception, stressed the perverse effect of requiring a plaintiff to file a second EEOC complaint to encompass retaliatory conduct that occurred as a result of the first charge. See Butts, 990 F.2d at 1402. But in this case, Ghose would not have had to file a second EEOC complaint because the retaliation he asserted in the case before this Court occurred prior to Ghose's dismissal and subsequent EEOC filing.

[**8] In addition, these additional claims do not satisfy the third exception to the preclusion rule because the specifics associated with each of the claims for hostile work environment, discrimination by discouraging association with African-American employees, and retaliation did not occur, as required by Butts, in "precisely the same manner" as Ghose's alleged termination by reason of race or national origin. See id. at 1403. Furthermore, these three claims could not reasonably have been expected to be contemplated within the scope of the EEOC investigation prompted by Ghose's original claim of wrongful termination. Ghose made no indication on the EEOC complaint that he had been discriminated against in any way other than being wrongfully terminated, referring only to his discharge and claims that he was fired on account of his national origin. Viewing Ghose's EEOC complaint in its most favorable light and drawing reasonable inferences in his favor, the absence of any mention of circumstances related to these three additional claims further evidences that such claims would not reasonably fall under the scope of an EEOC investigation in connection with the original [**9] claim for wrongful termination. Accordingly, Ghose may not litigate these causes of action before this Court.

II. Summary Judgment Standard

[HN6]A motion for summary judgment may be granted only if, upon review of the material submitted in support of and against the motion, the Court determines that there is no genuine issue of material fact to be tried, and the facts to which there is no triable issue warrant judgment for the moving party as a matter of law. See Fed. R. Civ. P. 56. See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The moving party bears the burden of demonstrating the absence of any issues of material fact. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, [*377] 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). In weighing the evidence to determine if any genuine issue of fact exists, the Court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). [HN7]A court cannot determine the merits or issues of fact, or assess the credibility of [**10] evidence on a motion for summary judgment; it can only ascertain whether there are disputed issues of material fact to be decided by the eventual trier of fact. See Gallo v. Prudential Residential Serv. Ltd., 22 F.3d 1219, 1224 (2d. Cir. 1994).

III. Wrongful Termination Under Title VII

[HN8]Title VII provides:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1). [HN9]National origin, under Title VII, refers to the country where a person was born, or more broadly, the country from which a person's ancestors came. See Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 38 L. Ed. 2d 287, 94 S. Ct. 334 (1973).

This Court's consideration of Ghose's federal, state, and city claims for discrimination in violation of Title VII, and the related state and city claims may be consolidated into a single examination of the [**11] federal claim because consideration of the city and state claims parallels that of the federal claim. See Cruz v. Coach Stores, Inc., 202 F.3d 560, 565 (2d Cir. 2000). In fact, it has been suggested that state law imposes a *stricter* standard with respect to imputing liability to an employer for alleged discrimination than does the applicable federal standard. See Torres v. Pisano, 116 F.3d 625, 629 (2d Cir. 1997). This Court, however, need not concern itself with the heightened standard of state law unless plaintiff here can first successfully establish a prima facie case under federal law.

[HN10]To survive a motion for summary judgment on a claim under Title VII, a plaintiff must establish a prima face case of discrimination. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); Song v. Ives Labs., Inc., 957 F.2d 1041, 1045 (2d Cir. 1992). [HN11]In order to establish a prima facie case of discrimination in violation of Title

VII, a plaintiff who claims to have [**12] been discharged for discriminatory reasons must show that (1) he belongs to a protected class; (2) he was qualified for the job from which he was fired; (3) he was fired; and (4) the discharge occurred under circumstances giving rise to an inference of discrimination. See Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d. Cir. 1994). See also Burdine, 450 U.S. at 253.

[HN12]If a plaintiff successfully establishes a prima facie case of discrimination, then it becomes defendant's burden to proffer, through sufficient admissible evidence, a legitimate, non-discriminatory reason for the employee's dismissal. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993) (quoting Burdine, 450 U.S. at 255). Upon such a showing by defendant, plaintiff then must demonstrate through admissible evidence that the employer's justification for dismissal was pretextual. See Fisher v. Vassar College, 114 F.3d 1332, 1339 (2d Cir. 1997); Cronin, 46 F.3d 196 at 204. Because such evidence must be sufficient to permit a rational fact finder to infer that the adverse employment [**13] decision was, more likely than not, motivated by discriminatory animus, evidence barely sufficient to establish a prima facie [*378] case may not be sufficient to establish discrimination after a defendant has offered a neutral rationale. See Stern v. Trustees of Columbia Univ., 131 F.3d 305, 312 (2d Cir. 1997).

In the case at hand, there is no dispute that Ghose satisfies the first three elements of a prima facie case of national origin discrimination. Ghose is a member of a protected class. He was qualified for the position (evident in that he retained his employment for nearly five years) and was dismissed. The outstanding issue is whether Ghose was fired under circumstances giving rise to an inference of discrimination. This Court finds that Ghose has failed to establish this requisite.

In opposition to the motion, Ghose asserts that he has "clearly established" a prima facie case, yet offers little evidence to support such a claim. See Plaintiff's Memo at 8. Ghose alleges that Century 21 discriminated against minorities in its ordinary employment decisions -- including hiring, firing and promotion -- an accusation that, if corroborated, might create circumstances [**14] from which discrimination could be inferred. Ghose further points to the fact that Betesh terminated two African-American managers from the Century 21 store in Brooklyn.

Ghose, however, introduces no statistical evidence indicating that Century 21 systematically discriminated against minorities, and the record developed here supports the contrary. According to Century 21's rebuttal evidence, during Betesh's tenure as Director of Loss Prevention, seven out of seventeen employees hired at Century 21's Manhattan store were members of minorities, as were six out of fourteen security guards hired. See Affidavit of James Betesh, sworn to July 26, 1999 ("Betesh Aff."), P8. Moreover, Century 21 justifies its dismissals of these two employees with evidence of poor job performance evaluations, coupled with oral and written warnings that were given to them prior to their dismissal. See Defendants' Statement of Material Facts, dated July 23, 1999 ("Statement"), Ex. 2 at 81-82, 85-86, 97-98. Furthermore, a Hispanic manager was hired to fill one of these positions. See Betesh Aff., P8.

Ghose further relies on the allegation that his supervisor, William Seeger, insulted his nationality [**15] by making fun of his accent, supposedly evidenced in that Seeger would ask Ghose to repeat himself. See Compl. P18(b); Plaintiff's Counterstatement of Material Facts, dated July 28, 1999 ("Counterstatement"), Ex. 1 at 160. Ghose points to an instance in which Seeger even asked him to repeat himself while Ghose was informing Seeger of an altercation between a customer and security guards. See Counterstatement, Ex. 1 at 160. This evidence, however, suggests nothing more than Seeger's difficulty understanding Ghose. [HN13]Although it is not the Court's task to weigh or assess the credibility of the evidence submitted, summary judgment cannot be defeated by either a "scintilla of evidence" or through mere speculation; a trier of fact must be able to find for the nonmovant. See Cronin, 46 F.3d at 206 (mere speculation); Anderson, 477 U.S. at 252 (scintilla of evidence). Therefore, because the evidence submitted by Ghose alleging that Century 21's managers insulted his accent is wholly speculative, Ghose has not sufficiently depicted circumstances giving rise to an inference of discrimination. Cf. Rivera v. Baccarat, Inc., 10 F. Supp. 2d 318 (S.D.N.Y. 1998) [**16] (testimony establishing that employer's president unequivocally said that he did not like plaintiff-employee's accent during a meeting in which plaintiff was being evaluated found sufficient to establish a prima facie claim of national origin discrimination).

In addition, Ghose contends that summary judgment is inappropriate because there are material issues of fact with respect to whether or not he was required to work extended hours during the holiday season; whether Century 21 notified him of the extended schedule; and whether his performance, aside from his refusal to [*379] work holidays, was inferior to others. See Plaintiff's Memo at 5-6. Viewing these discrepancies in a light most favorable to plaintiff, as the Court is obliged to do upon considering a motion for summary judgment, Ghose is still unable to establish a prima facie case of discrimination on account of national origin. Even if Ghose could establish a prima facie case of discrimination, Century 21 has proffered uncontroverted evidence

of and a legitimate, non-discriminatory reason for Ghose's dismissal in that Ghose was often late to work, tardy returning from breaks, exhibited a poor attitude and talked back to his [**17] superiors. See Statement, Ex. 2 at 169, 199, 213; Ex. 4 at 30, 43; Ex. 5 at 16, 22, 23-4, 31.

If Ghose were able to establish circumstances from which discrimination could be inferred on the evidence he has presented, he could not demonstrate that Century 21's reason for Ghose's dismissal was pretextual. See James v. Runyon, 843 F. Supp. 816 (N.D.N.Y. 1994). [HN14]To establish a prima facie case for a disparate treatment claim under Title VII requires that plaintiff was both qualified for the job and satisfied his employer's normal requirements in his work. See Carter v. AT&T Communications, 759 F. Supp. 155 (S.D.N.Y. 1991). Ghose's tardiness and unsatisfactory attitude, as documented by evidence Ghose has not sufficiently refuted, may reasonably sustain a determination that Ghose was no longer fulfilling normal employment requirements, thereby further supporting his failure to establish a prima facie case of discrimination.

[HN15]While acknowledging that a district court should hesitate in granting summary judgment where an employer's intent is at issue, on the record here adduced, this Court finds no sufficient evidence of circumstances from which a discriminatory [**18] motive could be inferred by the decision to terminate Ghose's employment. Ghose has failed to produce any evidence from which a rational fact finder could conclude that either his Century 21 supervisors or any other employee at Century 21 harbored any hostility towards Ghose on account of his national origin, let alone animus of a magnitude that would impel his being discharged. See Chambers, 43 F.3d at 35. Ghose also alleges that Century 21 mistreated him with the specific purpose of causing him to resign. See Compl. PP23, 24. But, beyond his conclusory assertions, Ghose presents no evidence to support this speculative accusation.

Furthermore, Ghose has not presented any evidence indicating the existence of more extensive, systemic hostile treatment towards any protected class. Although Ghose contends that Betesh told him not to associate with African-American employees, Ghose admits that Betesh, while orally reprimanding him for socializing while on duty, asked him not to talk to "them," referring to the two African-American co-workers with whom Ghose was conversing. [1] See Statement, Ex. 2 at 141-42. Ghose simply interpreted Betesh's reprimand to refer [**19] to African-Americans in general (see id. at 142), and such speculation does not suffice to establish circumstances from which a rational trier of fact could infer a discriminatory motive directed at Ghose sufficient to cause his dismissal. See Cronin, 46 F.3d at 206.

1 Ghose seemingly gives conflicting testimony as to the language Betesh used during this oral reprimand. Initially, Ghose testified that Betesh used the word "blacks" (Statement, Ex. 1 at 140), but he later stated that Betesh used the word "them." See id. at 141-42.

The Court concludes that outstanding questions of fact, if any, resulting from discrepancies between Ghose's and Century 21's account of the facts here are not material because, even in viewing these issues of fact most favorably to Ghose, he has not established a prima face case of discrimination. Accordingly, summary judgment is appropriate. See Chambers, 43 F.3d at 35.

IV. Section 1981

[HN16]Section 1981 prohibits discrimination on the [**20] basis of race in the making and enforcement [*380] of contracts. See 42 U.S.C. § 1981(a). This section, however, does not prohibit discrimination based on national origin. See Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613, 95 L. Ed. 2d 582, 107 S. Ct. 2022 (1987); Anderson v. Conboy, 156 F.3d 167, 170 (2d Cir. 1998). Accordingly, defendants' motion as to Ghose's claims under section 1981 must be granted.

CONCLUSION AND ORDER

Ghose has not met his burden to demonstrate circumstances that give rise to an inference of national origin discrimination and therefore cannot establish a prima facie case of discrimination. Given this finding, the Court need not address the merits of Ghose's state or city claims. In addition, 42 U.S.C. § 2000e-5(b) bars Ghose from bringing other causes of action not included in his original EEOC complaint. Accordingly, it is hereby

ORDERED that defendants' motion of summary judgment is granted in its entirety; and it is further

ORDERED that the Clerk shall close this case.

SO ORDERED:

New York, New York

August 18, 2000

Victor Marrero

[**21] United States District Judge

LEXSEE

Caution
As of: May 06, 2010

AYBIKE KORTAN, Plaintiff-Appellant, v. CALIFORNIA YOUTH AUTHORITY; ALBERT ATESALP; I.R. SCHULMAN; MANUAL CARBAJAL, Defendants-Appellees.

No. 98-56047

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

217 F.3d 1104; 2000 U.S. App. LEXIS 15661; 83 Fair Empl. Prac. Cas. (BNA) 618; 78 Empl. Prac. Dec. (CCH) P40,189; 2000 Cal. Daily Op. Service 5514; 2000 Daily Journal DAR 7386

February 8, 2000, Argued and Submitted, Pasadena, California
July 7, 2000, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Central District of California. D.C. No. CV-96-08518-ER. Edward Rafeedie, District Judge, Presiding.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff appealed from the grant of summary judgment by the United States District Court for the Central District of California in her action under 42 U.S.C.S. § 2000e alleging hostile work environment, retaliation, and gender discrimination.

OVERVIEW: Plaintiff's supervisor made several negative comments towards her and regarding women in general, and gave her a negative performance evaluation. Considering all the circumstances, including the fact that the offensive conduct was concentrated on one occasion, and that it occurred in the wake of a dispute about a nurse's failure to follow instructions and plaintiff's telling the supervisor that she would no longer serve as "acting senior psychologist" in his absence, the court concluded that no triable issue existed about whether the conduct was frequent, severe or abusive enough to interfere unreasonably with plaintiff's employment. Plaintiff failed to show that her evaluation was discriminatory or retaliatory, or was such an "intolerable" act that it would force an employee to quit. The district court properly dismissed the sex discrimination claim because plaintiff failed to show an adverse employment action.

OUTCOME: Summary judgment affirmed; no triable issue existed as to whether the alleged conduct was frequent, severe or abusive enough to interfere unreasonably with plaintiff's employment, plaintiff failed to show that her performance evaluation was discriminatory or retaliatory, or was such an "intolerable" act that it would force an employee to quit, and failed to demonstrate an adverse employment action.

CORE TERMS: hostile, retaliation, work environment, retaliatory, rating, supervisor's, offensive, female, regina, bitch, sexual harassment, superintendent, psychologist, castrating, undeserved, summary judgment, harassment, performance evaluation, actionable, harassing, madonna, abusive, sexual, employment decision, subjected, hostility, triable, senior, staff, sex

LexisNexis(R) Headnotes

Civil Rights Law > General Overview
[HN1]Under Title VII, it is unlawful for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race,

color, religion, sex, or national origin. 42 U.S.C.S. § 2000e-2(a)(1).

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > Elements
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > Sexual Harassment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN2]Title VII is violated if sexual harassment is so severe or pervasive as to create a hostile work environment. An employer is liable under Title VII for conduct giving rise to a hostile environment where the employee proves (1) that he was subjected to verbal or physical conduct of a harassing nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Conduct must be extreme to amount to a change in the terms and conditions of employment. To be actionable under Title VII, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. Harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. The motivation can be a general hostility to the presence of women in the workplace.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
[HN3]Courts are to determine whether an environment is sufficiently hostile or abusive by looking 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.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN4]Mere utterance of epithets which engenders offensive feelings would not affect conditions of employment to sufficiently significant degree necessary for violation of Title VII.

Labor & Employment Law > Discrimination > Retaliation > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN5]To make out a prima facie case of retaliation, a plaintiff must establish that she acted to protect her Title VII rights, that an adverse employment action was thereafter taken against her, and that a causal link exists between those two events.

Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN6]Unlike most cases alleging retaliation where the retaliatory conduct takes the form of discharge, demotion, failure to promote, or the like, a retaliatory negative job reference does not itself inflict tangible employment harm because it requires a prospective employer's subsequent, adverse action in response to the reference to create the employment harm. Accordingly, disseminating a negative job reference is a personnel action that violates Title VII even if it does not affect a decision not to hire the victim.

Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN7]Transfers of job duties and undeserved performance ratings, if proven, would constitute "adverse employment decisions."

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Proof > Burdens of Proof > Burden Shifting
[HN8]In order to establish a prima facie case of employment discrimination, a plaintiff must show that she was a member of a protected group; that she was adequately performing her job; and that she suffered an adverse employment action, or was treated differently from others similarly situated.

COUNSEL: Peter R. Dion-Kindem, Los Angeles, California, for the plaintiff-appellant.

David M. Tiede, Deputy Attorney General, San Diego, California, for the defendants-appellees.

JUDGES: Before: Pamela Ann Rymer and Raymond C. Fisher, Circuit Judges, and Lloyd D. George, Senior District Judge. * Opinion by Judge Rymer; Dissent by Judge Fisher.

* Honorable Lloyd D. George, Senior United States District Judge for the District of Nevada, sitting by designation.

OPINION BY: Pamela Ann Rymer

OPINION

[*1106] RYMER, Circuit Judge:

Aybike Kortan, a Clinical Staff Psychologist for the State of California Department of Youth Authority (CYA), appeals the summary judgment entered in CYA's favor on her action under 42 U.S.C. § 2000e alleging hostile work environment, retaliation, and gender discrimination. In a published opinion, the district court declined to consider evidence of harassment not mentioned in the complaint or in Kortan's charge with the California Department of Fair Employment and Housing; [**2] and held that a negative evaluation (after Kortan complained about her supervisor's conduct), unaccompanied by any other adverse impact such as a demotion or change of responsibilities, is insufficient to allow a retaliation claim to go forward. *Kortan v. State of California*, 5 F. Supp. 2d 843 (C.D. Cal. 1998). While an opinion published after the district court's decision, *Anderson v. Reno*, 190 F.3d 930 (9th Cir. 1999), indicates that evidence outside the limitations period should be considered at least as relevant background, it does not affect the result here. As we otherwise agree that no triable issues are raised, we affirm.

I

Kortan, who is a Caucasion female, began working at the Southern Youth Reception Center and Clinic (SYCC) in June 1988 as a Clinical Staff Psychologist. On June 29, 1989, her supervisor, Dr. Albert Atesalp, appointed Kortan as "acting senior psychologist" with the authority to act on his behalf in his absence. This was a special designation for which Kortan received no extra remuneration or benefits. On January 26, 1994, she was honored as Outstanding Employee of the Year. Kortan had no complaints about Atesalp's behavior [**3] until February 1994.

On February 1, she left instructions with the nursing staff that a ward who had been admitted to the hospital was not to be discharged back into the general population without her approval, but the next day discovered that her instructions had been torn up and the ward had been returned. Kortan believed that Nurse Chavez was responsible and reported this to Atesalp. Atesalp did not seem to Kortan to take her problem seriously. On February 3, Kortan wrote Atesalp that she no longer wanted to be "acting senior" in his absence, stating that "for the past 5 years, I have been acting in your capacity when you are absent. I have been trying to do my best. However, regardless of how much I try, I am unable to improve in any way how things are around here." Over coffee after Atesalp received the memo, Kortan says that he referred to one female, who was [*1107] formerly a superintendent of the SRCC,as a "regina," and said that this person "laughs like a hyena." He also referred to a former assistant superintendent as a "madonna," "regina" and a "castrating bitch." In the same conversation, Atesalp referred to women generally as "bitches" and "histrionics." [2]

2 Also in February of 1994, Atesalp made derogatory comments about two blacks which were offensive to Kortan. She originally sued on account of these remarks as well, but has not appealed dismissal of claims based on racial discrimination.

[**4] Sometime between February 3 and 10, Kortan complained about Atesalp's conduct to Assistant Superintendent Schulman. He seemed empathetic and encouraged Kortan to "take him [Atesalp] on." Kortan then complained to Superintendent Manual Carbajal and memorialized her charges against Atesalp in a February 10, 1994 memorandum. The memorandum details a number of difficulties, including the incident with Nurse Chavez; complaints from other psychologists that Atesalp pressured them to write reports; being called to Atesalp's office to listen to a tape by Dr. Abrams (a male psychologist on staff) whose language was shocking to Kortan and later, to read a letter Atesalp had written to Abrams that used the phrase "masturbate yourself"; and Atesalp's referring to a former Superintendent as "regina," and making racial remarks about blacks. The Office of the Superintendent forwarded Kortan's complaints together with a request for investigation to the Headquarters of the California Youth Authority in Sacramento. Brian Rivera of Internal Affairs was assigned to investigate.

After Kortan complained about Atesalp, he started to give her "the looks" and to stare at her instead of smiling, as he had [**5] before. Atesalp told Kortan that "All this time, I assumed you were 'Artemis' . . . I made a mistake, and you are not 'Artemis.' You are 'Medea.'" She also heard him laughing outside her door, saying "Yeah, she got me on sexual harassment charges. Ha. Ha."

Meanwhile, Kortan was concerned about having an upcoming evaluation conducted by Atesalp. She asked that her supervision be transferred from Atesalp to Dr. Pastrana, the Senior Psychologist of the Marshall program. However, that program was separate from the diagnostic program in which Kortan was working and was fully staffed with clinical psychologists at the time. Consequently, Atesalp did the evaluation. He rated Kortan's performance as "E" ("performance consistently exceeds expected standards") in five of the eight areas of evalua-

tion and "I" ("improvement needed to meet expected standards") in three areas: work habits, relationships with people, and meeting work commitments. These were the lowest overall evaluations Kortan had received, although she had received an "M" ("performance fully meets expected standards") in the "work habits" section on her 1989 evaluation. To avoid any perception of retaliation, Schulman independently [**6] reviewed Atesalp's evaluation of Kortan; because he did not believe that Atesalp's initial evaluation was completely accurate, and felt there was retaliation, he changed the three low ratings to "M." He explained that he could not give Kortan higher ratings because she had been on vacation or leave for a significant part of the evaluation period (between May and August 1993), and the maintenance staff had complained about how she treated them. Both Kortan and Atesalp refused to sign the evaluation. Only Schulman's evaluation (signed April 26) ended up in Kortan's personnel file.

On March 11 Schulman instructed Atesalp to conduct business with Kortan so there could be no perception of retaliation or harassment. On March 22, after reviewing Atesalp's initial performance evaluation, Schulman told him to stop any type of behavior that might be perceived as retaliatory or harassing. He also forwarded [*1108] information about Atesalp's possibly retaliatory conduct to Rivera.

Kortan asked Schulman for a temporary transfer to the Ventura facilty, but Schulman had no discretion to effect such a transfer. When Kortan inquired of Vivian Crawford, the Superintendent of the Ventura facility, regarding [**7] a position, she was told there was none available but that her letter would be kept on file. Kortan also indicated to Rivera that she would like to change offices, as hers was located next to Atesalp's. Alternatives were discussed with her and her office was eventually moved in September.

Rivera completed his report May 7, 1994; he found the charges of harassment in Kortan's February 10 memorandum unsubstantiated. Kortan was advised of CYA's conclusion that there was no evidence of sexual harassment on October 5, 1994. Her last day of work was October 24, and she was hospitalized the next day. Since then, Kortan has been on leave of absence.

Kortan filed charges with the EEOC on October 31, 1994. She claimed that starting February 2, 1994, Atesalp created a hostile work environment by using racist and sexist terminology, and that after complaining about his conduct she was given a lowered performance rating, had a temporary transfer request denied, and had been threatened with disciplinary action if she spoke about the allegations. She received a right to sue letter in September 1996, and filed this action December 6, 1996.

CYA moved for summary judgment, which the district court [**8] granted. Kortan timely appeals.

II

Kortan makes two arguments with respect to her hostile work environment claim. First, she argues that there is a triable issue as to the existence of a hostile work environment; and second, she asserts that the district court's decision to grant summary judgment was based in large part on its decision not to consider evidence of Atesalp's actions occurring during the four to five months prior to February 3, 1994.

A

The pre-February 3, 1994 evidence Kortan proffered consists of her declaration that beginning in late 1993 and continuing into 1994, Atesalp used gender derogatory language in her presence, including referring to various staff members as a "castrating bitch," "Madonna," and "regina." [3] Kortan also states that Atesalp referred to her as "Rapunzel" and "Medea" and wrote postcards to her at home. Asked at her deposition about Atesalp's use of terms such as "Madonna" or "castrating bitch," Kortan indicated that prior to February 3, 1994 he did so "very infrequently," "probably once or twice" in the case of the term "castrating bitch." Also, once, in talking about his license, he described a woman who interviewed him as "histrionic."

3 Apparently Atesalp told Kortan that a Georgia O'Keefe poster she had in her office was "suggestive." When Kortan asked what he meant, he said "I will not say it because I'll be in trouble." Then he said: "I'll say it this way, it reminds me of a 'regina.'" Kortan replied: "Oh, you have a dirty mind."

[**9] The district court did not consider this evidence because Kortan expressly limited the onset of the allegedly harassing incidents to February 1994 in her complaint, her EEOC charges, [4] and her deposition. [5] [*1109] Kortan submits that this was wrong under our opinion in *EEOC v. Farmer Bros.*, 31 F.3d 891, 899 (9th Cir. 1994), because Atesalp's prior actions were "like and reasonably related" to her allegations of harassment occurring after February 3, 1994, and would have been within the scope of a reasonably thorough EEOC investigation.

4 The EEOC charge, filed October 31, 1994, alleges that "starting February 2, 1994, my supervisor, Doctor Atesalp, created a hostile work environment by using racist and sexist terminology in my presence." In the attached Affidavit, Kortan avers that "in early February of 1994 my immediate supervisor, Dr. Atesalp, began to make verbal

comments in my presence that were both racist and sexist. I have heard him refer . . . to females as 'bitches', 'Madonnas' 'casterating bitches'. 'Regina' and 'histronic' these are just examples, he has used many negative terms to describe both females and Blacks." [sic.]

Kortan's EEOC charge also refers to the CYA investigation, which covered the November 1993 incidents involving the Abrams tape and Altesalp letter responding to it. But Kortan does not base her hostile work environment claim on these incidents.

[**10]

5 Kortan testified that before she wrote her February 3, 1994 letter, Atesalp treated her well and that she was never harassed by him until she wrote the February 3 memorandum.

In *Farmer*, the employer decided to reduce the number of women employed in production jobs and to accomplish this by a gender neutral lay-off followed by rehires that would be mostly male. The plaintiff raised a discriminatory layoff claim in her federal complaint, which Farmer Bros. sought to have dismissed for failure to exhaust administrative remedies on the ground that she had not included the layoff claim (as compared with a failure to rehire claim) in the charges filed with the EEOC. In that context we stated that the district court had subject matter jurisdiction over the lay-off claim "if that claim fell within the scope of the EEOC's *actual* investigation or an "'EEOC' investigation which *can reasonably be expected* to grow out of the charge of discrimination.'" *Id.* at 899 (quoting *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990)). We went on to note that Farmer [**11] *had* included her claim of discriminatory lay-off in her EEOC charge, but even if she hadn't, it was "*necessary* for the EEOC to investigate the circumstances of [plaintiff's] layoff" in order to understand the failure to rehire. *Id.* Therefore, we held that the district court correctly exercised jurisdiction over the layoff claim. Unlike *Farmer*, here it was not "*necessary*" for the EEOC to investigate pre-February 1994 events in order to evaluate the claim Kortan actually made - that Atesalp's comments beginning in February created a hostile work environment - nor had it done so, would the investigation have revealed anything probative except for the same comments "very infrequently" made.

However, after the district court rendered its decision in this case, we addressed a somewhat similar situation in *Anderson v. Reno*, 190 F.3d 930 (9th Cir. 1999). Anderson was a veteran of the FBI who brought a Title VII action alleging sexual harassment occurring over many years. In granting summary judgment on her claim of a hostile work environment, the district court declined to consider any incident that did not occur within the statutory limitations period [**12] before the EEOC proceedings were brought. We held that the excluded incidents were part of a pattern of alleged discrimination that continued within the statutory period, and that regardless of whether "actionable in and of themselves, untimely claims serve as relevant background evidence to put timely claims in context." *Id.* at 936. Therefore, we shall consider the evidence to which Kortan points that occurred four to five months prior to February 3, 1994.

B

[HN1]Under Title VII, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). [HN2]Title VII is violated if sexual harassment is so severe or pervasive as to create a hostile work environment. *See Montero v. AGCO Corp.*, 192 F.3d 856, 860 (9th Cir. 1999); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1001, 140 L. Ed. 2d 201 (1998). "An employer is liable under Title [**13] VII for conduct giving rise to a hostile [*1110] environment where the employee proves (1) that he was subjected to verbal or physical conduct of a harassing nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Pavon v. Swift Trans. Co., Inc.*, 192 F.3d 902, 908 (9th Cir. 1999). "'Conduct must be extreme to amount to a change in the terms and conditions of employment.' To be actionable under Title VII, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.'" *Montero*, 192 F.3d at 860 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 2284, 2283, 141 L. Ed. 2d 662 (1998)). "Harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Oncale*, 118 S. Ct. at 1002. The motivation can be a "general hostility to the presence of women in the workplace." *Id.* [HN3]

[**14] Courts are to determine whether an environment is sufficiently hostile or abusive by "'looking 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*, 118 S. Ct. at 2283 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)). [6]

6 Recent Supreme Court opinions (rendered after the district court's decision) have discussed an employer's vicarious liability for a hostile work environment, and have recognized the availability of an affirmative defense in certain circumstances. *See, e.g.*, Burlington Industries v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). Since we hold that Kortan has failed to establish a prima facie case of hostile work environment, we do not address the effect, if any, of these recent opinions on this case.

[**15] There is no question that Atesalp's comments were offensive. The difficulty is that they were mainly made in a flurry on February 3rd. Once or twice before he had referred to a former female superintendent as a "castrating bitch" or "madonna" or "regina," but Kortan did not regard this as harassing and she thought Atesalp behaved like a "perfect gentleman" prior to February 3. He used "regina" again on February 9. As unpleasant as Atesalp's outburst was, the comments were about other people. He never directed a sexual insult at Kortan. He also told her, on or after February 3, that she wasn't Artemis as he had previously thought but Medea. Even so, Atesalp's utterances were just offensive. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986) [HN4](mere utterance of epithet which engenders offensive feelings would not affect conditions of employment to sufficiently significant degree necessary for violation of Title VII).

Kortan argues that whether a reasonable woman would have found Atesalp's action hostile or abusive was an issue of fact for the jury to decide. She points to *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), [**16] where we affirmed the district court's findings and conclusions following a bench trial that repeated vulgarities, sexual remarks, and requests for sexual favors by a hotel employee subjected female maids to severe and pervasive sexual harassment that seriously tainted the working environment and altered the terms and conditions of their employment. Among other things, the chief of engineering (Nusbaum) told a pregnant maid "that's what you get for sleeping without your underwear," asked her why she was pregnant by another man, and made comments about her "ass." Nusbaum regularly offered to give another maid money and an apartment to live in if she would "give him [her] body"; he assured her she would never be fired if she would have sex with him; and he told another [*1111] "You have such a fine ass. It's a nice ass to stick a nice dick into. How many dicks have you eaten?" The evidence also showed that the Executive Housekeeper merely laughed at such remarks and herself called one of the maids a "dog," "whore" and "slut."

However offensive his language, Altesalp's conduct is not so severe or pervasive as Nusbaum's in *Hacienda Hotel*. Although Kortan urges that improper conduct does [**17] not have to rise to the level of that present in *Hacienda Hotel* to be actionable, other cases in which a hostile work environment has been found to exist are also quite different. *Anderson* is a good example. Anderson was an FBI agent who "endured a host of sexually harassing incidents between 1986 and 1994," including being referred to by her supervisor as the "office sex goddess," "sexy," "gorgeous," and "the good little girl" instead of by name; at a presentation she was to make about an arrest plan, finding an easel with a drawing of a pair of breasts and the words, "Operation Cupcake," and being told by the supervisor in front of the assembled group "This is your training bra session"; receiving various vulgar notes including a cartoon depicting varieties of female breasts with her initials next to an example labeled "cranberries"; and being patted on the buttocks by another agent, who commented on her "putting on weight down there" and informed Anderson of his observations from time to time.

In *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104 (9th Cir. 1998), a female employee of a mining company alleged that over a two-year period her supervisor made sexual [**18] remarks about her, in and out of her presence; frequently called her "beautiful" and "gorgeous" rather than her name; told her about his sexual fantasies, including his desire to have sex with her as well as his wife; joked that the answer to a riddle about what a Mexican prostitute was called is "frijole"; several times remarked about Draper's "ass" and commented to others that "it would be fun to get into [Draper's] pants"; and on one occasion used the loudspeaker to ask whether she needed help changing clothes and said there were several guys willing to help, and on another, after Draper had taken off a sweatshirt, to ask whether that was all she was going to take off.

Montero further illustrates the type of conduct that gives rise to a hostile working environment. Montero was the only female employee at a parts distribution center. Over a two-year period, one supervisor called her a "butt-kiss," told Montero he was going to spank her, rested his chin on her shoulder, grabbed her arms until she said "ouch," and made crude gestures. Another supervisor grabbed his crotch while speaking with her, placed his face on her bottom, told her he had sexual dreams about her, put his [**19] hand on her chair as she sat down, tried to bite her neck, and knelt in front of her and tried to put his head between her knees. Another employee had pulled her pants up from behind by the belt loop, commented about the small size of his penis,

and placed notes on her desk telling Montero to dance naked on the desk or to take off her clothes.

The conduct in this case is simply not of this order of magnitude. Considering all the circumstances, including the fact that Atesalp's offensive conduct was concentrated on one occasion, and that it occurred in the wake of a dispute about a nurse's failure to follow instructions and Kortan's telling Atesalp that she would no longer serve as "acting senior psychologist" in his absence, we conclude that no triable issue exists about whether the conduct was frequent, severe or abusive enough to interfere unreasonably with Kortan's employment.

III

Kortan next argues that the district court ignored retaliatory actions that were taken after she complained about Atesalp's conduct, and that it applied an incorrect legal standard in determining [*1112] whether she had been the subject of an "adverse employment decision." [HN5]To make out a prima facie case of [**20] retaliation, Kortan must establish "that she acted to protect her Title VII rights, that an adverse employment action was thereafter taken against her, and that a causal link exists between those two events." *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994).

Kortan identifies the following as adverse employment actions:

. Atesalp's laughing and stating that Kortan "got him on sexual harassment charges";

. Atesalp's ridiculing Kortan to other employees;

. Atesalp's hostile stares;

. Atesalp's calling Kortan "Medea";

. Atesalp's falsely accusing Kortan of not submitting a work order to have her desk repaired;

. Atesalp's increased criticism of Kortan;

. Atesalp's low ratings of Kortan's performance in three categories whereas before her complaints, she had been Outstanding Employee of the Year;

. CYA's failure to respond to Kortan's requests for transfer and a different office;

. CYA's failure to investigate complaints about retaliation;

. Shulman telling her on October 24, 1994 to communicate with him rather than with CYA headquarters about complaints, and Atesalp yelling at her during the meeting; [**21]

. Constructively discharging her.

Of these, Kortan contends that being forced to take medical leave because of the stress of retaliatory actions is the most obviously "adverse" employment decision. She analogizes to *Draper*, where a woman employee who had been subjected to extreme harassment by a supervisor and had complained to management, confronted him months later about continuing harassment and was met with a response that included telling his direct supervisor that Draper was in his office "digging up old bones" and laughing. From this she could reasonably conclude that nothing was going to be done to stop the conduct. Kortan views evidence that Atesalp stood outside her door and laughed, saying "she got me on sexual harassment charges" as similar; however, unlike *Draper*, Atesalp's response was his own immediate - albeit inappropriate - reaction to her complaint. From this, it is not possible to infer either that Atesalp's conduct would continue without sanction or that Kortan had no choice but to quit. Nor can we say that the combination of incidents after Kortan lodged her complaint February 10 were such that a "reasonable person would feel that the conditions [**22] of employment have become intolerable." *Draper*, 147 F.3d at 1110. Although she claims that Atesalp ridiculed her to other employees, falsely accused her of not submitting a work order, and was hypercritical, there is no evidence showing that these things happened. Thus, at most he was less civil, stared at her in a hostile fashion, and became more critical of her performance.

This leaves Kortan's evaluation by Atesalp, which appraised her work as "exceeds expected standards" in five categories but was lower than average in three - and was admittedly retaliatory. However, Schulman raised the three low marks that Atesalp had given to "performance fully meets expected standards." Thus, the evaluation in Kortan's file shows that she exceeded expected standards in most categories and fully met them in the others. Kortan does not ascribe any retaliatory motive to Schulman's evaluation, which is the one that counts.

Kortan maintains that she should not be expected to show a tangible injury, relying on *Hashimoto v. Dalton*, 118 F.3d 671 (9th Cir. 1997), and *Yartzoff v. Thomas*, 809 F.2d 1371 (9th Cir. 1987). In *Hashimoto*, an Asian-American [**23] woman alleged that [*1113] the Department of Navy gave her a negative job reference in retaliation for filing an EEO complaint. [HN6]We recog-

nized that unlike most cases alleging retaliation where the retaliatory conduct takes the form of discharge, demotion, failure to promote, or the like, a retaliatory negative job reference does not itself inflict tangible employment harm because it requires a prospective employer's subsequent, adverse action in response to the reference to create the employment harm. Accordingly, we held that disseminating a negative job reference is a personnel action that violates Title VII even if it does not affect a decision not to hire the victim. In *Yartzoff*, an employee at an EPA research laboratory alleged that the Agency made a number of adverse employment decisions because of his pursuit of Title VII grievances in May 1979. Among them were the transfer of various job duties between August 1979 and February 1980, the issuance of a sub-average performance rating in April 1980, and the transfer of additional job duties in February 1981. We stated that [HN7]"transfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions' [**24] cognizable under this section." Yartzoff, 809 F.2d at 1376. However, neither *Hashimoto* nor *Yartzoff* rescues Kortan's claim based on *Atesalp*'s negative evaluation. The *Atesalp* evaluation was not disseminated beyond Schulman, who corrected it; and the *Schulman* evaluation was not sub-average or undeserved to the extent it was less than perfect in three of eight categories. Beyond this, Kortan was not demoted, was not stripped of work responsibilities, was not handed different or more burdensome work responsibilities, was not fired or suspended, was not denied any raises, and was not reduced in salary or in any other benefit. Thus, Kortan has not shown that her evaluation was discriminatory or retaliatory, or was such an "intolerable" act that it would force an employee to quit. *See* Steiner, 25 F.3d at 1466 (evaluation characterizing plaintiff as "acceptable" is not "intolerable"). *Compare* Sanchez v. City of Santa Ana, 915 F.2d 424, 431 (9th Cir. 1990) (unfounded negative evaluations that led to denial of merit pay in evaluation constituted constructive discharge).

IV

Finally, Kortan argues that a triable issue of [**25] fact exists whether she was discriminated against because of her sex. [HN8]In order to establish a prima facie case of employment discrimination, Kortan must show that she was a member of a protected group (females); that she was adequately performing her job; and that she suffered an adverse employment action, or was treated differently from others similarly situated. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). The district court properly dismissed this claim because, for reasons we have already explained, Kortan failed to show an adverse employment action.

AFFIRMED.

DISSENT BY: Raymond C. Fisher (In Part)

DISSENT

FISHER, Circuit Judge, dissenting in part:

I respectfully dissent from the majority's conclusion that Aybike Kortan failed to raise genuine issues of material fact regarding her retaliation and hostile working environment claims. Admittedly, this is a close case, and there is an attraction to the majority's resolution in not setting the bar for Title VII claims so low as to encourage litigation over commonplace, although objectionable, behavior in the workplace. Nonetheless, I believe that, given the particular [**26] circumstances here and that this is a ruling on summary judgment where the close call should go to the plaintiff, Kortan has met her burden for both claims and should be allowed to proceed to trial on the merits.

The significant aspect of this case that causes me to differ with the majority is the overt retaliation against Kortan by her supervisor, Atesalp - conduct that elevates [*1114] this case from a misogynist's rantings against his female colleagues into a hostile work environment for this individual subordinate. For this supervisor did more than demean with words; he used his superior position to punish Kortan with a dramatically lowered and undeserved performance evaluation that even Atesalp's supervisor, Schulman, recognized as retaliation for Kortan's complaints against Atesalp. The majority, I fear, diminishes the true nature of the hostile work environment Kortan faced by isolating the retaliatory performance review from its analysis of the work environment, notwithstanding that retaliation was a critical aspect of the totality of the circumstances we are bound to consider. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993) [**27] ("Whether an environment is 'hostile' or 'abusive' can only be determined by looking at all the circumstances."); *see also* Drake v. Minnesota Mining & Mfg. Co., 134 F.3d 878, 886 (7th Cir. 1998) ("Retaliation can take the form of a hostile work environment."). Although Schulman took some steps to ameliorate Atesalp's retaliatory review, Atesalp - on the undisputed record before us - remained recalcitrant and unrepentant, suffered no reprimand other than a memorandum directing him to avoid the perception of retaliation or harassment and retained his supervisory authority over Kortan. I believe Atesalp's offensive and demeaning outbursts, his humiliating treatment of Kortan and - most significantly - the undeserved, retaliatory performance review comprise a totality of circumstances sufficient to withstand summary judgment on Kortan's hostile work environment claim.

Moreover, even Schulman's revised evaluation largely relied upon Atesalp's tainted evaluation and left Kortan with the lowest performance rating of her career with the California Youth Authority ("C.Y.A.") notwithstanding her having just been awarded "Outstanding Employee of the Year" for the same time period. [**28] Thus, I believe Kortan has also raised a triable issue that even Schulman's evaluation was impermissibly tainted by retaliation.

I. Hostile Work Environment: The Totality of the Circumstances

The record, construed favorably to Kortan, reasonably shows the following circumstances that turned Kortan's work environment into one of gender-based hostility. Until February 1994, Kortan and Atesalp - her immediate supervisor - enjoyed a relatively congenial professional relationship in a close-knit work environment. They interacted frequently to coordinate responsibility given Kortan's special designation as acting senior psychologist in Atesalp's absence, and Atesalp occasionally turned to her as a confidant. As Kortan testified in her deposition, however, this relationship made her "a captive audience" for Atesalp's sexist remarks - and ultimately captive to his retaliation as well. Kortan on several occasions had to listen as Atesalp unburdened himself of his offensive and demeaning attitudes toward women, with particular invective for certain women who were superintendents at C.Y.A. [1] These sexist, hostile statements about others are relevant to show Kortan was subjected to a hostile [**29] work environment. *See* Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 80, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998) [*1115] (concluding that actionable hostile work environment includes "general hostility to the presence of women in the workplace"); Heyne v. Caruso, 69 F.3d 1475, 1480 (9th Cir. 1995) (concluding that "conduct tending to demonstrate hostility towards a certain group" is relevant to show discrimination against an employee who is a member of that group). Most offensive in Atesalp's misogynistic vocabulary was his use of certain terms to label women he held in highest contempt: "castrating bitch" and "regina," a term he let Kortan know was a double-entendre for vagina. [2] The term "regina" is not the gutter language other cases have condemned, but given its intended meaning is just as offensive to women. *See* Steiner v. Showboat Operating Co., 25 F.3d 1459, 1461, 1463 (9th Cir. 1994) (relying on supervisor's references to women in a "derogatory fashion using sexually explicit and offensive terms," such as "dumb fucking broads" and "cunt" as evidence he created a hostile work environment); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 964-65 (8th Cir. 1993) [**30] (concluding that such "vulgar and offensive" words "'are widely recognized as not only improper, but as intensely degrading'" and thus frequent use of such words "clearly violates Title VII" (quoting Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983))); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) (holding that "pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile work environment"). Although Kortan for a time tolerated Atesalp's derogatory statements about other women, and acknowledges that as to her personally Atesalp was "a perfect gentleman," his offensive references bothered her and she objected to his use of them. Nonetheless, during the four to five month period before February 1994, Atesalp's verbal attacks on women "got worse and worse" and eventually contributed to her February 3 decision to step down from her role as acting senior psychologist. [3]

1 Prior to February 1994, Atesalp, referred to Crawford, a superintendent at C.Y.A., as a "regina" as well as "a castrating bitch." Atesalp had referred to Chavira, another superintendent, as a "castrating bitch" more than once and as a "madonna." The majority overlooks Atesalp's pre-February 1994 statements about Crawford when it says Kortan testified that Atesalp had used the term castrating bitch "very infrequently" and madonna "once or twice." Maj. Op. at 7387. This testimony was only referring to Atesalp's statements about Chavira. Later in her deposition, Kortan testified that Atesalp had also used these terms to refer to Crawford.

[**31]

2 Several months prior to February 1994, Atesalp made clear to Kortan that he intended regina to mean vagina when he told her the Georgia O'Keeffe poster in her office was "suggestive" because it reminded him "of a regina."

3 Atesalp also subjected Kortan to his racist comments. He repeatedly referred to one African-American employee as a "black ape," referred to another as a "black goon" and referred generally to African-American wards as "thugs."

At that point, Atesalp's attitude toward Kortan plainly shifted and became hostile. In a particularly emotional outburst, Atesalp directed invective at other female colleagues and females in general that, in context, Kortan could and did reasonably understand now included her - including relegating her to the despised "regina" category. Had that been the end of it - the emotional outburst of a supervisor who felt his trusted subordinate had unfairly abandoned him - there would not be cause for invoking Title VII. But that was not the end of it. Atesalp persisted in his retaliation, committing acts of increasing severity which transform this [**32] case from mere

offensive conduct into a valid hostile work environment claim.

Atesalp publicly directed his scorn against Kortan and made mockery of her sexual harassment charge outside the door of her office. Such humiliating conduct is an important factor in determining whether an employee was subjected to a hostile or abusive work environment. *See* Harris, 510 U.S. at 23. Kortan also presented evidence, which on summary judgment we must construe in her favor, that Atesalp retaliated by purposely scheduling Kortan's performance evaluation on the day Kortan was to meet with the C.Y.A.'s internal investigator and falsely accusing Kortan of not submitting a work order. Atesalp also stared and glared at her and became hypercritical of her work - prompting Schulman to admonish Atesalp to behave himself in a March 11 memorandum suggesting Atesalp was harassing [*1116] Kortan and retaliating against her through "excessive corrections on Psychological evaluations, lack of flexibility of work hours, and documentation for minor behavior irritants." [4]

4 Schulman's memo contradicts the majority's statement that "there is no evidence showing" Atesalp retaliated by becoming hypercritical of Kortan. *See* maj. op. at 7394.

[**33] Atesalp did not back off, however. Instead he invoked his supervisory authority to retaliate against Kortan - using her annual performance review to send an unmistakable message of retribution. Thus Kortan, who had a five-year record of receiving the highest ("E") rating in all performance categories (with the exception of one "M" - an average rating - in one category in her first year), and who was awarded "Outstanding Employee of the Year" for 1993 (the evaluation period in question), dropped two levels in three categories to the substandard "I" *rating in Atesalp's evaluation. Those ratings were admittedly retaliatory, as the majority recognizes.*

Although Schulman partially revised Atesalp's evaluation, those revisions neither negated the hostility of the work environment nor defeat Kortan's retaliation claim. In sum, C.Y.A. management effectively ratified Atesalp's retaliation, and added to the hostility of the work environment, by failing to take any disciplinary action against him. Not surprisingly, Atesalp remained recalcitrant and refused to sign the upgraded evaluation. As the Supreme Court has observed, management's knowledge of sexual harassment and failure to take any [**34] *disciplinary action "may be seen as . . . the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy."* Faragher, 524 U.S. at 789; *accord* Fuller v. City of Oakland, 47 F.3d 1522, 1529 (9th Cir. 1995) ("Title VII does not permit employers to stand idly by once they learn that sexual harassment has occurred. To do so amounts to a ratification of the prior harassment."). Faced with management's failure to punish Atesalp for his known acts of retaliation, Kortan reasonably perceived her work environment as hostile. [5]

5 Kortan had reason to be disheartened, because Schulman had initially encouraged her to "take him [Atesalp] on," suggesting Atesalp was a known abuser who needed to be challenged. Yet when Kortan did "take him on," she was the one who suffered adverse consequences.

The majority effectively insulates Atesalp's retaliatory conduct, however, first by excluding his retaliatory evaluation [**35] from its analysis of the hostile work environment and, second, by finding no actionable retaliation because Schulman's evaluation superseded Atesalp's - essentially, "no harm, no foul." I believe both grounds are in error: the totality of the circumstances, including Atesalp's retaliatory evaluation, add up to a triable case of a hostile work environment; and - as I discuss next - even Schulman's evaluation supports a separate claim of retaliation.

II. Retaliation Based on the Poor Evaluation

The majority accepts that Atesalp's performance evaluation was retaliatory, and recognizes that an undeserved performance evaluation is actionable under Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987). It attempts to distinguish *Yartzoff*, however, because only Schulman's "corrected" evaluation went into Kortan's personnel file, and it characterizes Schulman's evaluation as not undeserved. *See* maj. op. at 7396. I disagree with this analysis in several respects. First, although Schulman did modify Atesalp's retaliatory - and therefore undeserved - evaluation, he did not go so far as to correct it. Rather, Schulman largely relied on the retaliatory evaluation [**36] to give Kortan the lowest evaluation of her five-year career at C.Y.A., and thereby ratified Atesalp's retaliation.

As to the three undeserved ratings Atesalp gave Kortan, in the categories "relationships [*1117] with people," "work habits" and "meeting work commitments," Schulman merely struck a compromise between the highest ("E") rating and Atesalp's unwarranted "I" ratings - moving Kortan up one rating to "M". Schulman may have independently investigated Kortan in the "relationships with people" category, but he did not independently investigate the other two. Schulman contends he lacked a "sufficient record of her performance . . . to give her anything more than 'M' ratings" in those categories because she was on evacation or leave for a significant part of the yearly evaluation period, between May and August 1993. This "justification" rings hollow given that Kortan was named "Outstanding Employee of the Year"

for the same year, absences and all. Moreover, rather than allow Atesalp's punitive ratings to drag Kortan down, Schulman could have declined to rate Kortan in those two categories for want of personal knowledge, defaulted to Kortan's prior history of "E's" over the years or otherwise [**37] memorialized his uncertainty. Instead, he simply compromised and left Kortan with her lowest performance evaluation at C.Y.A. At the end of the day, Schulman's evaluation was at least as harmful to Kortan because, by failing to remove the retaliatory taint of Atesalp's evaluation, Schulman made clear to Kortan that management would not eliminate the adverse effect of Atesalp's retaliation - only lessen it. [6]

6 The majority also seems to distinguish *Yartzoff* because Shulman's evaluation was not "subaverage." Ratings need not be subaverage, however, to constitute retaliation. Rather, it is "*undeserved* performance ratings, if proven, [that] would constitute 'adverse employment decisions'" actionable under the retaliation provision of Title VII. Yartzoff, 809 F.2d at 1376 (quotation marks and citation omitted) (emphasis added); *accord* Brooks v. City of San Mateo, 214 F.3d 1082, 2000 U.S. App. LEXIS 12165, 2000 WL 713748, at *7 (9th Cir. 2000); *see also* Steiner, 25 F.3d at 1465 (holding that performance evaluation with only three below average ratings out of seven categories was sufficient adverse employment decision to create prima facie case of retaliation).

[**38] Not only does the majority decline to recognize the effect of Schulman's tainted evaluation on Kortan, it also declines to address the "chilling effect which [a supervisor's] retaliatory conduct might have on the remaining employees under his supervision." Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997); *accord* EEOC v. Hacienda Hotel, 881 F.2d 1504, 1511 (9th Cir. 1989). No doubt many C.Y.A. employees observed the conflict between Atesalp and Kortan and learned that the consequence of Kortan exercising her Title VII rights was that she went from "Outstanding Employee" to a disfavored employee and became the focus of Atesalp's wrath. These employees will likely be deterred from reporting sexual harassment out of fear of retaliation by Atesalp and ending up in the same predicament as Kortan.

Because Schulman's evaluation did not cure, but effectively ratified and perpetuated the "'deleterious effect on the exercise of [Title VII] rights,'" caused by Atesalp's evaluation, Hashimoto, 118 F.3d at 676 (quoting Garcia v. Lawn, 805 F.2d 1400, 1405 (9th Cir. 1986)), I would hold that Kortan has presented sufficient [**39] evidence to defeat summary judgment on her retaliation claim.

LEXSEE

Questioned
As of: May 06, 2010

SHIRLEY J. MITCHELL, Plaintiff-Appellant, v. TOLEDO HOSPITAL, Defendant-Appellee.

No. 91-3268

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

964 F.2d 577; 1992 U.S. App. LEXIS 11505; 59 Fair Empl. Prac. Cas. (BNA) 76; 59 Empl. Prac. Dec. (CCH) P41,640

September 30, 1991, Submitted
May 21, 1992, Decided
May 21, 1992, Filed

PRIOR HISTORY: [**1] ON APPEAL from the United States District Court for the Northern District of Ohio. District No. 89-07686. Nicholas J. Walinski, Senior District Judge.

DISPOSITION: AFFIRMED

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant discharged employee sought review of a judgment from the United States District Court for the Northern District of Ohio, which granted summary judgment on behalf of appellee employer in a race and age discrimination/termination of employment action brought under 42 U.S.C.S. §§ 1981, 1983 and Ohio Rev. Code Ann. §§ 4112.02(A), 4112.99.

OVERVIEW: Appellant discharged employee alleged that her discharge was discriminatory, based on race and age in violation of 42 U.S.C.S. §§ 1981, 1983 and Ohio Rev. Code Ann. §§ 4112.02(A), 4112.99. The court affirmed the lower court judgment that granted summary judgment on behalf of appellee employer because appellant failed to establish that the non-discriminatory reason for her discharge was pretextual. Appellant was required to make a prima facie case of discrimination by showing that she was a member of a protected class, she was discharged, she was qualified for the position. and that a person outside the class replaced her. Although appellant satisfied the first three requirements, she failed to show that a person who was white or younger replaced her. The court held that appellee gave a legitimate non-discriminatory reason for appellant's discharge in that she misused hospital property when she hid important documents and appellant failed to rebut the non-discriminatory reason for her discharge. The court concluded that summary judgment on behalf of appellee was proper because appellant failed to set forth specific facts to show that there was a genuine issue of material fact.

OUTCOME: The court affirmed the motion for summary judgment granted on behalf of appellee employer because appellant discharged employee failed to rebut the non-discriminatory reason for her discharge and to set forth specific facts to show that there was a genuine issue of material fact.

CORE TERMS: summary judgment, prima facie case, misuse, supervisor, comparable, discharged, similarly situated, seriousness, deposition, desk, co-worker, examiner, box, articulated, leader, team, age discrimination, genuine issue of material fact, non-minority, promotion, fired, non-discriminatory, billing, employee handbook, insubordination, occupational, discipline, correctly, jokingly, cabinet

LexisNexis(R) Headnotes

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting

Labor & Employment Law > Discrimination > Racial Discrimination > Employment Practices > Discharges
[HN1]The four-part McDonnell Douglas test for a prima facie showing of discrimination requires a showing that the plaintiff: (1) was a member of a protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by a person outside the class.

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Opposition > Supporting Materials
Civil Procedure > Summary Judgment > Supporting Materials > General Overview
[HN2]Fed. R. Civ. P. 56(e) requires that affidavits in support of, or in opposition to, a motion for summary judgment be made on personal knowledge, set forth such facts as would be admissible into evidence and show affirmatively that the affiant is competent to testify to the matters stated therein.

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Summary Judgment > Supporting Materials > Discovery Materials
[HN3]The general standard that an appellate court applies in reviewing the grant or denial of a summary judgment motion is the same standard utilized by the trial court initially: As provided in Fed. R. Civ. P. 56(c), summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions of file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Scintilla Rule
Civil Procedure > Summary Judgment > Evidence
[HN4]The mere existence of a scintilla of evidence in support of the plaintiff's position for a motion for summary judgment will be insufficient; there must he evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry unavoidably asks whether reasonable jurors could find by a preponderance of evidence that the plaintiff is entitled to a verdict.

Civil Procedure > Summary Judgment > Evidence
Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Standards > Appropriateness
[HN5]In order to defeat summary judgment a plaintiff must come forward with more persuasive evidence to support his or her claim than would otherwise be necessary. Where the defendant demonstrates that after a reasonable period of discovery the plaintiff is unable to produce sufficient evidence beyond the bare allegations of the complaint to support an essential element of his or her case, summary judgment should be granted.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
[HN6]The burden is on an employment discrimination plaintiff to establish a prima facie case of discrimination.

Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Racial Discrimination > General Overview
[HN7]The requirements of a prima facie claim of disparate treatment using such a "comparable non-protected person was treated better" element as one of the requisites, the plaintiff must produce evidence which at a minimum establishes (1) that he was a member of a protected class and (2) that for the same or similar conduct he was treated differently than similarly-situated non-minority employees.

Labor & Employment Law > Discrimination > Racial Discrimination > General Overview
[HN8]To make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the "comparables" are similarly-situated in all respects. Thus, to be deemed "similarly-situated", the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Civil Procedure > Summary Judgment > Evidence
Civil Procedure > Summary Judgment > Opposition > General Overview

[HN9]In order to withstand a motion for summary judgment, the party opposing the motion must present "affirmative evidence" to support his/her position; a mere "scintilla of evidence" is insufficient.

COUNSEL: For Plaintiff - Appellant: William J. Peters, Briefed, 419-242-5429, 316 N. Michigan Street, Suite 422 Toledo Building, Toledo, OH 43624.

For Defendant - Appellee: Michael S. Scalzo, Briefed, 419-249-7100, Marshall & Melhorn, 4 Seagate Building, Eighth Floor, Toledo, Oh 43604.

JUDGES: Before: JONES and NELSON, Circuit Judges; and ROSEN, District Judge. * ROSEN, District Judge, delivered the opinion of the court, in which NELSON, Circuit Judge, joined. JONES, Circuit Judge delivered a separate dissenting opinion.

* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION BY: GERALD E. ROSEN

OPINION

[*578] ROSEN, District Judge. Plaintiff Shirley Mitchell appeals the District Court's entry of summary judgment in favor of Defendant Toledo Hospital in this race and age discrimination/termination of employment action. For the following reasons, we affirm the decision of the District Court.

I. INTRODUCTION

This is a race and age discrimination/termination of employment case. In her Complaint [**2] filed in the U.S. District Court for the Northern District of Ohio on December 8, 1989, Plaintiff alleged that her discharge from employment at the Defendant hospital on December 12, 1988 was in violation of the Fourteenth Amendment, 42 U.S.C. §§ 1981 and 1983, Title VII, the ADEA and Sections 4112.02(A) and 4112.99 of the Ohio Revised Code. Paragraph 1 of Plaintiff's Complaint also contained a passing allegation that Ms. Mitchell had once been denied a promotion at the hospital because of her race, but she admitted in her deposition that this lawsuit only dealt with her discharge and her attorney confirmed that the allegation in the Complaint was a "misprint". [1]

1 This is actually the second lawsuit Ms. Mitchell has filed against her former employer, Toledo Hospital. In 1986, she filed a race and age discrimination suit against the hospital which was predicated on the hospital's promotion of a younger white female co-worker instead of her to a position for which both Ms. Mitchell and the white co-worker had applied and were interviewed. As in this case, Plaintiff alleged separate causes of action under the Fourteenth Amendment, Section 1981, Section 1983, Title VII and ADEA.

The District Court granted the hospital's motions to dismiss and for summary judgment in that "denial of promotion" suit on June 19, 1987 and May 25, 1988, finding that there was no legal basis for Plaintiffs allegations of violation of the Fourteenth Amendment and Section 1981 and 1983, and subsequently finding, with respect her Title VII and ADEA claims, that Plaintiff had failed to show that a genuine issue of material fact existed as to whether the hospital's articulated reasons for the employment decision were pretextual. (In that case, the District Court made no determination as to whether Ms. Mitchell had established a *prima facie* case.)

The Sixth Circuit affirmed the District Court in that denial-of-promotion case in an unpublished opinion on June 23, 1939.

In her deposition in the instant action, Ms. Mitchell further admitted that she has no evidence of having been denied a promotion because of her race or her age other than the evidence given by her in her deposition in the prior litigation. Thus, even if she and her attorney had not withdrawn the denial of promotion allegations, she would be barred from proceeding with a denial of promotion claim by virtue of the doctrine of *res judicata.*

[**3] In an Opinion and Order dated February 14, 1991, the District Court granted the [*579] Defendant's Motion for Summary Judgment, finding that Plaintiff had failed to establish a *prima facie* case of race or age discrimination, and even assuming *arguendo* that she did establish a *prima facie* case, Plaintiff failed to establish that the non-discriminatory reason given by the hospital for her discharge -- misuse of hospital property -- was pretextual. A Judgment of dismissal was accordingly entered on February 20, 1991.

Plaintiff timely filed her Notice of Appeal to the Sixth Circuit.

II. FACTUAL BACKGROUND

Plaintiff Shirley Mitchell is a 51-year old black female who had been employed by Defendant Toledo Hospital ("the Hospital") for 29 years prior to the termination of her employment in December 1988. At the time of her discharge, Ms. Mitchell was employed as an accounts examiner. [2] As an accounts examiner, Ms.

Mitchell was responsible for billing Welfare for charges incurred by Welfare patients at the Hospital. It was Ms. Mitchell's responsibility to review the appropriate forms and make sure they were correctly filled out before sending them to Welfare so that the Hospital [**4] could be reimbursed for the patients' charges by that agency.

2 There were five accounts examiners in Plaintiff's department at the time of Plaintiff's discharge.

On December 5, 1988, certain "Sterilization Consent Forms" (the "forms") turned up missing. The forms had been seen in a box on a coffee table in the office two days earlier. Because her "team leader" and immediate supervisor, Martha Holmes, was absent, she went to Ron Wachsman, the "billing manager" who apparently was Plaintiff's supervisor's supervisor, and asked him if he had seen the box of forms that had been on the coffee table.

Wachsman told Ms. Mitchell that he had recently moved the coffee table but did not indicate to her whether had seen any box of forms on the table. *See* J.A. 63. From Wachsman's statement that he had moved the coffee table, Ms. Mitchell surmised that he must have set the box of forms on the floor and that housekeeping might have thrown the box in the trash. *Id.* Plaintiff then proceeded to look for the box of forms [**5] for two or three hours on December 5th but to no avail..

Around 8 o'clock in the morning the next day, Tuesday, December 6, 1988, Plaintiff found the box of forms in the hospital basement. She took the box to her office and placed it under her desk. Plaintiff testified at her deposition that on December 6th she only told one person -- Cathy Brown, one of Plaintiff's co-workers -- that she had found the forms. J.A. 83. She did not tell any of her supervisors. *Id.*

Plaintiff subsequently told three of her fellow welfare accounts examiners about finding the forms, and she and these three co-workers agreed to play a "practical joke" on Wachsman:

[MITCHELL]

A: I remember we were jokingly, Mary [Mihalko], Sue [Sheronick], Cindy [Dawson] and I, saying that we weren't going to tell Ron Wachsman until, jokingly, December. . . .

[DEFENSE COUNSEL]

Q: You said until December. It was December.

A: Christmas I was saying. We were jokingly saying it.

Q: You were not going to tell Ron until the day before Christmas?

A: Uh-huh, or something like that.

Q: Was it you or the --

A: Mary Mihalko and I jokingly said it.

Q: Okay.

A: And Cindy said yes, he doesn't need to know anytime [**6] soon.

Q: Who said it first?

A: We all said it in unison.

Q: You all said it in unison?

A: Uh-huh, and I said not until Christmas.

Q: You were the one that said not until Christmas. That was going to be his Christmas present or what?

[*580] A: No. It was said jokingly. . . .

J.A. at 80-82.

A couple of hours later that morning, Mitchell's supervisor, Ronald Wachsman asked her if she had seen the forms. She denied having seen them, even though she knew that she had them under her desk. [3] She kept the forms hidden under her desk for another day and then moved them to her personal file cabinet which she locked with a key. On Thursday morning, December 8, Plaintiff was advised by a co-worker that Mr. Wachsman and Mr. Mike Swick, another supervisor, had been looking for the forms and had looked under her desk on Wednesday evening. Later on Thursday, Mr. Wachsman again asked Plaintiff if she had located the forms and she again denied having seen them.

3 Ms. Mitchell testified at her deposition that she decided not to tell her supervisors about having found the forms "as a practical joke." The subject forms were not blank forms, but rather forms that were already filled out and ready to be reviewed and/or sent to Welfare and represented several hundred thousand dollars of income to the hospital.

[**7] On Friday, December 9, Mr. Wachsman called Ms. Mitchell into his office and informed her that the forms had been found. When he asked her why she had not told him that she had found them, Mitchell replied that "she wanted him to stew in his own mess." J.A. at 89.

Plaintiff was informed that her actions constituted a misuse of Hospital property, a terminable offense according to the Hospital's employee handbook. The Hos-

pital's five member review board was convened and unanimously agreed that discharge was the appropriate disciplinary action.

Accordingly, on Monday, December 12, 1988, in a meeting with Mr. Wachsman and Mr. Baranski of the hospital's Human Resources department, Plaintiff was advised that her employment was terminated. Mitchell then brought the instant action, claiming that she was terminated because of her race and her age.

III. PLAINTIFF'S ARGUMENTS IN THE DISTRICT COURT AND IN THIS APPEAL

While Plaintiff alleged in her Complaint that the hospital has not terminated any white or younger employees for the same type of conduct in which she engaged, she admitted at her deposition that she knows of no white employees or employees under the age of 40 who engaged [**8] in similar conduct and were not discharged. Her only basis for her claims of discrimination is her contention that a lot of white people have not been discharged who have done what Plaintiff believes were worse things than what she did. However, at her deposition she could only identify two non-minority employees, Karen Lind, one of Plaintiff's fellow account examiners whom Plaintiff claims had a poor absentee record, and Bobbie Walley, a employee in charge of filing, who in 1987 once cursed her team leader. Neither of these two individuals was fired, and Plaintiff believes that they were afforded more lenient treatment because they were white.

Additionally, after Defendant moved for summary judgment, Plaintiff submitted with her Response to the Summary Judgment Motion a hearsay Affidavit, which is dated February 8, 1991, seven months after her deposition, in which she states that she had "been advised by [unidentified] employees of Toledo Hospital" that at some unspecified point in time, two white female employees, Connie Kortgoede and Karen Lind, kept medicare checks and personal checks payable to Toledo Hospital hidden in their desks for two years but the only disciplinary action [**9] taken against either woman was that one of them was transferred out of the Billing Department to another department.

Further, although Plaintiff admits having hidden the subject forms as described above, and admits having intentionally misled her supervisor every time he asked her if she had seen them, Plaintiff argues that her hiding the forms from her supervisor does not constitute a misuse of Hospital property -- which was the reason given for her discharge. Rather, she contends that because she had hidden the forms under her desk and in her filing cabinet, "at no [*581] time after December 6, 1988 were the forms any place than in a proper location. The forms after being found did not leave the Hospital Billing Department. The Hospital property was under lock and key for approximately twenty four (24) hours and certainly were not misused."

IV. THE DISTRICT COURT'S DECISION

Applying [HN1]the four-part *McDonnell Douglas* test for a *prima facie* showing of discrimination, *i.e.*, showing that the plaintiff

(1) was a member of a protected class,

(2) was discharged,

(3) was qualified for the position, and

(4) was replaced by a person outside the class,

the District [**10] Court determined that Plaintiff failed to establish a *prima facie* case of race or age discrimination because "nowhere in the record is it alleged that she was replaced by a person outside the [protected] class." Further, noting that Plaintiff could also have established a *prima facie* case by presenting credible, direct evidence of discrimination, the Court observed that Mitchell had not presented any such evidence.

The District Court went on, however, to hold that even assuming *arguendo* that Mitchell had met all four prongs of the *McDonnell Douglas* test, the Hospital had articulated a legitimate, nondiscriminatory reason for her discharge -- misuse of Hospital property -- and Plaintiff failed to establish that the Hospital's reason was pretextual. In so doing, the Court held that Ms. Mitchell's hearsay affidavit, regarding what she had been told by unnamed Hospital employees about the two woman who had kept medicare and personal checks in their desk drawers but had either not been disciplined or received lesser discipline, failed to satisfy the requirements of [HN2]Fed. R. Civ. Pro. 56(e) which requires that affidavits in support of, or in opposition to, a motion for summary [**11] judgment be made on personal knowledge, set forth such facts as would be admissible into evidence and show affirmatively that the affiant is competent to testify to the matters stated therein. Therefore, the Court refused to consider the affidavit, and because all that Ms. Mitchell had offered in support of her claims were "mere allegations of discrimination", it entered summary judgment in favor of the Hospital.

V. DISCUSSION

A. THE STANDARDS GOVERNING RENEW OF A GRANT OF A MOTION FOR SUMMARY JUDGMENT

[HN3]The general standard that an appellate court applies in reviewing the grant or denial of a summary judgment motion is the same standard utilized by the trial court initially: As provided in Fed. R. Civ. Pro. 56(c),

summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions of file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The principles governing consideration of motions for summary judgment were redefined by the United States Supreme Court in a 1986 trilogy of cases: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); [**12] *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The Sixth Circuit expressly adopted the Supreme Court trilogy's "new era" in summary judgment practice in its recent decision in *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989).

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court held:

[HN4]The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must he evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by [*582] a *preponderance of evidence* that the plaintiff is entitled to a verdict. . . .

106 S. Ct. at 2512 (emphasis added). The "mere possibility" of a factual dispute is not enough. *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986). [**13] Rather, [HN5]in order to defeat summary judgment a plaintiff "must come forward with more persuasive evidence to support [his or her] claim than would otherwise be necessary." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1350, 1356, 89 L. Ed. 2d 538 (1986). Where the defendant demonstrates that after a reasonable period of discovery the plaintiff is unable to produce sufficient evidence beyond the bare allegations of the complaint to support an essential element of his or her case, summary judgment should be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). *See also, Street v. J.C. Bradford & Co., supra*, 886 F.2d at 1478-1480.

B. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT HOSPITAL.

1. The District Court Properly Applied the McDonnell Douglas/Burdine Evidentiary Framework to Plaintiffs Claims of Discrimination.

The *McDonnell Douglas/Burdine* formula is the evidentiary framework applicable not only to claims brought under Title VII, but also to claims [**14] under ADEA, *Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975), to claims of discrimination under Ohio state law, *In re Brantley*, 34 Ohio App.3d 320, 518 N.E.2d 602 (1987), and to claims under 42 U.S.C. § 1981, *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 2378, 105 L. Ed. 2d 132 (1989). Therefore, the District Court correctly "lumped together" Plaintiffs Title VII, ADEA, Section 1981 and Ohio state law theories of discrimination and applied the *McDonnell Douglas/Burdine* evidentiary framework in analyzing the factual and legal merits of Plaintiff's claims.

2. Plaintiff Failed to establish a Prima Facie Case of Race Or Age Discrimination:

It is well-established that [HN6]the burden is on an employment discrimination plaintiff to establish a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1972); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).

As the District Court explained, under *McDonnell Douglas and Burdine*, Plaintiff can establish a *prima facie* case of discrimination [**15] by showing that (1) she was a member of a protected class; (2) she was discharged; (3) she was qualified for the position; and (4) she was replaced by a person outside the class. [4]

4 The District Court also correctly noted that Plaintiff could have alternatively established her *prima facie* case by presenting credible, direct evidence of discriminatory intent. *See Terbovitz v. Fiscal Court of Adair County*, 825 F.2d 111 (6th Cir. 1987). However, she did not present any such direct evidence and, therefore, the Court properly proceeded with application of the *McDonnell Douglas/Burdine* formula.

The District Court held that Plaintiff satisfied the first three *McDonnell Douglas/Burdine* elements but failed to satisfy the fourth element -- *i.e.*, she failed to show that she was replaced by a white or younger person. Therefore, the District Court held that Plaintiff failed to establish a *prima facie* case of either race or age discrimination.

Although the District Judge found no *prima* [**16] *facie* case had been established by Plaintiff because of the lack of the fourth "replaced-by-a-'non-protected'-person" element of the *McDonnell Douglas/Burdine* criteria, a plaintiff can so make out a *prima facie* case by

showing, in addition to the first three elements, that "a comparable non-protected person was treated better".

As the Sixth Circuit has frequently phrased [HN7]the requirements of a *prima facie* claim of disparate treatment using such a "comparable non-protected person was [*583] treated better" element as one of the requisites, the plaintiff must produce evidence which at a minimum establishes (1) that he was a member of a protected class and (2) that for the same or similar conduct he was treated differently than similarly-situated non-minority employees. *See e.g.,* Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988), *cert. denied,* 490 U.S. 1110, 104 L. Ed. 2d 1028, 109 S. Ct. 3166 (1989); *Long v. Ford Motor Co.,* 496 F.2d 500 (6th Cir. 1974).

It appears that it is under this formula that Plaintiff here attempted to make out her case. She alleges that one non-minority Hospital employee, Karen Lind, had a poor attendance record. She [**17] also alleges that, in 1987, Bobbie Walley, an employee in charge of filing, cursed at her team leader. But neither Lind nor Walley was fired.

According to Plaintiff, these "facts" establish a *prima facie* case that non-minority employees, guilty of conduct of "comparable seriousness" to the conduct for which she was fired, received more lenient treatment.

However, as the facts of this case demonstrate, Plaintiff's allegations regarding other employees not being fired for different, but what she subjectively believes to be more serious, misconduct simply does not satisfy that element either.

It is fundamental that [HN8]to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the "comparables" are similarly-situated in all respects. Stotts v. Memphis Fire Department, 858 F.2d 289 (6th Cir. 1988). Thus, to be deemed "similarly-situated", the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would [**18] distinguish their conduct or the employer's treatment of them for it. Mazzella v. RCA Global Communications, Inc., 642 F. Supp. 1531 (S.D.N.Y. 1986), *aff'd,* 814 F.2d 653 (2d Cir. 1987); Lanear v. Safeway Grocery, 843 F.2d 298 (8th Cir. 1988) (plaintiff must prove that he and the white employee were similarly situated in all respects and that the other employee's acts were of comparable seriousness to his own); Cox v. Electronic Data Systems Co, 751 F. Supp. 680 (E.D. Mich. 1990).

Plaintiff produced no facts to establish that the two white employees she identified as not having been fired were "similarly situated in all respects". Moreover, she did not produce sufficient information about Ms. Lind's alleged absenteeism and Ms. Walley's insubordination to indicate whether the absenteeism and insubordination were of "comparable seriousness" to the conduct for which Plaintiff was discharged. [5]

5 The dissent would hold that Plaintiff has established a *prima facie* case. This determination is based principally upon the dissent's conclusion that Ms. Walley's conduct, in allegedly once swearing at her team leader, was of "comparable seriousness" to Plaintiff's deliberate concealment of records on which the hospital depended for getting paid, and her subsequent lying about it under direct questioning from her superior. However, Plaintiff presented no evidence regarding Ms. Walley's cursing incident so as to establish the "comparable seriousness" of conduct on which the dissent relies. It is the discrimination plaintiff's burden to establish that the other employee's acts were of "comparable seriousness" to his or her own infraction. Lanear v. Safeway, supra, 843 F.2d at 301. Plaintiff here has not met that burden.

Moreover, even if the majority were constrained to find sufficient record evidence that Ms. Walley's cursing at her team leader was, as the dissent suggests, of "comparable seriousness" to Ms. Mitchell's concealment of records and lying, the dissent does not address the fact that Plaintiff simply *produced no evidence* to establish that she and Ms. Walley were otherwise "similarly situated in all respects". It is undisputed that Plaintiff and Ms. Walley were employed in different capacities -- Ms. Walley was a file clerk while Plaintiff was an accounts examiner. There is *no evidence of record* to establish that such different positions, or the duties and responsibilities required of holders of these jobs, are sufficiently similar so as to render them "comparable" positions. In determining that Ms. Walley's and Ms. Mitchell's positions were comparable, the dissent assumes that a file clerk and an accounts examiner are simply "specialized secretarial positions", and thus concludes that the positions are similar because they represent "jobs at the same level in occupational hierachy". Based on that assumption -- without any record evidence to support it -- the dissent summarily determined that Walley and Mitchell were sufficiently similarly-situated to validate a comparison of their treatment.

Further in finding sufficient comparability, the dissent refuses to require Plaintiff to establish that she and Ms. Walley "dealt with the same supervisor and were subject to the same standards". The dissent appears to assume that Ms. Walley and Ms. Mitchell were subject to the same standards because they were both hospital employees and the hospital had an "employee handbook". However, without evidence that these two employees reported to the same supervisor, there can be no showing that they were "subject to the same standards".

[**19] [*584] It is now quite well-established that, [HN9]in order to withstand a motion for summary judgment, the party opposing the motion must present "affirmative evidence" to support his/her position; a mere "scintilla of evidence" is insufficient. Anderson v. Liberty Lobby, supra, 106 S. Ct. at 2510, 2514; Street v. J.C. Bradford & Co., supra, 886 F.2d at 1479.

Because Plaintiff failed to produce sufficient affirmative evidence to establish that the non-minority employees with whom she compares her treatment were "similarly situated in all respects", or that their conduct was of "comparable seriousness" to the conduct for which she was discharged, no claim for discrimination can be based upon a comparison of Plaintiff's and their treatment.

3. The Hospital Articulated a Legitimate Non-Discriminatory Reason for Plaintiffs Discharge.

The District Court, however, went on to assume *arguendo* that Plaintiff had established a *prima facie* case and proceeded with the *Burdine* burden-shifting framework. [6] The Court found that the Hospital articulated a legitimate non-discriminatory reason for Plaintiff's discharge -- [**20] misuse of Hospital property. As the District Court noted, the non-discriminatory nature of the Hospital's decision is bolstered by the Affidavit of Donald Currier, the Vice-President of the Hospital's Human Resources Department who was a member of the Review Board that voted to discharge Plaintiff for her actions. In his Affidavit, Currier stated that there was no one similar to Plaintiff who was caught misusing Hospital property who was not discharged and that the decision by the Board to terminate Plaintiff was made without any consideration of her race or age.

6 *Burdine* provides that:

First, the plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

450 U.S. at 252-53 (citations omitted).

[**21] *4. Plaintiff Failed to Establish Pretext.*

Because the Hospital articulated a legitimate non-discriminatory reason for Plaintiff's termination, to withstand summary judgment, Plaintiff had to establish that the proffered reason was pretextual.

As the District Court found, Plaintiff has not met this burden.

All that Plaintiff offers to rebut the Hospital's articulated non-discriminatory reason is (1) her hearsay Affidavit that she had heard from some unidentified Hospital employees that at some unspecified point in time two white female employees supposedly had kept medicare and personal checks payable to the Hospital in their desks but were not discharged when this was discovered and (2) her denial that her actions on December 6-9, 1988 constituted "misuse of Hospital property".

First of all, with regard to Plaintiff's hearsay Affidavit, the District Court correctly found that the Affidavit was not a proper Rule 56(e) affidavit because it was not made on personal knowledge and did not set forth "facts" that would be admissible into evidence. Even if the Court were to consider the Affidavit, the statements [*585] contained therein are nothing more than rumors, conclusory allegations [**22] and subjective beliefs which are wholly insufficient evidence to establish a claim of discrimination as a matter of law. *See*, O'Shea v. Detroit News, 887 F.2d 683 (6th Cir. 1989); Simpson v. Midland-Ross Corp., 823 F.2d 937 (6th Cir. 1987); Chappell v. GTE Products Corp., 803 F.2d 261, 268 (6th Cir. 1986), *cert. denied*, 480 U.S. 919, 94 L. Ed. 2d 690, 107 S. Ct. 1375 (1987); Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181 (11th Cir. 1984); Locke v. Commercial Union Insurance Co., 676 F.2d 205 (6th Cir. 1982).

With respect to Plaintiff's contention that her denial that her actions on December 5-9, 1988 constituted a "misuse of hospital property" is sufficient to get to a jury, Plaintiff is mistaken. Courts have repeatedly held that the plaintiff's denial of the defendant's articulated legitimate reason without producing substantiation for the denial is insufficient for a race discrimination claim to withstand a motion for summary judgment. Irvin v. Airco Carbide, 837 F.2d 724 (6th Cir. 1987); Ridenour v. Lawson Co., 791 F.2d 52 (6th Cir. 1986).

Thus, [**23] this Court agrees with the District Court -- the record in this case reveals no genuine issue of material fact as to whether Plaintiff's conduct constituted a misuse of hospital property or as to whether Ms. Mitchell told her superiors that the missing forms were locked in her file cabinet.

VI. CONCLUSION

In sum, as the District Court held,

The Hospital's motion for summary judgment was made and supported as required by Fed. R. Civ. P. 56. Mitchell was required to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). This she has not done. Mere allegations of discrimination are not sufficient. As such, summary judgment must be entered for the Hospital.

This Court finds no error in the District Court's holding. Therefore, the Judgment entered by the District Court on February 20, 1991 is hereby AFFIRMED.

DISSENT BY: NATHANIEL R. JONES

DISSENT

NATHANIEL R. JONES, Circuit Judge, dissenting. I take a substantially different view of the evidence in this case, and that view leads me to a result opposite from that of the majority. Accordingly, I respectfully dissent.

In her deposition, Mitchell testified at some length and in great detail about the fact that [**24] she and her co-workers agreed to play a practical joke on Wachsman, their team leader's supervisor. In furtherance of their agreement, Mitchell told her co-workers where the hospital's billing forms were located. When Wachsman later came looking for the forms, none of Mitchell's co-workers told him that the forms were under Mitchell's desk. Instead, Cindy Dawson merely told Mitchell the next day that Wachsman and another billing manager had come looking for the forms. Thus, all the accounts examiners clearly participated in the practical joke. Nonetheless, Mitchell was the only one singled out for punishment.

Mitchell was, concededly, the only one who actually lied to Wachsman. I agree with the majority that this factor distinguishes Mitchell. Specifically, I would find that she was more insubordinate than the others. Of course, the problem with the majority's analysis is that Mitchell was not discharged for insubordination.

With this factual background in mind, I turn to Mitchell's legal claims. I join the majority in holding that this case is more appropriately viewed under a four-factor test that replaces the replaced-by-a-non-protected-person element of *McDonnell Douglas/Burdine* [**25] with a comparable-non-protected-person-was-treated-better element. Mitchell was comparable to her co-workers but for the insubordination involved in lying to Wachsman. In this regard, I would find that Mitchell met the fourth element of the test by alleging that, in 1987, Bobbie Walley, an employee in charge of filing, cursed at her team leader. Walley was not fired. This is a clear example of how Toledo [*586] Hospital has dealt with insubordinate employees in the past. Walley's act is of a similar type -- verbal insubordination -- and of "comparable seriousness." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).

In the textual discussion preceding footnote 5, the majority relies upon *Stotts v. Memphis Fire Department*, 858 F.2d 289 (6th Cir. 1988) for the proposition that Walley is not similarly situated *in all respects* to Mitchell. *Stotts* involved an action filed under the terms of a 1980 consent decree issued in a separate class action against the Memphis Fire Department. *Id.* at 291. In this context, the court addressed the district court's finding of a pattern and practice of disparate treatment in the [**26] Department's discipline of its employees. *Id.* at 296. We repeatedly stressed, either by way of emphasis or quotation marks, that the relevant inquiry was whether the white employees were engaged in acts of comparable seriousness. *E.g., id.* at 296-98. Nowhere does that case discuss the meaning of "similarly situated." In fact, the *Stotts* court compared the conduct of Captain Tom Phillips, a white manager in the Department's administration, and Chief William Posey, a white, higher-ranking official, who both stole a promotional exam, with the conduct of the plaintiff, Jesse Jones, Jr., a fire fighter, who was disciplined for fighting. *Id.* at 291, 300. In concluding that Jones's case and Phillips' case lacked similarity and comparability, the court focused upon a comparison of the acts of stealing and fighting, without ever mentioning the fact that Phillips was an administrator while Jones was a fire fighter. *Id.* at 300. Thus, *Stotts* provides ample support for the proposition that the primary inquiry is into conduct rather than into precise occupational status.

Similarly, *Lanear v. Safeway Grocery*, 843 F.2d 298 (8th Cir. 1988) [**27] does not support the position expressed in footnote 5. The actual quotation from *Lanear* is "'similarly situated in all *relevant* respects.'" *Id.* at 301 (emphasis added) (quoting *Smith v. Monsanto*, 770 F.2d 719, 723 (8th Cir. 1985), *cert. denied*, 475 U.S. 1050, 89 L. Ed. 2d 581, 106 S. Ct. 1273 (1986)). Furthermore, the *Lanear* court does not engage in any analysis supporting the fine distinction in occupational status suggested by footnote 5 of the majority's opinion in the instant case.

The district court in Mazzella v. RCA Global Communications, 642 F. Supp. 1531 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 653 (2d Cir. 1987) attempted to provide some objective standards to measure the relevant aspects in determining whether a fellow employee is similarly situated:

Employees are not "similarly situated" merely because their conduct might he analogized. Rather, in order to be similarly situated, other employees must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to the plaintiff's, [**28] without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it.

Id. at 1547. Like *Lanear, Mazzella* is relevant here only for whatever persuasive effect it may have. *Mazzella,* however, is not persuasive, because after stating the facts and its rule of law, the district court engages in no analysis whatsoever. *Id.* Rather, it refers the reader back to the facts. From those facts, one may infer that Mazzella compared herself to dissimilar employees. *Id.* at 1546. Nonetheless, this inference falls far short of supporting the view that the fellow employees must be engaged in exactly the same occupation and report to the same supervisor. The *Mazzella* court's holding is based on may other factors, the bulk of which address the other employees' *conduct* and the absence of proof thereof. *Id.*

Applying these principles to the instant case, Walley and Mitchell held jobs at the same level in the occupational hierarchy -- specialized secretarial positions. Whether they reported to different supervisors is irrelevant here, because decisions regarding employee discipline [**29] at Toledo Hospital were made by a five-member review board. Furthermore, both employees are judged [*587] by the same standards -- the hospital's employee handbook. Accordingly, although Walley and Mitchell are certainly not similarly situated in all respects, the majority cites no *relevant* respects in which they differ. In any event, the primary inquiry, once again, examines the similarity of the employee's conduct, not their occupational status.

Having found a prima facie case, I would turn to Toledo Hospital's proffered nondiscriminatory reason for Mitchell's discharge: "misuse" of hospital property. The burden then shifts back to Mitchell to present evidence that the hospital's reason was merely a pretext for discrimination. As the Supreme Court explained in *Burdine,* a plaintiff may succeed in proving intentional discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly by showing that the employer's proffered explanation is unworthy of credence."* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981) (emphasis added).

The majority somehow finds it immanently logical [**30] that an employer, after providing employees with personal filing cabinets, would fire an employee for locking important forms in one of those cabinets. I find this remarkable on its face, but all the more remarkable in the instant case, because Mitchell was the only one with the insight to rescue the forms from the trash after Wachsman carelessly left them to be discarded by housekeeping. Keep in mind that the hospital is not claiming that it discharged Mitchell for her conduct in lying to Wachsman. Rather, it alleges that she was discharged only for misuse of hospital property or, in other words, solely for locking the forms away for safekeeping. I would suggest that such a explanation is unworthy of credence.

Other considerations also lead me to the conclusion that summary judgment was inappropriate in this case. Even in the "new era" of summary judgment, the party moving for summary judgment bears the burden of proving that no genuine issue of material fact exists. Boyd v. Ford Motor Co., 948 F.2d 283, 285 (6th Cir. 1991), *cert. denied,* 117 L. Ed. 2d 624, 112 S. Ct. 1481 (1992). The district court granted summary judgment in the instant case based upon the affidavit [**31] of Donald Currier, Toledo Hospital's Vice-President of Human Resources. Currier represented therein that Mitchell was discharged for misuse of hospital property, a terminable offense pursuant to the employee handbook. The district court accepted this representation even though the employee handbook was not in evidence. I would hold that the hospital could not meet its burden by a mere allegation that misuse is a terminable offense; I would require that the hospital cite to a handbook in evidence or, at the very least, quote the relevant portion of the handbook.

A second problem arises from this court's attempt to review this case in the absence of the employee handbook's exact language. Assuming the handbook provision refers to "misuse" in only general terms, the jury would be entitled to decide whether the hospital was offering a genuine interpretation of that language or merely a pretext for discrimination. I would surmise that a jury would be likely to interpret a general "misuse" provision as being addressed to the problem of misappropriation of hospital property. In any event, I posit that no one, except apparently the majority of this Court, would conclude that a person could [**32] "misuse" what she did not in fact "use."

In sum, I would find that Mitchell responded sufficiently to Toledo Hospital's motion for summary judg-

ment by alleging that the hospital's proffered nondiscriminatory reason is unworthy of credence. [1] Accordingly, [*588] I would reverse the district court, because the record demonstrates a genuine issue of material fact as to whether Mitchell's conduct constituted misuse of hospital property.

1 Mitchell also alleged specific evidence of disparate treatment involving "misuse," namely that two other employees, Karen Lind and Connie Kortgoede, kept personal and medicare checks payable to the hospital locked in their desk drawers, yet the hospital did not discharge either of them for misuse of hospital property. Her allegations, however, were not based upon personal knowledge, and her counsel did not preserve the matter for discovery by a Rule 56(f) motion. *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989).

LEXSEE

Caution
As of: May 06, 2010

RAYMOND VINCENT NIDDS, Plaintiff-Appellant, v. SCHINDLER ELEVATOR CORPORATION, Defendant-Appellee.

No. 95-15090

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

113 F.3d 912; 1996 U.S. App. LEXIS 39997; 75 Fair Empl. Prac. Cas. (BNA) 571; 37 Fed. R. Serv. 3d (Callaghan) 591; 97 Cal. Daily Op. Service 3154; 97 Daily Journal DAR 5505

August 15, 1996, Argued, Submitted, San Francisco, California
December 24, 1996, Filed

SUBSEQUENT HISTORY: [**1] As Amended on Denial of Rehearing and Suggestion for Rehearing En Banc April 30, 1997.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-92-02177-VRW. Vaughn R. Walker, District Judge, Presiding.

Original Opinion Previously Reported at: 1996 U.S. App. LEXIS 33457.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant employee sought review of a judgment from the United States District Court for the Northern District of California, which granted summary judgment for appellee employer in an action based on the California Fair Employment and Housing Act (FEHA) for age discrimination and retaliation. Federal jurisdiction was based on the parties' diversity of citizenship.

OVERVIEW: Employee was a highly experienced, 54-year old elevator service mechanic when he was hired. At one time, his supervisor made the statement that he intended to get rid of all the "old timers." About a year later, employee was laid off. He filed an age discrimination claim under California Fair Employment and Housing Act. He was later recalled to work and then terminated. Employee brought action claiming that the original lay-off was based on a discriminatory motive and that the termination was in retaliation for his filing and not withdrawing the age discrimination claim with the California Department of Fair Employment and Housing. The district court granted summary judgment to employer. The court affirmed and held that employer was entitled to summary judgment because the evidence employee offered was not sufficiently probative that it would allow a reasonable factfinder to conclude either that the alleged reason for his discharge was false, or that the true reason for his discharge was a discriminatory one. The court held that the remark by the supervisor was not evidence of age discrimination because of the ambivalent manner in which it was made.

OUTCOME: The court affirmed the grant of summary judgment.

CORE TERMS: summary judgment, route, prima facie case, layoff, discovery, age discrimination, discriminatory, retaliation, mechanic, factfinder, pretext, downturn, en banc, supervisor, deposition, younger, motive, old timers, genuine issue, protected class, quotation, shifting, assigned, discrimination claim, continuance, termination, discharged, seniority, housing, discrimination case

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Evidence
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
[HN1]A court reviews the district court's grant of summary judgment on both the age discrimination and retaliation claims de novo. A court must decide whether there is a genuine issue as to any material fact. Fed. R. Civ. P. 56(c). The criteria of "genuineness" and "materiality" are distinct requirements. The requirement that an issue be "genuine" relates to the quantum of evidence the plaintiff must produce to defeat the defendant's motion for summary judgment. There must be sufficient evidence that a reasonable jury could return a verdict for the nonmoving party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Labor & Employment Law > Discrimination > Age Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Age Discrimination > Employment Practices > Discharges & Failures to Hire
Labor & Employment Law > Discrimination > Age Discrimination > Federal & State Interrelationships
[HN2]Cal. Gov't. Code § 12941 of the California Fair Employment and Housing Act, provides, in relevant part, it is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action.

Labor & Employment Law > Discrimination > Age Discrimination > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
[HN3]A plaintiff must first establish a prima facie case of age discrimination. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

Labor & Employment Law > Discrimination > Age Discrimination > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Circumstantial Evidence
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
[HN4]In order to show a prima facie case of age discrimination, a plaintiff must offer evidence that gives rise to an inference of unlawful discrimination. That evidence may be either direct or circumstantial, and very little is required. To establish a prima facie case of age discrimination through circumstantial evidence, the plaintiff must show that he was: a member of a protected class [age 40-70]; performing his job in a satisfactory manner; discharged; and replaced by a substantially younger employee with equal or inferior qualifications.

Labor & Employment Law > Discrimination > Age Discrimination > Proof > Circumstantial Evidence
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
Labor & Employment Law > Wrongful Termination > Defenses > General Overview
[HN5]The failure to prove replacement by a younger employee is not necessarily fatal to an age discrimination claim where the discharge results from a general reduction in the work force due to business conditions. Rather, courts require instead that the plaintiff show through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination. This inference can be established by showing the employer had a continuing need for his skills and services in that his various duties were still being performed or by showing that others not in her protected class were treated more favorably.

Labor & Employment Law > Discrimination > Age Discrimination > Employment Practices > Reductions in Force
Labor & Employment Law > Discrimination > Age Discrimination > Proof > General Overview
[HN6]A prima facie case of age discrimination is established where complainant belongs to a protected class; his job performance was satisfactory; he was discharged; and others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class. A discharged employee need not show that he was replaced by a younger, newly hired employee; it is sufficient that the discharge occur in circumstances giving rise to an inference of age discrimination.

Labor & Employment Law > Discrimination > Age Discrimination > Defenses & Exceptions > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
[HN7]To rebut a prima facie case of age discrimination, the employer must merely articulate a legitimate, nondiscriminatory reason for the action. Once the employer meets this burden, the presumption of discrimination drops away.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Interference With Protected Activities
Labor & Employment Law > Discrimination > Age Discrimination > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
[HN8]In a retaliation case, the burden shifting scheme is much the same as that in an age discrimination case. A prima facie case requires the plaintiff to show that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action.

Civil Procedure > Discovery > General Overview
Civil Procedure > Summary Judgment > Appellate Review > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
[HN9]A court reviews a district court's denial of a Fed. R. Civ. P. 56(f) request for further discovery by a party opposing summary judgment for abuse of discretion. The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists and that it would prevent summary judgment. Moreover, the district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past.

COUNSEL: Kendra L. Tanacea, San Francisco, California, for the plaintiff-appellant.

Rebecca Hull, Cynthia H. Plevin, Sedgwick, Detert, Moran & Arnold, San Francisco, California, for the defendant-appellee.

JUDGES: Before: Joseph T. Sneed, John T. Noonan, Jr., and David R. Thompson, Circuit Judges. Opinion by Judge Sneed; Dissent by Judge Noonan.

OPINION BY: SNEED

OPINION

[*915] OPINION

SNEED, Circuit Judge:

Raymond Vincent Nidds appeals the grant of summary judgment in favor of his former employer, Schindler Elevator Corp. ("Schindler"), on his California Fair Employment and Housing Act ("FEHA") discrimination and retaliation claims. Federal jurisdiction is based on the parties' diversity of citizenship. Nidds also contests the district court's refusal to continue discovery before ruling on Schindler's summary judgment motion. We have jurisdiction under 28 U.S.C. § 1291, [**2] and we affirm.

I.

BACKGROUND OF THE DISPUTE

Nidds was a highly experienced, 54-year-old elevator service mechanic when he was hired by Schindler on June 13, 1988, and assigned to a downtown San Francisco service route. He was well-liked by his customers and his employer. Sometime in 1989 or 1990, Schindler's District Service Supervisor, Darrel Graham, allegedly told another service mechanic that he intended to get rid of all the "old timers" because they would not "kiss my ass." On October 5, 1990, Nidds and two other service mechanics were laid off. Graham wrote a favorable letter of recommendation for Nidds, and assured him that he would be considered for reemployment should business pick up. Shortly thereafter, his route was assigned at least in substantial part to 25-year-old Greg Cardenas, a former "helper" (an apprentice) employed by Schindler since 1985, who had passed his mechanic's test only 30 days earlier.

When Nidds learned that his route had been assumed by Cardenas, he filed an age discrimination complaint with the California Department of Fair Employment and Housing ("DFEH") on December 7, 1990. The investigation by DFEH revealed that Schindler laid off a total [**3] of eleven employees during 1990 due to a purported downturn in business. Sixty-four percent of those employees were over 40 years old. Asked how it selected employees for layoff, Schindler initially responded that seniority was the basis, and later, that it looked at a combination of factors, including seniority, job performance, special expertise, and competence. Schindler explained that Nidds was overall a very good employee but that he was less proficient on the modern "Solid State" equipment than other mechanics. As to Nidds' claim that there was no downturn in work in the company's service arm, Schindler explained that the downturn was in the construction arm, and that its practice was to shift its best

employees from construction to service to avoid losing them to competitors, and to lay off employees from service to compensate. In November 1991, the DFEH informed Nidds that it would not pursue his claim.

Earlier Schindler had made two offers to rehire Nidds, the first for a route in Fresno, the second for an Oakland route; Nidds rejected the first but accepted the latter in January 1991. Schindler soon began receiving complaints from the manager of 1800 Harrison, a building [**4] that accounted for 60% of the revenues on the Oakland route. Schindler also allegedly received complaints from its troubleshooters, who said that Nidds needed their help more than did other mechanics.

In March 1992, Nidds was purportedly asked by a supervisor whether he had dropped his DFEH complaint, to which he replied that he had not. Later that month, Nidds' attorney informed Schindler of Nidds' intention to sue the company for age discrimination. In April 1992, Schindler removed Nidds from the Oakland route and assigned him to the restoration department. Although his compensation was unaffected, Nidds characterizes this transfer as a demotion. In response, Nidds filed a second complaint, charging age discrimination and retaliation, with the DFEH on June 10, 1992.

Schindler transferred Nidds again in June 1992, from the restoration department to a service route that included the Geneva Towers, an allegedly high-crime housing complex in San Francisco. On June 26, Nidds left Geneva Towers in the middle of the day after learning of riots at nearby Woodrow Wilson High School. Although he returned later in the afternoon to repair two malfunctioning [*916] elevators, his behavior annoyed [**5] Geneva Towers' management. A subsequent cascade of meetings and correspondence between Geneva Towers and Schindler resulted in a decision to remove Nidds from the route. Nidds, who went on vacation from July 2 to July 22, learned of this decision on his return. Shortly thereafter, on July 28, he was laid off for the second and final time.

Nidds filed his employment discrimination and retaliation complaint in California Superior Court on May 5, 1992. In June, Schindler removed the action to federal court based on the parties' diversity of citizenship. Following extensive discovery by Nidds' attorney and several discovery disputes during 1992 and 1993, the magistrate set a discovery cutoff date of November 1, 1993. On July 23, however, Schindler proceeded to move for summary judgment. Nidds requested a continuance so that he could depose several of Schindler's declarants and obtain additional documents. The district court denied the continuance in August, but deferred ruling on the summary judgment motion to allow Nidds to take three more depositions and to allow time for supplemental briefing. The depositions were never taken, and on November 17, 1994, the district court granted Schindler's [**6] motion for summary judgment on all of Nidds' claims. Nidds timely appealed.

II.

THE AGE DISCRIMINATION CLAIM

[HN1]We review the district court's grant of summary judgment on both the age discrimination and retaliation claims de novo. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 134 L. Ed. 2d 209, 116 S. Ct. 1261 (1996). We must decide whether there is a "*genuine* issue as to any *material* fact." Fed. R. Civ. P. 56(c) (emphasis added). The criteria of "genuineness" and "materiality" are distinct requirements. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The requirement that an issue be "genuine" relates to the quantum of evidence the plaintiff must produce to defeat the defendant's motion for summary judgment. There must be sufficient evidence "that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50.

"As to materiality, the substantive law will identify which facts are material." *Id.* at 248. Nidds' age discrimination claim, which relates to his October 1990 layoff, is based on the [**7] California Fair Employment and Housing Act ("FEHA"). [HN2]FEHA reads in relevant part:

> It is an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases where the law compels or provides for such action.

Cal. Gov't Code § 12941. California courts interpreting FEHA often look to federal cases interpreting the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., and Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e et seq. *See Stephens v. Coldwell Banker Commercial Group, Inc.*, 199 Cal. App. 3d 1394, 245 Cal. Rptr. 606, 609 (App. 1988). Therefore, we too rely on such cases where helpful.

An age discrimination case alleging disparate treatment, such as this one, involves shifting burdens of proof as follows:

> [[HN3]A] plaintiff must first establish a *prima facie* case of discrimination. If the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that [**8] the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

Wallis v. J. R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994) (quoting *Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir. 1985), *as amended*, 784 F.2d 1407 (1986)); *see also Caldwell v. Paramount Unified Sch. Dist.*, 41 Cal. App. 4th 189, 48 Cal. Rptr. 2d 448, 453-54 (App. 1995), *rev. denied* (1996). However, the burden of persuasion remains at all times [*917] with the plaintiff. *Washington v. Garrett*, 10 F.3d 1421, 1432 (9th Cir. 1994).

A. *The Prima Facie Case Barrier*

"[HN4]In order to show a *prima facie* case of discrimination, 'a plaintiff must offer evidence that "gives rise to an inference of unlawful discrimination." '" *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1110 (9th Cir. 1991) (quoting *Lowe v. City of Monrovia*, 775 F.2d at 1005, quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)). That evidence may be either direct or circumstantial, and very little is required. *Messick v. Horizon Indus. Inc.*, 62 F.3d 1227, 1229 (9th Cir. 1995); *Caldwell*, 48 Cal. Rptr. 2d at 454.

To [**9] establish a prima facie case of age discrimination through circumstantial evidence, the plaintiff must show that he was:

> (1) a member of a protected class [age 40-70];
>
> (2) performing his job in a satisfactory manner;
>
> (3) discharged; and
>
> (4) replaced by a substantially younger employee with equal or inferior qualifications.

Wallis, 26 F.2d at 891 (quoting *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1421 (9th Cir. 1990)).

The fourth element, however, has been treated with some flexibility: "We have held that [HN5]the failure to prove replacement by a younger employee is 'not necessarily fatal' to an age discrimination claim where the discharge results from a general reduction in the work force due to business conditions." *Rose*, 902 F.2d at 1421; *see also Ewing v. Gill Indus., Inc.*, 3 Cal. App. 4th 601, 4 Cal. Rptr. 2d 640, 645 (App. 1992). Rather, courts "require instead that the plaintiff show through circumstantial, statistical, or direct evidence that the discharge occurred under circumstances giving rise to an inference of age discrimination." *Rose*, 902 F.2d at 1421. This inference "can be established by showing the employer had a continuing need for [**10] his skills and services in that his various duties were still being performed," *Wallis*, 26 F.3d at 891 (internal quotation omitted), or by showing "that others not in her protected class were treated more favorably." *Washington*, 10 F.3d at 1434. [1]

> 1 *See also Caldwell*, 48 Cal. Rptr. 2d at 455 ([HN6]prima facie established where "(1) complainant belongs to a protected class; (2) his job performance was satisfactory; (3) he was discharged; and (4) others not in the protected class were retained in similar jobs, and/or his job was filled by an individual of comparable qualifications not in the protected class").(internal quotation omitted); *Ewing*, 4 Cal. Rptr. 2d at 645 (in a reduction in force case, a discharged employee "need not show that he was replaced by a younger, newly hired employee; it is sufficient that the discharge occur in circumstances giving rise to an inference of age discrimination") (internal quotation omitted).

The district court ignored the flexibility these cases require and erred [**11] in concluding that to establish a prima facie case, Nidds was required to show that he was at least as qualified as his replacement. The court also erred by counting against Nidds the fact that he was not directly replaced by the younger employee, Cardenas. Under *Rose*, *Wallis*, and *Washington*, it is enough that Nidds' duties were substantially transferred to Cardenas.

In summary, Nidds has shown that he was discharged; that he was performing satisfactorily; and that his duties continued to be performed by a substantially younger individual. Nidds therefore cleared the prima facie case barrier and established "a presumption that the employer unlawfully discriminated against the employee." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993) (internal quotation omitted).

B. *Schindler's Burden*

However, [HN7]to rebut this presumption the employer must merely articulate a legitimate, nondiscriminatory reason for the action. *Id.*; Wallis, 26 F.3d at 892. Once the employer meets this burden, the presumption of discrimination drops away. St. Mary's, 509 U.S. at 507; Wallis, 26 F.3d at 892.

[*918] Schindler met its burden by offering some evidence that a downturn [**12] in work required some layoffs, and that it used a combination of factors, including performance, technical qualifications, and seniority, in deciding whom to discharge. As a consequence, the burden returned to Nidds to show that Schindler's articulated reason was a pretext for discrimination.

C. *Pretext*

To satisfy that burden, and survive summary judgment, Nidds must produce enough evidence to allow a reasonable factfinder to conclude *either*: (a) that the alleged reason for Nidds' discharge was false, *or* (b) that the true reason for his discharge was a discriminatory one. Warren, 58 F.3d at 443 (stating that the plaintiff "must produce evidence of facts that either show a discriminatory motive or show that the [employer's] explanation for his rejection is not credible"). [2]

2 At trial, Nidds must prove "*both* that the [employer's alleged] reason was false, *and* that discrimination was the real reason." St. Mary's, 509 U.S. at 515 (emphasis in original). However, if Nidds persuades the jury that the defendant's alleged reason is false, then "the factfinder's disbelief of the reasons put forward by the defendant . . . together with the elements of the prima facie case . . . will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . no additional proof of discrimination is *required*." *Id.* at 511 (emphasis in original). Thus, to survive summary judgment, Nidds is not required to provide direct evidence of discriminatory intent as long as a reasonable factfinder could conclude - based on Nidds' prima facie case *and* the factfinder's disbelief of Schindler's reasons for discharge - that discrimination was the real reason for Nidds' discharge.

[**13] Applying the law to the facts before us, we hold that Schindler was entitled to summary judgment, because the evidence Nidds has offered is not sufficiently probative that it would allow a reasonable factfinder to conclude either that the alleged reason for his discharge was false, or that the true reason for his discharge was a discriminatory one.

Nidds presents three distinct arguments that, he says, raise sufficient factual disputes that require his case to proceed to trial. First, he argues that Schindler's explanation for the initial layoff, a downturn in business, was false. Nidds asserts that there was no downturn in business. In support of this claim, Nidds adduces some evidence that Schindler's service business was doing quite well. But this evidence does not raise a genuine issue of material fact. Schindler explained that there was a downturn in *construction* business, not *service* business, and that it responded to the downturn in its construction business by moving employees from construction to service, and then laying off service employees. Nidds has failed to adduce any evidence that calls into question the veracity of Schindler's explanation.

Second, Nidds [**14] argues that summary judgment against his claims was improper because of Schindler's shifting explanations for the October 1992 layoff. These alone, he insists, are enough to raise a genuine issue as to its discriminatory motives. He cites Washington, 10 F.3d at 1434 ("We note that, in the ordinary case, such fundamentally different justifications for an employer's action would give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that neither of the official reasons was the true reason"), and Lindahl v. Air France, 930 F.2d 1434, 1438-39 (9th Cir. 1991) (reasons for discharge not credible where they were vague, unsupported by the facts, and not articulated until the litigation commenced). However, the reasons given by Schindler are not incompatible, and therefore not properly described as "shifting reasons." "Lack of work" was the reason given for the layoffs in general, while Nidds' lack of seniority and poorer performance relative to other mechanics were the reasons given for *his* layoff specifically. Therefore, Nidds' evidence is insufficient to raise a genuine issue of fact as to whether Schindler's reasons for the layoff were [**15] pretextual.

Moreover, there is insufficient evidence to raise a genuine issue of fact as to whether the actual reason was a discriminatory one. Nidds cites the "old timers" comment allegedly made by Graham as evidence of a discriminatory motive. That comment, however, was very much like the comments in Nesbit v. Pepsico, Inc., 994 F.2d 703, 705 [*919] (9th Cir. 1993), which the court held did not support an inference of discriminatory motive. In *Nesbit*, the plaintiff's immediate supervisor commented to Nesbit that "we don't necessarily like grey hair." The court found that the "comment was uttered in an ambivalent manner and was not tied directly to Nesbit's termination," and upheld the grant of summary judgment in favor of the employer. *Id.*

Similarly, Graham's comment was ambiguous because it could refer as well to longtime employees or to employees who failed to follow directions as to employees over 40. Moreover, the comment was not tied di-

rectly to Nidds' layoff. Like the comment in Nesbit, therefore, it is weak evidence and not enough to create an inference of age discrimination.

Also distinguishable is *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1411 (9th [**16] Cir. 1996), *cert. denied*, 136 L. Ed. 2d 214, 117 S. Ct. 295 (1996), upon which Nidds relies. There, we reversed the grant of summary judgment in favor of the employer where the employee had alleged "that on three separate occasions, when he asked to be considered for president, he was told the Board wanted somebody younger for the job" and had submitted evidence to the same effect in the form of meeting notes and an affidavit of a coworker. Nidds' evidence, by contrast, is neither as direct nor as weighty. It is not enough to support an inference of age discrimination.

III.

THE RETALIATION CLAIM

A. *Prima Facie Case*

[HN8]In a retaliation case, the burden shifting scheme is much the same as that in an age discrimination case. *Lam v. University of Hawaii*, 40 F.3d 1551, 1559 & n.11 (9th Cir. 1994). A prima facie case requires the plaintiff to show "that he engaged in a protected activity, his employer subjected him to adverse employment action, and there is a causal link between the protected activity and the employer's action." *Flait v. North Am. Watch Corp.*, 3 Cal. App. 4th 467, 4 Cal. Rptr. 2d 522, 528 (App. 1992).

Nidds' complaints to the DFEH were protected activity because California law specifically [**17] prohibits employers from taking adverse actions against employees as a result of their filing a complaint alleging FEHA violations. *See* Cal. Gov't Code § 12940(f). Although we decline to view Nidds' transfer to the restoration department as an adverse employment action, [3] his ultimate termination on July 28, 1992, certainly was.

3 *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 n.6 (9th Cir. 1994) (questioning whether transfer from swing shift to day shift was "adverse" employment action where employee "was not demoted, or put in a worse job, or given any additional responsibilities"), *cert. denied*, 513 U.S. 1082, 130 L. Ed. 2d 636, 115 S. Ct. 733 (1995); *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987) (no adverse employment action where temporary transfer did not result in loss of salary or benefits).

Moreover, Nidds has submitted sufficient evidence to create an inference of a "causal link" between Nidds' complaints and his July 1992 layoff. The layoff occurred only four months after his supervisor allegedly [**18] asked him if he had dropped his first discrimination complaint (March 1992) and only one month after he filed his second complaint (June 10, 1992). The temporal proximity of events was sufficient to satisfy the third element of the prima facie case. *See Flait*, 4 Cal. Rptr. 2d at 529-30 (sufficient causal link where supervisor who terminated employee had made sexist comments to another employee and fired employee five months after a confrontation).

B. *The Employer's Burden*

Schindler, however, also met its burden of articulating a legitimate reason for the layoff. It was that the management of Geneva Towers requested that Nidds be removed from the route, and that Schindler had no other place for him. Thus, the deciding question again is whether Nidds has produced enough evidence from which a reasonable factfinder could conclude that Schindler's reason was a pretext for retaliatory termination. We hold [*920] that again Nidds has failed to make that showing.

C. *Pretext*

The crux of Nidds' argument is that Schindler encouraged the management of Geneva Towers to complain about Nidds so that Schindler would have a reason to terminate Nidds in retaliation for his filing his [**19] second age discrimination claim and intent to sue letter. For support, he cites the letter and testimony of Arthur Hutton, Geneva Towers' administrator, concerning an incident in which Nidds purportedly failed to respond to a service call.

In Hutton's letter to Ken Robinson of Schindler, dated July 21, 1992, he stated: "Pursuant to our conversation of today, we feel that it is in both our interest to relieve Mr. Ray Niddes [sic] from his duties at Geneva Towers Apartments. The environment seems to dictate whether he is able to perform his duties on a day-to-day basis." Hutton testified at his deposition that "I believe that I wrote that letter immediately - well, I believe that I spoke with Ken Robinson immediately after I became aware that the incident took place. Shortly after that, if my recollection serves me correctly, I proceeded to write the letter." Hutton testified further that "[Robinson] suggested that I write a letter expressing what we talked about over the phone."

Nidds argues that because he was on vacation from July 2 through July 21, this evidence shows that "another Schindler mechanic failed to respond to the Geneva Towers' service call. Then Robinson, seeking [**20] to find a pretext for Nidds' termination, asked Hutton to

write a letter regarding *Nidds'* failure to service the route."

Nidds' proposed inference is not one that a reasonable factfinder could make. Hutton's own testimony indicates that he called Robinson and then wrote to him when he *became aware* of the incident, not when it actually happened. Moreover, the incident that prompted the call was clearly the June 26 incident when Nidds left Geneva Towers after hearing about a gang riot at the nearby high school: Hutton stated at deposition that "I do know that the information that I received indicated that Mr. Nidds didn't want to come out because he had heard that there had been violence, gang violence, during the course of that day." It is unlikely that the same incident recurred a month later with the same response from some other Schindler mechanic. Although the time lag between the June 26 incident and Hutton's phone call of about July 21 remains unexplained, the reasonable inference from Hutton's testimony is that he did not learn of the incident until the latter date.

Other evidence also supports Schindler's explanation that Geneva Towers was dissatisfied with Nidds' [**21] performance. Schindler employee Larry Scharfe stated in a declaration that "Mr. Gray [of Geneva Towers] expressed some concerns regarding Mr. Nidds leaving his job. He said that he and others in management at the apartment complex were not satisfied with the service or the attitude of the new service person, Mr. Nidds." Schindler employee Ken Robinson stated that "Mr. Gray said that he or someone else would set out their concerns regarding Mr. Nidds in writing and send them to Schindler." In a June 26, 1992, memo to Graham, Robinson explained that "At our June 25, 1993 meeting, Mr. Gray expressed his concern that Geneva Towers was merely a number on Mr. Nidds' route sheet. Mr. Gray told me that he was concerned that the level of service would decline now that Nidds had been assigned because Mr. Nidds did not care about Geneva Towers' problems."

In light of this evidence, neither Hutton's letter nor his testimony are sufficient to allow a reasonable factfinder to conclude that Schindler used Geneva Towers' concerns as a pretext to discharge Nidds. We therefore affirm summary judgment on this claim as well.

IV.

THE RULE 56(f) MOTION

"[HN9]We review a district court's denial of a [**22] [Fed. R. Civ. P. 56(f)] request for further discovery by a party opposing summary judgment for abuse of discretion." Conkle v. Jeong, 73 F.3d 909, 914 (9th Cir. 1995), *cert. denied,* 117 S. Ct. 56, [*921] 136 L. Ed. 2d 19 (1996). The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, *id.,* and that it would prevent summary judgment. *Qualls v. Blue Cross of California, Inc.,* 22 F.3d 839, 844 (9th Cir. 1994). "Moreover, the district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past." Conkle, 73 F.3d at 914 (internal quotation omitted).

A problem might exist had the district court denied Nidds' motion for a continuance where Nidds had outstanding discovery requests and November, the cutoff date for discovery, was still several months away. Here, however, the court postponed ruling on the summary judgment motion for over a year to give Nidds time to take three depositions. Yet, Nidds never took the depositions. This lack of diligence precludes a finding that the district court abused its discretion. *See, e.g., Hauser v. Farrell,* 14 F.3d [**23] 1338, 1340-41 (9th Cir. 1994) (denial of Rule 56(f) motion proper in light of failure to depose witness within 27 months of filing suit); *Mackey v. Pioneer Nat'l Bank,* 867 F.2d 520, 524 (9th Cir. 1989) (failure to take advantage of additional month of discovery granted by district court showed lack of diligence).

V.

CONCLUSION

Because Nidds' evidence of discrimination and retaliation is insufficient, we affirm the grant of summary judgment in favor of Schindler. We also hold that the district court did not abuse its discretion in denying Nidds' motion for a continuance of the summary judgment hearing.

AFFIRMED.

[*914] contd [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC AND AMENDED OPINION

ORDER

The opinion filed in this case on December 24, 1996, (slip op. 16047), is hereby amended as attached.

With this amendment, a majority of the panel voted to deny appellant's petition for rehearing. Judge Thompson voted to reject the suggestion for rehearing en banc and Judge Sneed so recommended. Judge Noonan voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the [**24] suggestion for en banc rehearing, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

DISSENT BY: NOONAN

DISSENT

NOONAN, Circuit Judge, dissenting:

We all agree that the district court erred in finding that Nidds had not made a prima facie case. He had, and the burden shifted to Schindler to produce a nonpretextual nondiscriminatory reason for his discharge. What we disagree about is whether Nidds produced enough evidence from which a reasonable juror could have inferred that Schindler's reason was pretextual and that in fact it laid him off because of his age.

Nidds had two witnesses (not one, as the court appears to assume) whose evidence was that Graham, the district superintendent, wanted to get rid of the "Old Timers." The court in its opinion suggests that Graham's comment was "ambiguous." There was not much ambiguity about it. That the Old Timers would not kowtow to Graham was connected by him to their length of service; and length of service in this industry meant being over forty. In his comment to Julia Stuart, Schindler's Assistant Field Supervisor, [**25] Graham said that he wanted to replace the Old Timers with "new blood" - another distinct reference to age. Even if I agreed with the court that the remark was ambiguous, a reasonable juror could resolve whatever ambiguity there is by an inference in Nidds' favor. We're operating under circuit law which is unequivocal in setting "a high standard for the granting of summary judgment in employment discrimination cases." Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1410 (9th Cir. 1996), *cert. denied,* 136 L. Ed. 2d 214, 117 S. Ct. 295 (1996). The standard should not unaccountedly be lowered.

Nidds' evidence of discriminatory intent is properly taken into account with Schindler's shifting explanation of why it laid him off. Schindler said, first, that it was senority and stuck to that in a proceeding before the DFEH; finally, when pressed, a year after the layoff Schindler said Nidds was a poor performer on the newer Solid State equipment. Yet when Schindler took Nidds back only four months later, it assigned him to a service route in Oakland which had over twice as many units of Solid State equipment as his old route, and Graham said that Nidds was "the most qualified [**26] person at that time." A reasonable jury could easily infer that Schindler was cloaking the discrimination already expressed by Graham with these made-up stories of why the company laid off this old and experienced and efficient employee whom Graham had rated as "excellent."

[*922] As to retaliation, it is Nidds' evidence that assignment to Geneva Towers was the company's not very nice and not very subtle way of dumping employees it wanted to punish; and it was the convenient prelude to pushing him out altogether. Schindler put him there shortly after Schindler had pointedly inquired about his discrimination filing before the DFEH. Within two months, Nidds was fired from this route as a result of a letter which in so many words indicates that the request of Geneva Towers to remove Nidds was coordinated with Schindler management. The opinion of the court turns somersaults trying to explain why Nidds' evidence on this point should not be believed. The opinion includes a pure speculation as to whether two incidents of gang violence in a gang-infested neighborhood could occur within a month. It's good jury reasoning. It's highly inappropriate for an appellate body or for a district court that [**27] is supposed to respect the different functions of judge and jury.

We are dealing here not with some procedural rule or even with a statutory direction. We are under compulsion of a constitutional command entitling persons to trial by jury as it existed at common law. U.S. Const. amend. VII. The time at which the common law right existed is the time when the Seventh Amendment was adopted. *Markman v. Westview Instruments, Inc.*, 134 L. Ed. 2d 577, 116 S. Ct. 1384, 1389 (1996). The test is historical. *Id.* A wealth of new scholarship indicates how sensitive to jury verdicts even a fairly high-handed but wise judge such as Lord Mansfield was at the time at the time of our Revolution. *See, e.g., Olney v. Allen,* (K.B. 1783), *in* 1 *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 354-55 (James Oldham, ed. 1992); *Harris v. Worsley,* (K.B. 1773), *in* 2 *id.* 1129-1130 (the jury verdict, upheld by Mansfield, was in his words: "To the astonishment of every body").

It can happen that a judge distrustful of a jury's sympathy for the hard luck of a plaintiff, or a judge conscious that he is the master of the facts and can speed up the process by killing a [**28] case early, will enter summary judgment where there are facts open to different interpretation by the jury. However benevolent the judge's motive, the judge is denying the litigants their constitutional right to trial by their peers. We should be the last to give countenance or comfort to such a departure from the basic structure of our law. Therefore, I dissent.

TROY SWINTON, Plaintiff-Appellee, v. POTOMAC CORPORATION, dba Crescent Cardboard Company, dba Crescent/U.S. Mat, Defendant-Appellant.

No. 99-36147

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

270 F.3d 794; *2001 U.S. App. LEXIS 22853*; *87 Fair Empl. Prac. Cas. (BNA) 65*; *82 Empl. Prac. Dec. (CCH) P40,887*; *2001 Cal. Daily Op. Service 9092*; *2001 Daily Journal DAR 11381*

October 24, 2001, Resubmitted, Seattle, Washington
October 24, 2001, Filed

SUBSEQUENT HISTORY: [**1] Certiorari Denied April 22, 2002, Reported at: *2002 U.S. LEXIS 2870.*

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-97-01399-JET. Jack E. Tanner, District Judge, Presiding.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant employer appealed from a judgment of the United States District Court for the Western District of Washington, finding in favor of plaintiff employee on his cause of action for racial discrimination under *42 U.S.C.S. § 1981* and Wash. Rev. Code § 49.60 et seq., and awarding the employee $ 5,612 in back pay, $ 30,000 for emotional distress, and $ 1,000,000 in punitive damages.

OVERVIEW: The employer argued that the district court's failure to instruct the jury as to an affirmative defense, as applied to a negligence theory of employer liability, warranted a new trial. The employer also alleged a variety of evidentiary and instructional errors. Finally, the employer argued that punitive damages were either unwarranted as a matter of law, or, in the alternative, constitutionally excessive. The court concluded that given the overwhelming evidence presented at trial, it was much more likely than not that the employee would have prevailed under the negligence theory, even if the jury had not been given the option of considering vicarious liability at all. Next, the court held that there was no prejudicial error in the jury instructions. Finally, the court held that the highly offensive language directed at the employee, coupled by the abject failure of the employer to combat the harassment, constituted highly reprehensible conduct justifying a significant punitive damages award. Moreover, the court concluded that the ratio was not constitutionally excessive.

OUTCOME: The judgment of the district court was affirmed.

CORE TERMS: harassment, punitive damages, supervisor, joke, punitive, co-worker, damages award, remedial actions, ratio, offensive, jury instructions, vicarious liability, compensatory, manager, undertaken, affirmative defense, good faith, witnessed, harasser, remedial, quit, remediation, racially, nigger, employer liability, corrective action, distress, prompt, negligence theory, evidentiary

LexisNexis(R) Headnotes

Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence
[HN1] A verdict must be affirmed if there is substantial evidence to support the verdict.

Civil Procedure > Appeals > Standards of Review > General Overview
[HN2] The evidence must be viewed in the light most favorable to the non-moving party.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Civil Procedure > Trials > Motions for Mistrial
Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Prejudicial Errors
[HN3] In evaluating jury instructions, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was not fairly and correctly covered.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence
[HN4] An appellate court reviews evidentiary rulings for abuse of discretion.

Civil Procedure > Remedies > Damages > Punitive Damages
Civil Procedure > Appeals > Standards of Review > De Novo Review
Torts > Damages > Punitive Damages > Award Calculations > Constitutional Requirements
[HN5] An appellate court reviews de novo a due process challenge to the punitive damages award.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview
Torts > Vicarious Liability > Employers > Activities & Conditions > General Overview
[HN6] An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. No affirmative defense is available however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > Antiharassment Policy
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employer Liability > General Overview
Torts > Vicarious Liability > Employers > Activities & Conditions > General Overview
[HN7] A plaintiff may state a case for harassment against the employer under one of two theories: vicarious liability or negligence. Which route leads to employer liability depends on the identity of the actual harasser, specifically whether he is a supervisor of the employee, or merely a co-worker. If the harasser is a supervisor, the employer may be held vicariously liable. If, however, the harasser is merely a co-worker, the plaintiff must prove that the employer was negligent, i.e., that the employer knew or should have known of the harassment but did not take adequate steps to address it.

Civil Rights Law > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Protected Parties
Labor & Employment Law > Discrimination > Racial Discrimination > Federal & State Interrelationships
Labor & Employment Law > Discrimination > Reconstruction Statutes (secs. 1981, 1983 & 1985)
[HN8] An employee may seek relief under both Title VII of the Civil Rights Act of 1964 and *42 U.S.C.S. § 1981* for racial discrimination in employment.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview
Torts > Vicarious Liability > Employers > Activities & Conditions > General Overview
[HN9] The affirmative defense to liability or damages applies only in cases of vicarious liability, where the harasser is the victim's supervisor.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Civil Procedure > Eminent Domain Proceedings > Jury Trials
Torts > Vicarious Liability > Employers > Activities & Conditions > General Overview
[HN10] A plaintiff alleging co-worker harassment must prove that the employer either provided no reasonable

avenue for complaint or knew of the harassment but did nothing about it.

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > Coercion > Elements
Labor & Employment Law > Employment Relationships > At-Will Employment > Employees
Torts > Vicarious Liability > Employers > Activities & Conditions > General Overview
[HN11] An employee is a member of management if a supervisor possessing substantial authority and discretion to make decisions concerning the terms of the harasser's or harassee's employment, such as authority to counsel, investigate, suspend, or fire the accused harasser, or to change the conditions of the harassee's employment. Second, a supervisor who lacks such authority is nonetheless classified as "management" if he has an official or strong de facto duty to act as a conduit to management for complaints about work conditions.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
Torts > Vicarious Liability > Employers > Activities & Conditions > General Overview
[HN12] An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.

Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview
Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > General Overview
Evidence > Procedural Considerations > Rulings on Evidence
[HN13] An error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless. While this standard of review is less stringent than review for harmless error in a criminal case, it is more stringent than review for sufficiency of the evidence, in which courts view the evidence in the light most favorable to the prevailing party. In reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Civil Rights Law > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Proof of Discrimination
Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > Sexual Orientation
[HN14] *42 U.S.C.S. § 1981* does require proof of intentional discrimination. But there is no authority for the proposition that the word "intentional" must be included in jury instructions.

Civil Procedure > Remedies > Damages > Punitive Damages
Civil Rights Law > General Overview
Labor & Employment Law > Discrimination > Disparate Impact > General Overview
[HN15] Employment discrimination not based on a disparate impact theory is, in fact, intentional discrimination.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN16] An employer is liable on a hostile environment claim where the employee proves (1) that he was subjected to verbal or physical conduct of a harassing nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Labor & Employment Law > Discrimination > Racial Discrimination > Coverage & Definitions
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN17] The fact that defendant may have told jokes about racial or ethnic groups other than African-Americans does not excuse the fact that he racially harassed plaintiff.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Civil Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Prejudicial Errors
[HN18] The law governing appellate review of jury instructions counsels against looking at any one jury instruction in isolation. Rather, prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was not fairly and correctly covered.

Civil Procedure > Judicial Officers > Judges > General Overview
Evidence > Procedural Considerations > Judicial Intervention in Trials > Comments by Judges > General Overview
Evidence > Procedural Considerations > Judicial Intervention in Trials > Interrogation of Witnesses
[HN19] The law grants district judges wide discretion to participate in the questioning of witnesses. It is well established that a trial judge is more than a moderator or umpire. It is entirely proper for him to participate in the examination of witnesses for the purpose of clarifying the evidence, confining counsel to evidentiary rulings, controlling the orderly presentation of the evidence, and preventing undue repetition of testimony. The court oversteps the bounds of propriety and deprives the parties of a fair trial, thus requiring a new trial, only if the record discloses actual bias on the part of the trial judge or leaves the reviewing court with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality.

Business & Corporate Law > Agency Relationships > Causes of Action & Remedies > Punitive Damages
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Remedies > Punitive Damages
Torts > Damages > Punitive Damages > Availability > Employers
[HN20] To be liable for punitive damages, the employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages. In the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's good faith efforts to comply with Title VII of the Civil Rights Act of 1964.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Defenses & Exceptions > Antiharassment Policy
Torts > Vicarious Liability > Employers > Activities & Conditions > General Overview
[HN21] The inaction of even relatively low-level supervisors may be imputed to the employer if the supervisors are made responsible, pursuant to company policy, for receiving and acting on complaints of harassment.

Labor & Employment Law > Discrimination > Racial Discrimination > Coverage & Definitions
Labor & Employment Law > Discrimination > Racial Discrimination > Remedies > Compensatory & Punitive Damages
[HN22] It is well established that it is insufficient for an employer simply to have in place anti-harassment policies; it must also implement them.

Civil Procedure > Remedies > Damages > Punitive Damages
Evidence > Relevance > Relevant Evidence
Labor & Employment Law > Discrimination > Racial Discrimination > Remedies > General Overview
[HN23] Given the fact of different standards for the imposition of liability and the award of punitive damages, it is not unreasonable to conclude that evidence that may be irrelevant to proving the former is nevertheless relevant to demonstrating the appropriateness of the latter (and vice versa).

Evidence > Relevance > Subsequent Remedial Measures
Torts > Negligence > Proof > Evidence > Prior & Subsequent Events
Torts > Products Liability > Design Defects
[HN24] See *Fed. R. Evid. 407.*

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Availability > Employers
Torts > Damages > Punitive Damages > Award Calculations > General Overview
[HN25] A district court may, in its discretion, allow a defendant/employer to introduce evidence of remedial conduct undertaken in response to its discovery of discrimination as a means to mitigate punitive damages. Likewise, where the plaintiff, in arguing for punitive damages, contends that they are necessary to teach the defendant a lesson, post-charge remediation may be relevant to defendant's posture. The plaintiff can, of course, make arguments about prejudice, too little too late, and relevance of remedial conduct. Adoption of this approach has the advantage of encouraging employers to implement remedial measures, while leaving to the trial court, which has a front-row seat in evaluating the evidence, the discretion to determine the limitations on such evidence.

Evidence > Relevance > Subsequent Remedial Measures

[HN26] District courts have discretion, under traditional relevance principles, to admit or exclude evidence of remediation undertaken after the filing of a complaint.

Civil Procedure > Remedies > Damages > Punitive Damages
Civil Procedure > Appeals > Standards of Review > De Novo Review
Torts > Damages > Punitive Damages > Award Calculations > Constitutional Requirements
[HN27] An award of punitive damages violates constitutional due process requirements if grossly excessive. There are three "guideposts" to assist courts in determining whether an award violates this standard: the degree of reprehensibility of the tortfeasor's actions; the disparity between the harm or potential harm suffered by the plaintiff and his punitive damage award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Award Calculations > General Overview
[HN28] Punitive damages must bear a reasonable relationship to compensatory damages. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > General Overview
[HN29] Courts are permitted to address the reasonable relationship between the punitive damages and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.

Civil Procedure > Remedies > Damages > Punitive Damages
Civil Rights Law > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Proof of Discrimination
Torts > Damages > Punitive Damages > Award Calculations > Factors

[HN30] The Title VII of the Civil Rights Act of 1964 statutory cap does not apply to limit the recovery under *42 U.S.C.S. § 1981.*

COUNSEL: Thomas Sullivan (argued), Jenner & Block, Chicago, Illinois, Sarah E. Pace (on the brief), McBride Baker & Coles, Chicago, Illinois, for the defendant/appellant.

Jeffrey Needle, Law Office of Jeffrey Needle, Seattle, Washington, for the plaintiff/appellee.

JUDGES: Before: M. Margaret McKeown, William A. Fletcher, and Johnnie B. Rawlinson, Circuit Judges. Opinion by Judge McKeown.

OPINION BY: M. Margaret McKeown

OPINION

[*799] McKEOWN, Circuit Judge:

This case should serve as a reminder to employers of their obligation to keep their workplaces free of discriminatory harassment. Although much of what happened here was characterized as "jokes," neither the discrimination nor the jury verdict is a laughing matter. Troy Swinton, a worker in the shipping department of a cardboard company, was subject to repeated "jokes" by co-workers featuring use of the word "nigger" and to a continuing stream of racial slurs. He sued his former employer for racial harassment under federal and state anti-discrimination statutes, and a jury awarded [**2] him $ 5,612 in back pay, $ 30,000 for emotional distress, and $ 1,000,000 in punitive damages. The employer's claims on appeal fall into three categories. First, the employer asserts that the district court's failure to instruct the jury as to an affirmative defense under *Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998)* and *Faragher v. City of Boca Raton, 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998)*, as applied to a negligence theory of employer liability, warrants a new trial. Second, it alleges a variety of evidentiary and instructional errors. Finally, the employer argues that punitive damages were either unwarranted as a matter of law, or, in the alternative, constitutionally excessive under *BMW of N. Am. v. Gore, 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996)*. We affirm both the liability determination and the award of punitive damages.

BACKGROUND

Troy Swinton was employed in the shipping department of U.S. Mat between August 1996 and February 1997. He was the only African-American of approximately 140 employees of the Woodinville, Wash-

ington company, which [**3] manufactures cardboard matting used in picture frames. Shortly before Swinton was hired, the company was acquired by the Chicago-based Potomac Corporation.

Swinton became aware of U.S. Mat through his fiancee, whose uncle, Jon Fosdick, worked there as supervisor in the bevel-cutting department. Swinton listed Fosdick as a reference on his job application. Fosdick would often stop by the shipping department. While there, he would regularly tell racially offensive jokes in the presence of Swinton and others. Among the "jokes":

> - What do you call a transparent man in a ditch? A nigger with the shit kicked out of him.
>
> - Why don't black people like aspirin? Because they're white, and they work.
>
> - Did you ever see a black man on "The Jetsons"? Isn't it beautiful what the future looks like?
>
> - Reference to "Pontiac" as an acronym for "Poor old nigger thinks it's a Cadillac."

According to Swinton, Fosdick began telling such jokes soon after he arrived at the company and continued "whenever he felt like it, all the time."

Pat Stewart, Swinton's immediate superior as supervisor of the shipping department, witnessed Fosdick telling racial jokes and laughed along. Swinton [**4] testified that Stewart "was present at the table most of the time when [Fosdick] was coming in and saying this [the racial jokes]." Stewart also acknowledged making "racial jokes or a slur" two or three times, though it is not clear from his testimony whether such conduct occurred in Swinton's presence. Stewart also overheard one of the two plant managers make racial jokes on several occasions. Stewart admitted that [*800] although he had an obligation under company policy to report the racial harassment, he never made any such report and never told Fosdick or anybody else to stop making such jokes.

Though Fosdick was the main perpetrator of the jokes, Swinton's co-workers also told racially offensive jokes in his presence, and those comments were witnessed by several co-workers. The jokes and comments ranged from numerous references to Swinton as a "Zulu Warrior" to a comment in the food line, "They don't sell watermelons on that truck, you know, how about a 40-ouncer?" On the subject of Swinton's broken-down car, it was suggested "why don't you get behind it and push it and call it black power" and "why don't you just jack a car. You're all good at that."

Testimony by co-workers underscored [**5] the ubiquity of the racist atmosphere at U.S. Mat. One co-worker said that there were jokes about a wide variety of ethnic groups, including whites, Asians, Polish people, gays, Jews, and Hispanics. Another testified that the majority of the people at U.S. Mat had actually witnessed the use of racially offensive language, and a third employee testified that "just about everybody" at U.S. Mat had heard Fosdick use "racial slurs and comments." [1] During the short time he was at U.S. Mat, Swinton heard the term "nigger" more than fifty times.

> 1 The trial transcript contains references to many other instances of offensive racial comments by various employees of U.S. Mat, but it is not clear whether any of these were directed at, or witnessed by, Swinton.

Swinton's reactions to the racially derogatory comments included glaring and walking away, and remarking to co-workers that the jokes were "f*** ed up." Swinton testified that he did not directly ask Fosdick to stop because he knew that Fosdick regularly carried [**6] a .22 caliber pistol in his back pocket.

Despite Fosdick's regular use of racially offensive language, Swinton and Fosdick socialized both at work and outside of work. Swinton claimed that he socialized with Fosdick not because he enjoyed doing so, but only at the urging of his fiancee (Fosdick's niece), to maintain harmonious family relations.

Swinton testified that he did not immediately quit in the face of the racial comments because he needed the job to support himself and his fiancee, who was pregnant. He eventually quit on February 27, 1997, stating in his testimony that he was "fed up . . . with all the name-calling. I was angry. I was mad. I was upset. I was frustrated. I just couldn't take it no more. I had to get out of there." Potomac's theory explaining why Swinton quit and brought suit centers around an alleged breakdown in family relations. According to Potomac, Swinton brought suit as a means to retaliate against Fosdick because of comments that Fosdick's wife purportedly made about Swinton and his fiancee.

Upon commencing employment at U.S. Mat, Swinton was presented with an employee manual. Swinton testified alternately that he "read" and "browsed through" the [**7] manual; he did sign a form acknowledging that he received it. The employee manual included the following language:

> If you believe you are being harassed by co-workers or others, notify your Supervi-

> sor. If you believe you are being harassed by your Supervisor, or if this is otherwise inappropriate, notify the President. No employee will be retaliated against in any way for making a factually supported claim of harassment.

[*801] Swinton never availed himself of any formal internal complaint procedures. He advanced several reasons. According to Swinton, the "Supervisor" to whom he was supposed to direct his complaint was Pat Stewart, who had already witnessed the joke-telling and had actually "laughed along." Swinton claimed that he did not know the identity of the" President" (whom the manual identified as an alternative complaint recipient), and thus did not bring the harassment to his attention. Swinton also feared Fosdick, whom he knew to carry a gun. Swinton told a co-worker that he feared that he might lose his job if he complained because he was the" low man on the totem pole" (questioner's paraphrase). Finally, Swinton testified that "everyone already knew." This answer [**8] came in response to a question whether "people in management" knew of the racially offensive language directed at him.

On March 7, 1997, Swinton filed an application for unemployment benefits with the Washington Employment Security Department, indicating that he had quit on February 28. In his handwritten responses to questions on the application form, Swinton referred to "racial slander" and "racial jokes daily by numerous people," and stated, "Everyday, from one person or another, a racial joke or comment was thrown my way, and I was sick and tired of it." Swinton identified several of the specific jokes about which he and others later testified at trial. He noted that he "didn't feel comfortable going to management because they knew about the problem [and]did nothing about it."

The State of Washington notified U.S. Mat of Swinton's allegations of racial harassment on or about April 17, 1999. Upon learning of the charges, U.S. Mat Human Resources Manager Vickie Thompson interviewed Stewart, the plant co-managers, and the president. All denied to Thompson that they had witnessed the harassment of Swinton. Sometime in June, Thompson also interviewed Fosdick, who had left U.S. [**9] Mat's employ April 1. After Swinton filed suit in July 1997, Thompson interviewed more of Swinton's co-workers, who confirmed Fosdick's telling of racial jokes but stated that they believed that Swinton was not bothered by them and" would laugh and joke back." In September of 1997, in apparent response to Swinton's charges, U.S. Mat had all of its supervisors and managers undergo training for the identification and prevention of harassment. No one at U.S. Mat was disciplined for the use of, or toleration of, offensive racial language.

Swinton filed suit against Potomac in Washington state court, alleging causes of action under *42 U.S.C. § 1981*, [2] *R.C.W. 49.60.010 et seq.* (the "Washington Law Against Discrimination"), and the state tort of "outrage" (intentional infliction of emotional distress). Potomac removed the action to federal court. Judge John Coughenour, who conducted pre-trial proceedings, denied Potomac's motion for summary judgment on the causes of action under the job discrimination statutes, but granted its motion as to the state "outrage" claim. The case was then transferred to Judge Jack Tanner for trial. After trial, the jury returned a verdict [**10] for Swinton and damages consisting of $ 5,612 in back pay, $ 30,000 for emotional distress, and $ 1,000,000 in punitive damages. Potomac moved for a new trial under *Federal* [*802] *Rules of Civil Procedure 50(b)* and *59*. The district court denied the motion with a brief order stating that the motion "merely rehashes arguments that it made and lost during trial."

> 2 "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . . The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

STANDARDS OF REVIEW

"[HN1] The verdict must be affirmed if there is substantial evidence to support the verdict." *Gilbrook v. City of Westminster, 177 F.3d 839, 856 (9th Cir. 1999).* [HN2] The evidence must be viewed in the light most favorable to the non-moving party (Swinton). *See Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1161 (9th Cir. 1997).* [**11] [HN3] In evaluating jury instructions, "prejudicial error results when, 'looking to the instructions as a whole, the substance of the applicable law was not fairly and correctly covered.'" *In re Asbestos Cases, 847 F.2d 523, 524 (9th Cir. 1988)* (citing *Pollock v. Koehring Co., 540 F.2d 425, 426 (9th Cir. 1976).* "[HN4] This court reviews evidentiary rulings for abuse of discretion." *United States v. Fleming, 215 F.3d 930, 938 (9th Cir. 2000)* (citation omitted). [HN5] We review de novo a due process challenge to the punitive damages award. *Cooper Industries, Inc. v. Leatherman, 532 U.S. 424, 149 L. Ed. 2d 674, 121 S. Ct. 1678, 1683 (2001).*

DISCUSSION

I. ELLERTH/FARAGHER DEFENSE

We first address whether the affirmative defense to employer liability established in *Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998)* and *Faragher v. City of Boca Raton, 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998)*, is available in a claim for harassment based on the employer's negligence. In those cases the Supreme Court set out the contours of an employer's affirmative defense [**12] to harassment perpetrated by a superior, available in certain circumstances. The Court held,

> [HN6] An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any []harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise . . . . No affirmative defense is available however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Faragher, 524 U.S. at 806; *Ellerth, 524 U.S. at 765* (citation omitted) (the language in each case is identical). The defense is premised on the principle that an [**13] employer may escape liability for harassment by certain of its employees when it undertakes appropriate steps to remedy the situation. The defense also recognizes that a harassed employee bears some responsibility to avoid or mitigate workplace hostility. The question is whether such a defense is available under all of Swinton's claims: 1) vicarious liability; 2) harassment based on negligence (the defendant knew or should have known of the harassment; and 3) the state law claim. Potomac asserts that the district court erred by failing to incorporate the *Ellerth/Faragher* defense into the jury instruction on the negligence theory. But, as we explain, the court was not required to do so.

[*803] [HN7] A plaintiff may state a case for harassment against the employer under one of two theories: vicarious liability or negligence. [3] Which route leads to employer liability depends on the identity of the actual harasser, specifically whether he is a supervisor of the employee, or merely a co-worker. If the harasser is a supervisor, the employer may be held vicariously liable. *Nichols v. Azteca Restaurant Enters., 256 F.3d 864, 875 (9th Cir. 2001)*; *Ellison v. Brady, 924 F.2d 872, 876 (9th Cir. 1991)*. [**14] If, however, the harasser is merely a co-worker, the plaintiff must prove that the employer was negligent, *i.e.* that the employer knew or should have known of the harassment but did not take adequate steps to address it. *Nichols, 256 F.3d at 875*. Even after the advent of the affirmative defense outlined in *Ellerth* and *Faragher*, the negligence standard "still applies to sexual harassment by coworkers." *Burrell v. Star Nursery, 170 F.3d 951, 955 (9th Cir. 1999)*.

> 3 Though *Ellerth* and *Faragher* involve Title VII, their reasoning applies to cases involving *§ 1981* and RCW 49.60 *et seq. See Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1412 (9th Cir. 1987)* ("[HN8] An employee may seek relief under both Title VII and *section 1981* for racial discrimination in employment. *Lowe [v. City of Monrovia], 775 F.2d 998, 1010* [(9th Cir. 1986)] . . . . The same standards apply, and facts sufficient to give rise to a Title VII claim are also sufficient for a *section 1981* claim. *Id.")*; *see also Nichols v. Azteca Restaurant Enters., 256 F.3d 864, 875 n. 9 (9th Cir. 2001)* (similarity of Title VII and WLAD); *Xieng v. Peoples Nat'l Bank, 120 Wn.2d 512, 844 P.2d 389, 392 (Wash. 1993)* (same).

[**15] Swinton's negligence theory was based primarily upon the harassment by Fosdick, who, while a supervisor within the company, was not *Swinton's* supervisor in the shipping department. The Supreme Court made clear that [HN9] the affirmative defense outlined in *Ellerth* and *Faragher* applies only in cases of vicarious liability, where the harasser is the victim's supervisor. *Faragher, 524 U.S. at 807* (stating that "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee" and then proceeding to outline affirmative defense).

Potomac argues that the availability of the *Ellerth/Faragher* defense in the vicarious liability context, but not in the negligence context, "leads to an absurd result: that an employer is better off if the harasser is an immediate supervisor or someone with successively higher authority, because it triggers an obligation of the

plaintiff to utilize internal remedies." This reasoning rests on the faulty premise that an employer is "better off" in the strict liability context than in the negligence [**16] context.

It is, in fact, slightly misleading to say that the *Ellerth/Faragher* defense is not available in the negligence context. While it is strictly true that it is not available as an affirmative defense, the principle embodied in the defense -- that an employer can avoid liability in situations where it acts promptly to remedy harassment -- is contained in the requirements for a prima facie case based on negligence. In the context of this case, it was Swinton's burden, in accord with Jury Instruction 10, to prove that management knew or should have known of the harassment and "failed to take reasonably prompt, corrective action . . .". And, as the Second Circuit has explained, [HN10] a plaintiff alleging co-worker harassment must prove that the employer "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995)* (cited in the post-*Ellerth/Faragher* case *Distasio v. Perkin Elmer Corp., 157 F.3d 55, 63 (2d Cir.* [*804] *1998))*. This formulation is substantively similar to the *Ellerth/Faragher* defense; the chief difference [**17] is that in the negligence context, the plaintiff bears the burden of proving the employer's failure to respond adequately to the harassment, while, in a vicarious liability regime, the defendant must establish the corrective action as an affirmative defense.

And, indeed, it is not clear under which rubric employers are "better off" from an evidentiary and legal standpoint. It might reasonably be argued, in fact, that employers are "better off" in the negligence context, where the plaintiff is required to prove both the employer's knowledge of the harassment (or that it should have known) and that it failed to take reasonable corrective action. In the strict liability context, the plaintiff is required to prove significantly less in the prima facie case: merely that the harasser was his supervisor. Thus, given the different elements that the plaintiff must prove under each theory, it is quite logical that the defense should be available in one context but not the other. Under which theory of liability an employer is "better off" is often in the eyes of the beholder, will vary under the specific facts of the case, and has no bearing on whether the employee may assert the *Ellerth/Faragher* [**18] defense. The fact is that vicarious liability and negligence are two distinct bases for liability, each with its own elements of proof.

Given the overwhelming evidence of racial harassment presented at trial, it is hardly surprising that the jury would have imposed liability against Potomac under the negligence theory, as articulated by Jury Instruction 10, which provided in relevant part that the jury should find for Swinton if they determined:

> That management knew, through complaints or other circumstances, of the harassing conduct or language by Fosdick or co-workers and the employer failed to take reasonably prompt, corrective action designed to end the harassment, OR
>
> That management should have known of the harassment [by] Fosdick or co-workers, due to the pervasiveness of the conduct or language, or through other circumstances, and the employer failed to take reasonably prompt, corrective action designed to end the harassment.

Indeed, in light of the undisputed testimony detailing Fosdick's racial harassment of Swinton, the racial comments and acquiescence of co-workers, and the undisputed testimony that Pat Stewart witnessed the harassment but did nothing [**19] to end it, the jury was all but compelled to find for Swinton under this instruction.

Potomac, however, maintains on appeal that, though Stewart was a supervisor, he was not part of U.S. Mat's" management," as identified in Jury Instruction 10, and thus that his knowledge and inaction could not be imputed to the company. We considered the issue of what sort of employees constitute "management" for purposes of imputation to the employer in Title VII law in *Brooks v. City of San Mateo, 229 F.3d 917, 925 n. 6 (9th Cir. 2000)*. The discussion in *Brooks* relied heavily on the district court opinion in *Lamb v. Household Servs., 956 F. Supp. 1511, 1516-18 (N.D. Cal. 1997)*, which featured a thorough survey of the law in this area. The court in *Lamb* identified two categories of employees who qualify as management for these purposes. First, [HN11] an employee is a member of management if a "supervisor[]possessing substantial authority and discretion to make decisions concerning the terms of the harasser's or harassee's employment, "such as "authority to counsel, investigate, suspend, or fire the accused harasser, or to change the conditions of the harassee's [**20] employment." *Id. at 1517.* [*805] Second, a supervisor who lacks such authority is nonetheless classified as "management" if he "has an official or strong de facto duty to act as a conduit to management for complaints about work conditions." *Id.*; *see also Distasio, 157 F.3d at 64* ("An official's knowledge will be imputed to an employer when: '. . . (B) the official is charged with a duty to act on the knowledge [of harassment] and stop the harassment; or (C) the official is charged with a duty to inform the company of the harassment.'") (quoting *Tor-*

res v. Pisano, 116 F.3d 625, 636-37 (2d Cir. 1997) (citations omitted)).

It is beyond dispute that Stewart fell into the second category of "management" employees identified by *Lamb*: employees with "an official or strong de facto duty to act as a conduit to management for complaints about work conditions." *956 F. Supp. at 1517.* [4] The duty here was official and explicit, not left to chance. By the very terms of U.S. Mat's employee manual, Stewart was charged with accepting reports of harassment; he was the one to whom Swinton was to report first if he experienced harassment. [**21] And it is also undisputed that Stewart personally witnessed the harassment; he admitted as much. It could even be said that he participated in it himself by laughing along with Fosdick's jokes. Under these circumstances, we are confident in concluding that Swinton presented overwhelming and undisputed evidence justifying a verdict in his favor under a negligence theory, as outlined in Instruction 10.

> 4 Here we may determine that Stewart was a member of "management" as a matter of law because "the court's conclusion depends not on factual findings regarding the job, but on the implications of the employment within the Title VII framework." *Lamb, 956 F. Supp. at 1516 n. 4* (citing *Horton v. Taylor, 767 F.2d 471, 478 (8th Cir. 1985)).*

Potomac maintains, however, that, even if Instruction 10 correctly stated the law, the verdict nonetheless cannot stand because Instruction 12 on the vicarious liability theory was incorrect. This instruction purports to set forth the vicarious liability [**22] theory, as well as the *Ellerth/Faragher* defense. It states that the jury may find for the plaintiff if it finds, inter alia, "That John [sic] Fosdick was employed in a supervisory capacity and participated in the harassment." Potomac is correct that this instruction is an erroneous statement of the law. It is not sufficient that Fosdick "was employed in a supervisory capacity." Rather, for vicarious liability to attach, he must have been *Swinton's* supervisor. *See Faragher, 524 U.S. at 806* ("[HN12] An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by *a supervisor with immediate (or successively higher) authority over the employee.*") (emphasis added).

We employ the following standard in evaluating a verdict where the jury was given an incorrect instruction:

> [HN13] An error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless. *Coursen v. A.H. Robins Co., Inc., 764 F.2d 1329, 1337 (9th Cir. 1985).* While this standard of review is less stringent than review for harmless error in a criminal case, it is more stringent [**23] than review for sufficiency of the evidence, in which we view the evidence in the light most favorable to the prevailing party. *See, e.g., United States v. Adler, 879 F.2d 491, 495 (9th Cir. 1988).* In reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted [*806] from a misapprehension of law rather than from factual determinations in favor of the prevailing party.

Caballero v. City of Concord, 956 F.2d 204, 206-07 (9th Cir. 1992). Under the particular facts of this case, we can conclude with confidence that the inclusion of the incorrect vicarious liability instruction was more probably than not harmless. This is not a case where the jury might have found for the defendant under the negligence instruction but instead found for the plaintiff under the erroneous vicarious liability instruction. In such a case, where we could not determine that the jury did not rely on an incorrect statement of the law, the verdict could not stand. But here, as explained above, given the overwhelming evidence presented at trial, it [**24] is much more likely than not that Swinton would have prevailed under the negligence theory, as outlined in Instruction 10, even if the jury had not been given the option of considering vicarious liability at all. Our conclusion is further bolstered by the fact that the jury returned a large punitive damages award, which we have held constitutes evidence that an erroneous jury instruction was harmless. *See Lambert v. Ackerley, 180 F.3d 997, 1009-1010 (9th Cir. 1999)* (en banc), *cert. denied, 528 U.S. 1116, 145 L. Ed. 2d 814, 120 S. Ct. 936 (2000)* (citing *Larez v. Holcomb, 16 F.3d 1513, 1518 (9th Cir. 1994); Benigni v. City of Hemet, 879 F.2d 473, 480 (9th Cir. 1989)).*

In sum, we hold that the district court did not err in its formulation of the negligence theory of employee liability for harassment, and that the promulgation of the erroneous vicarious liability instruction was harmless.

II. JURY INSTRUCTION/EVIDENTIARY CHALLENGES

A. Instruction under *42 U.S.C. § 1981*

Potomac proposed an instruction under *42 U.S.C. § 1981*, stating that the plaintiff was required [**25] to

prove both intentional discrimination and "that white employees were not subject to" the same sort of conduct as was Swinton. The district court did not err in declining to give such an instruction. Potomac is correct that [HN14] *§ 1981* does require proof of intentional discrimination. But there is no authority for the proposition that the word "intentional" must be included in jury instructions. The cases Potomac cites in this regard, *Evans v. McKay, 869 F.2d 1341, 1344 (9th Cir. 1981), Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30, 694 F.2d 531, 536 (9th Cir. 1982)*, and *Williams v. Owens-Illinois, Inc., 665 F.2d 918, 927 (9th Cir. 1982)*, do not state that a jury must specifically be told that they must find "intentional" discrimination. *Evans* simply rejected the district court's view that a *§ 1981* claim required an allegation of conspiracy. *Gay* held that a disparate impact theory of employment discrimination was insufficient to state a claim under *§ 1981*. Similarly, *Williams* concerned the use of statistical evidence to prove employment discrimination. These cases are not relevant here, where there is no conceivable [**26] argument that the harassment perpetrated by Fosdick (and imputed to the employer through the doctrines discussed in Section I., *supra*) was not, in fact, intentional.

The Supreme Court has held that [HN15] employment discrimination not based on a disparate impact theory is, in fact, intentional discrimination: "The 1991 [Civil Rights]Act limits compensatory and punitive damages awards . . . to cases of 'intentional discrimination' -- that is, cases that do not rely on the 'disparate impact' theory of discrimination." *Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 534, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999)* (citation omitted). Swinton did not base his claim [*807] on a disparate impact theory. Under our precedent, [HN16] an employer is liable on a hostile environment claim:

> Where the employee proves (1) that he was subjected to verbal or physical conduct of a harassing nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Pavon v. Swift Transp. Co., Inc., 192 F.3d 902, 908 (9th Cir. 1999). The jury instructions [**27] adequately included these elements and mirrored the Ninth Circuit model civil jury instruction for disparate treatment under Title VII, which is analogous for purposes of this analysis.

Nor was Swinton required to prove that white employees were not subject to similar harassment. To suggest, as Potomac does, that it might escape liability because it equally harassed whites and blacks would give new meaning to equal opportunity. Potomac's status as a purported "equal opportunity harasser" provides no escape hatch for liability. [HN17] The fact that Fosdick may have told jokes about racial or ethnic groups other than African-Americans does not excuse the fact that he racially harassed Swinton. *See, e.g., Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463-64 (9th Cir. 1995)* (rejecting claim that harassing language directed at woman was "cured" by fact that harasser also referred to men as "assholes").

B. General instruction regarding corporations

Potomac asserts that the district court committed prejudicial error by giving a standard instruction regarding corporate liability, Instruction No. 3, which provides in part, "a corporation is responsible for the [**28] acts of its employees, agents . . . performed within the scope of authority." Potomac argues that this instruction misstates the law of employer liability as stated in *Ellerth, Faragher*, and *Kolstad*.

It is true that this instruction, taken in isolation, does not fully state the applicable law of employer liability for harassment by its employees. But [HN18] the law governing appellate review of jury instructions counsels against looking at any one jury instruction in isolation. Rather, "prejudicial error results when, *'looking to the instructions as a whole*, the substance of the applicable law was [not] fairly and correctly covered.'" *In re Asbestos Cases, 847 F.2d 523, 524 (9th Cir. 1988)* (emphasis added) (citing *Pollock v. Koehring Co., 540 F.2d 425, 426 (9th Cir. 1976))*. Taken as a whole, the instructions given by the district court do "fairly and correctly" cover the proper legal standard governing employer liability. As discussed above, Instruction 10 correctly states the law governing employer liability under the negligence standard, and Instruction 12, addressing vicarious liability, though incorrect as to the identification of the [**29] supervisor, correctly included the *Ellerth/Faragher* defense. Therefore, it was not prejudicial error for the district court to give a general, boilerplate instruction regarding corporations, when more specific instructions regarding employer liability in the harassment context were given as well.

C. Admission of summaries of Swinton's statements to counselors

The district court admitted two exhibits consisting of documents prepared by psychologists contacted by Swinton after he left the employ of U.S. Mat. These documents include Swinton's account of the harassment, as

related to the therapist. Potomac argued in a motion in limine that these documents consist of hearsay outside [*808] any exception, and it repeats this argument on appeal.

The district court admitted these medical summaries under *Federal Rule of Evidence 803(4)*, which excludes from hearsay, "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The exhibits at issue appear to reflect the [**30] psychologists' collection of a patient's medical history, a routine part of medical diagnosis. Potomac has not offered any evidence, case law, or argument to the contrary. The cases it cites do not discuss *Rule 803(4)*, the medical diagnosis exception; rather, they discuss *Rule 803(3)*, the state of mind exception, and *Rule 803(6)*, the business records exception. In sum, nothing suggests that the district court abused its discretion in admitting the exhibits pursuant to *Fed. R. Evid. 803(4)*.

D. Refusal to admit evidence relating to timing of retention of counsel and seeking of counseling

Potomac unsuccessfully sought to admit evidence that Swinton only sought psychological counseling two days after consulting with his attorney. Potomac's argument is that the court's ruling prevented it from effectively cross-examining Swinton and arguing that his emotional distress claim was not genuine. Although another judge might have chosen to admit this timing evidence, the district court fully considered the issue and was within its discretion in making its ruling. Potomac had ample opportunity to cross-examine Swinton about the extent of his mental distress and to explore the basis for [**31] the emotional distress claim. In any event, given the wealth of other evidence admitted, any error on this evidentiary point was almost certainly harmless.

E. Court's questioning of Hondo Vo

Potomac asserts that the district court demonstrated bias by improperly questioning Hondo Vo, one of the two co-plant managers at U.S. Mat. [HN19] The law grants district judges wide discretion to participate in the questioning of witnesses. "It is well established that a trial judge is more than a moderator or umpire." *United States v. Mostella, 802 F.2d 358, 361 (9th Cir. 1986)*. "It is entirely proper for him to participate in the examination of witnesses for the purpose of clarifying the evidence, confining counsel to evidentiary rulings, controlling the orderly presentation of the evidence, and preventing undue repetition of testimony." *Id.* The court "oversteps the bounds of propriety and deprives the parties of a fair trial," thus requiring a new trial, "only if the record 'discloses actual bias on the part of the trial judge or leaves the reviewing court with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance [**32] of advocacy or partiality.'" *Id.* (citing *Shad v. Dean Witter Reynolds, Inc., 799 F.2d 525 (9th Cir. 1986))*.

An examination of the questions the court posed to Hondo Vo reveals little of consequence. Probably the information most harmful to Potomac about which the court inquired of Vo was the fact that Swinton was the only black employee at U.S. Mat. [5] But this colloquy was not the jury's only source of this information. Even before the judge's inquiry, Swinton himself testified to this fact, as did Vickie Thompson, the human resources director. Later, Lloyd Everhard, U.S. Mat's president, [*809] testified to the same thing. At the beginning of the trial, out of the presence of the jury, Potomac's counsel actually admitted that it was inevitable that the jury would be made aware of this fact during trial. Therefore, the court's elicitation of this information was, if anything, cumulative and superfluous. It did not present the jury with anything about which it was not already aware, and thus was not prejudicial.

5 U.S. Mat's hiring practices were not at issue in the lawsuit.

[**33] **F. Court's statement about "going all over the countryside"**

Potomac asserts error in the district court's statement, during the direct testimony of company president Lloyd Everard, "Can we get to the issues of this case with this witness instead of going all over the countryside?" It was not error for the district court to make this statement. An examination of the context in which the court made this comment reveals that it came after several minutes of testimony that were frequently interrupted by objections that the witness' answers were not responsive to the attorney's questions. The court, as was entirely proper, was simply expressing its desire for the witness to answer questions without injecting extraneous information.

G. District court's "exclusion" of exhibit regarding the investigation

The last of Potomac's asserted evidentiary errors concerns what it terms the "exclusion" of an undated memorandum written by human resources director Vickie Thompson purporting to recount the steps she took in her investigation of the Swinton matter. Potomac misperceives what actually took place; this exhibit was never excluded by the court. When Potomac moved during Thompson's [**34] testimony for the admission of

the document, Swinton's attorney objected on hearsay grounds. The court responded, "I will reserve on it. Let me see it. Go ahead." Swinton's attorney then said that he also objected on the grounds that the exhibit had not been identified in the pretrial order. The court responded," I understand the argument and the objection. Let's continue with this witness. Something else." The court never "excluded" the exhibit. It merely "reserved" ruling on the objection, to which Potomac's attorney responded by stating, "I have no further questions."

Potomac's attorney could have used the document to refresh the witness's memory on the point. Although he started down this path before he first moved for admission of the exhibit, he never followed-up. He could have argued that the report was admissible as a past recollection recorded under *Federal Rule of Evidence 803(5)*. He chose not to do so, and we are in no position to second-guess his tactics. Potomac's counsel also could have asked the court for an immediate ruling, but, for whatever reason, chose not to. Nor did Potomac raise the issue again or at a later point move for introduction of the exhibit. In any [**35] case, Potomac cannot now complain of the exclusion of evidence when the district court never actually excluded it. In addition, it is true that this exhibit was not included in the pretrial order. The court would be well within its discretion to exclude an exhibit not identified in the pretrial order. *See Fed. R. Civ. P. 16(e)*; *Byrd v. Guess, 137 F.3d 1126, 1131-32 (9th Cir. 1998)*; *United States v. Lummi Indian Tribe, 841 F.2d 317, 320 (9th Cir. 1988)*.

III. PUNITIVE DAMAGES

A. Availability of punitive damages under Kolstad

In *Kolstad v. American Dental Ass'n, 527 U.S. 526, 144* [*810] *L. Ed. 2d 494, 119 S. Ct. 2118 (1999)*, the Supreme Court clarified the standard to be applied in assessing punitive damages in the employment discrimination context. The Court rejected the contention that punitive damages are available only in cases of an employer's" egregious" conduct. *Id. at 534*. But it held that, [HN20] to be liable for punitive damages, the employer "must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id. at 536*. [**36] Most relevant here, the Court held that, "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'" *Id. at 545* (quoting *Kolstad v. Am. Dental Ass'n, 139 F.3d 958, 974 (D.C. Cir. 1998)* (Tatel, J., dissenting)).

The parties generally agree that the answer to the question whether punitive damages are appropriate under *Kolstad* turns on whether the actions (or, rather, the inaction) of Swinton's direct supervisor, Pat Stewart, in the face of Fosdick's behavior, may properly be imputed to Potomac. Potomac takes the position that Stewart -- though designated in the employee manual as the proper recipient of harassment complaints by virtue of his position as Swinton's supervisor -- was only a low-level supervisor and was thus not employed in a "managerial capacity," permitting punitive damages under *Kolstad, 527 U.S. at 542-43*.

Courts in several other circuits have addressed similar situations, where a supervisor who did not actually perpetrate the harassment [**37] but nonetheless was responsible under company policy for receiving and acting upon complaints of harassment, failed to take action to remedy the harassment. They have reached the conclusion that [HN21] the inaction of even relatively low-level supervisors may be imputed to the employer if the supervisors are made responsible, pursuant to company policy, for receiving and acting on complaints of harassment. In *Deters v. Equifax Credit Information Servs., Inc., 202 F.3d 1262 (10th Cir. 2000)*, a plaintiff sexually harassed by co-workers complained to the manager designated to receive such reports, but the manager failed to act. The Tenth Circuit held that the employer could not avail itself of *Kolstad's* "good faith" defense because the very person the company entrusted to act on complaints of harassment failed to do so, and failed with malice or reckless disregard to the plaintiff's federally protected rights. *See id. at 1271*; *see also Cooke v. Stefani Management Servs., Inc., 250 F.3d 564, 569 (7th Cir. 2001)* (Where the "claim [is] that the supervisor failed adequately to remedy the harassment[,] . . . the supervisor acts on behalf [**38] of the company in enforcing (or failing to enforce) its []harassment policy, and it is therefore fair to attribute his knowledge and acts to the company.") (citing *Deters)*; *cf. Lamb v. Household Credit Servs., 956 F. Supp. 1511, 1516-18 (N.D. Cal. 1997)* (classifying supervisor responsible for passing on complaints of harassment as management for purposes of liability); *Distasio, 157 F.3d at 64* (same).

In an effort to invoke the good faith defense, Potomac cites to its written materials forbidding harassment and putting in place anti-harassment procedures as conclusive evidence that it acted in good faith and was thus undeserving of punitive damages. Aside from the fact that, as just noted, Potomac is not entitled to assert the good-faith defense under these circumstances, [HN22] it is well established that it is insufficient for an employer simply to have [*811] in place anti-harassment policies; it must also implement them. *See Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 517 (9th Cir. 2000)*; *Lowery v. Circuit City Stores, 206 F.3d 431, 446 (4th Cir. 2000)* ("While an employer's institu-

tion of a written [**39] policy against race discrimination may go a long way toward dispelling any claim about the employer's reckless or malicious state of mind with respect to racial minorities, such a policy is not automatically a bar to the imposition of punitive damages.") (citation omitted); *Deffenbaugh-Williams v. Wal-Mart Stores, 188 F.3d 278, 286 (5th Cir. 1999)* ("Wal-Mart's only evidence [of an anti-discrimination policy] was that it (Wal-Mart) encourages employees to contact higher management with grievances. Plainly, such evidence does not suffice to establish, as a matter of law, Wal-Mart's good faith in requiring its managers to obey Title VII."). Surely, U.S. Mat cannot claim to have *implemented* its anti-harassment policy in good faith (even if it were conceived in good faith) when the very employee (Stewart) charged with carrying it out vis-a-vis Swinton laughed along with the "nigger" jokes, did nothing to stop them, and never reported the repeated incidents to higher management. U.S. Mat made a considered judgment to place responsibility for reporting on an employee's direct supervisor. It could well have required some other supervisor or manager further up the chain [**40] to be the point of contact. And it could have impressed upon its supervisors, like Stewart, whom it tasked with accepting complaints of harassment, the (we would hope) obvious point that repeatedly subjecting a black employee to "nigger" jokes is wholly unacceptable, and at odds with basic anti-discrimination principles. But it chose not to, and U.S. Mat cannot now be heard to protest that Stewart's position was too "low-level" to warrant imputation of his actions or inaction to the company.

B. Post-litigation remedial actions

Potomac next seeks a new trial on punitive damages because the district court excluded evidence of one of the steps taken by U.S. Mat to remedy the discrimination after Swinton filed his discrimination suit. Potomac argues that such evidence is relevant to the issue of punitive damages because it demonstrates the company's good faith once the company became fully aware of the racial harassment; also, such evidence would tend to show that the imposition of punitive damages was not necessary to deter U.S. Mat from future tolerance of harassment. Swinton counters that such evidence was properly excluded as irrelevant.

Swinton cites numerous cases purporting [**41] to stand for the proposition that evidence of post-occurrence remediation is nearly always irrelevant in discrimination cases. *See Lam v. Univ. of Hawaii, 40 F.3d 1551, 1561 n. 17 (9th Cir. 1994)*; *Bouman v. Block, 940 F.2d 1211, 1227 (9th Cir. 1991)*; *Gonzales v. Police Dep't, City of San Jose, 901 F.2d 758, 761 (9th Cir. 1990)*. These cases, however, do not sweep as broadly as Swinton asserts. Courts have held, quite sensibly, that evidence of post-event occurrences are rarely relevant to the issue of whether the defendant actually engaged in discrimination. This notion was best summarized in *Gonzales, 901 F.2d 758 at 762*: "Curative measures simply do not tend to prove that a prior violation did not occur."

But the issue of discrimination *vel non* is distinct from the issue whether punitive damages are warranted. *See Kolstad, 527 U.S. at 534* ("Congress plainly sought to establish two standards of liability -- one for establishing a right to compensatory damages and another, higher [*812] standard that a plaintiff must satisfy to qualify for a punitive award."). [HN23] Given the fact of different standards for the imposition [**42] of liability and the award of punitive damages, it is not unreasonable to conclude that evidence that may be irrelevant to proving the former is nevertheless relevant to demonstrating the appropriateness of the latter (and vice versa). *See EEOC v. Ind. Bell Tel. Co., 256 F.3d 516, 527 (7th Cir. 2001)* ("Because the size of a punitive award reflects the jury's assessment of the defendant's blameworthiness, many circumstances that bear on this issue become relevant, even though they could not defeat liability.") (en banc).

In support of its argument, Potomac points us to several recent decisions of the Supreme Court, and one from this court, in which the opinions, in discussing punitive damages, make reference to remedial action undertaken by defendants after the filing of a lawsuit. For example, in *BMW, 517 U.S. at 565-66*, the Court commented on steps the car maker took to mend its ways, even after the trial court's imposition of the punitive damages award. *See id. at 579* ("It is also significant that there is no evidence that BMW persisted in a course of conduct after it had been adjudged unlawful on even one occasion, let alone [**43] repeated occasions"); *see also id. at 579 n. 31* ("Before the verdict in this case, BMW had changed its policy [relating to the misconduct that led to liability] . . . . *Five days after the jury award*, BMW altered its nationwide policy.") (emphasis added).

Similarly, in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 149 L. Ed. 2d 674, 121 S. Ct. 1678 (2001)*, the Court noted in the punitive damages context remedial actions taken by the defendant after the filing of the lawsuit. See *id. at 1680-81* ("The first ToolZall was designed to be virtually identical to [Leatherman's product], but the design was ultimately modified in response to this litigation."); see also *121 S. Ct. at 1680* ("[After the entry of a preliminary injunction,] Cooper withdrew the original ToolZall from the market and developed a new model with plastic coated handles that differed from the PST."). Most recently, this court, affirming a grant of summary judgment for the employer in a sexual harassment case, relied on the fact that the em-

ployer undertook "extensive "investigation of sexual harassment charges after the plaintiff filed a charge with the Equal Employment [**44] Opportunity Commission and conducted mandatory training seminars for all employees several months later. *See Kohler v. Inter-Tel. Techs., 244 F.3d 1167, 1181-82 (9th Cir. 2001).*

Potomac thus urges the view that, as a general principle, remedial action undertaken by the defendant, even after the filing of a lawsuit, is necessarily admissible and relevant to the issue whether punitive damages are appropriate. We do not, however, read the cases as necessarily establishing the bright-line rule Potomac urges. The Supreme Court's references to post-litigation remedial action are glancing and ambiguous. The Court did not, to be sure, face head-on the question presented here: whether a defendant must be permitted to present evidence of remedial action undertaken after the filing of a complaint as a means of mitigating a punitive damages claim. We do not interpret the language in *BMW* and *Cooper* as *relying* on evidence of post-occurrence remediation for overturning the punitive damages awards; rather, the Courtappears simply to have been recounting a full history of the litigation to give a complete picture of the proceedings. Nonetheless, the Court's passing references [**45] are not without some persuasive value in the context of evaluating punitive damages on appeal.

[*813] A review of case law from other jurisdictions and academic commentary on this subject reveals no consistent rule on the admissibility of such evidence. *See* Tom Alan Cunningham & Paula K. Hutchinson, *Bifurcated Trials: Creative Uses of the* Moriel *Decision, 46 Baylor L. Rev. 807, 821-22 (1994)* ("Some courts have held that evidence of a defendant's rehabilitated character or actions or both are irrelevant to the issue of punitive damages, on the theory that it is the defendant's intent, motive or state of mind at the time of the occurrence which is controlling. However, other courts have found that subsequent occurrences may be relevant to the determination of punitive damages, insofar as such damages are intended to serve as a deterrent to future bad acts.") (footnotes omitted). Some courts have taken the view that such evidence is almost never relevant in assessing punitive damages. For example, in *O'Gilvie v. Int'l Playtex, Inc., 821 F.2d 1438 (10th Cir. 1987)*, the jury awarded the plaintiff $ 10,000,000 in punitive damages following the death [**46] of his wife from toxic shock syndrome caused by the defendant's tampons. The district court, notwithstanding the fact that it found the size of the award within reason and entered judgment for the plaintiff in this amount, nonetheless reduced the punitive damages to $ 1,350,000 upon a promise by Playtex to "discontinue the sale of some of its products, institute a program of alerting the public to the dangers of toxic shock syndrome, and modify[]its product warning." *Id. at 1440-41.*

The Tenth Circuit reversed, however, holding that such remittitur was improper because the district court" based its decision to remit on events occurring after trial." *Id. at 1449.* In doing so, the *O'Gilvie* court relied on decisions from both the Kansas Supreme Court and the Oregon Supreme Court holding that evidence of post-occurrence action by the defendant is not relevant in determining punitive damages. *See Ettus v. Orkin Exterminating Co., 233 Kan. 555, 665 P.2d 730, 741 (Kan. 1983)* (holding that only factors relevant under Kansas law in determining punitive damages are those involving" the quality of the character of the tortious act itself. [**47] "). Or, as the Oregon Supreme Court explained, such evidence is generally not relevant to an award of punitive damages because it is more likely to be motivated by a desire to mitigate punitive damages than by genuine contrition:

> Evidence of the parties' conduct subsequent to the event, which produces plaintiff's claim for punitive damages, whether aggravating or mitigating, must be probative of the defendant's state of mind *at the time of the transaction.* [Citation omitted].
>
> . . .
>
> In the case here at issue the evidence of contrition and a conciliatory attitude of one of the defendant's agents after the complaint was filed has scant relevance respecting the state of mind of other agents of defendant at the time [of the wrong]. Assuming the evidence established the good faith and good will of defendant's president toward plaintiff, such conduct came as a response to the complaint, which prayed for substantial punitive damages. The evidence shows a desire to "buy peace" and minimize the risk of an award of punitive damages and not that the defendant dealt in good faith with plaintiff [at the time of the tort].

Byers v. Santiam Ford, Inc., 281 Ore. 411, 574 P.2d 1122, 1125 (Or. 1978) [**48] (emphasis added); *see also Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982)* (applying Ohio law); *cf.* David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors be Given to* [*814] *Determine the Amount of a Punitive Damages Award?, 57 Md. L. Rev. 174, 216 (1998)* (*Fed. R. Evid. 407* "probably disallows

the use of subsequent remedial measures to determine liability for punitive damages, and probably the amount as well.").

Other courts, however, permit the introduction of post-occurrence remediation evidence by the defendant as a shield against punitive damages. The Tennessee Supreme Court has held that jurors *must*, in assessing punitive damages, consider "whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused . . ." *Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 902 (Tenn. 1992)*; *but see* P. Steven Hacker, *Comment, Tennessee Attempts to Tighten the Purse Strings on Punitive Damages*: Hodges v. S.C. Toof & Co., 60 *Tenn. L. Rev.* 983, 995 (criticizing decision [**49] on grounds that "allowing such evidence to be admitted during a punitive damages stage may merely present the bad actor with the opportunity to mitigate punitive damages through use of a recently initiated subsequent remedial measure as window dressing."); *see also Spaeth v. Union Oil Co., 710 F.2d 1455 (10th Cir. 1983)* (distinguished by court in *O'Gilvie)*; *Lazenby v. Godwin, 60 N.C. App. 504, 299 S.E.2d 288 (N.C. 1983)* (reversing judgment on grounds that trial court improperly excluded evidence of remedial actions undertaken by defendant after allegedly fraudulent acts).

We decline to endorse here, in the context of an employment discrimination suit, either the view that such evidence is always relevant, or that it is always irrelevant. We note that nearly all the courts that have discussed this issue have done so in products liability suits, which present their own unique issues and problems. In most such suits, for example, the defendant attempts to exclude under *Federal Rule of Evidence 407* [6] any evidence of post-occurrence remediation, fearing that introduction of such evidence tends to show consciousness of guilt. In the employment discrimination [**50] context, however, post-occurrence remediation is part and parcel of the legal framework. Under the negligence standard, the plaintiff must prove that the employer failed to take reasonably prompt corrective action once it learns of the harassment. And, in the vicarious liability context, the *Ellerth/Faragher* defense encourages employers to introduce such evidence as a defense to liability. Thus while the case law cited above highlights the conflicting policy implications of admitting or excluding this category of evidence, it does not compel any particular answer here.

6 ***Rule 407.*** **Subsequent Remedial Measures**

> [HN24] When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

[**51] Accordingly, we hold that [HN25] a district court may, in its discretion, allow a defendant/employer to introduce evidence of remedial conduct undertaken in response to its discovery of discrimination as a means to mitigate punitive damages. Likewise, where the plaintiff, in arguing for punitive damages, contends that they are necessary to "teach the defendant a lesson," post-charge remediation may be [*815] relevant to defendant's posture. The plaintiff can, of course, make arguments about prejudice, too little too late, and relevance of remedial conduct. Adoption of this approach has the advantage of encouraging employers to implement remedial measures, while leaving to the trial court, which has a front-row seat in evaluating the evidence, the discretion to determine the limitations on such evidence. In framing this discussion, we do not attempt to prejudge in all cases whether remedial conduct is admissible, even if it occurs after the plaintiff has filed a charge with an administrative agency such as the EEOC, or has in fact filed a lawsuit. Rather, the determination as to whether the evidence is too far afield, temporally or by subject matter, is left, in the first instance, to the discretion [**52] of the trial court.

While we stress that [HN26] district courts have discretion, under traditional relevance principles, to admit or exclude evidence of remediation undertaken after the filing of a complaint, we do offer some guidance. *Ellerth*, *Faragher*, and *Kolstad* all clearly stand for the proposition that employers should be encouraged to institute anti-harassment measures, and must be given the opportunity to present evidence of such efforts. Thus an employer should be given the opportunity to present evidence that tends to prove that it undertook prompt and appropriate remedial measures, whether such measures occurred before or after the plaintiff happened to file his complaint.

Consider the situation where the plaintiff quits based on a constructive discharge, files a *§ 1981* suit (or an EEOC complaint) the next day, and then seeks to bar any evidence of post-complaint investigation and follow-up. If a court were to exclude all post-complaint remediation evidence, the employer might well be denied the *Ellerth/Faragher* defense and the opportunity to demonstrate good faith as an argument against punitive damages. In contrast, if the plaintiff files an EEOC complaint, [**53] then waits until the last possible day to a file a lawsuit, and only then does the employer take any remedial action, the circumstances may well be different. The point is that the timing and nature of remedial action are case-specific and will not always fit in a neat box. From a policy standpoint, the law should encourage employers to undertake remedial action without regard to their ultimate liability.

We also wish to emphasize that evidence of post-charge remediation would not automatically bar the imposition of punitive damages. A jury would, of course, be free to discount such evidence on the grounds that the remedial action undertaken by the employer is nothing but a sham concocted by defense attorneys as a strategy to avoid punitive damages. In the first instance, the trial court acts as a gatekeeper with respect to relevance. But once this evidence is admitted, the system relies on the jury to determine whether the remedial conduct is nothing more than window dressing. We have little doubt that some juries will cast a skeptical eye on such evidence of after-the-fact good works. But the jury might also find that such remedial actions were indeed bona fide efforts to repent [**54] and to prevent the reoccurrence of similar harassment in the future, thus lessening the need for additional deterrence in the form of punitive damages. [7] *See* Hacker, *supra* at 994 (evidence [*816] of remedial measures" allows the defendant to illustrate some deterrence has already occurred ..."). We also stress that our holding here does nothing to alter the underlying rules regarding a district court's determination of relevancy under the rules of evidence. *See Fed R. Evid. 401-03.*

7 Assume, for example, that -- contrary to the evidence presented at trial -- Swinton filed suit the week after he quit, and that high-level managers at U.S. Mat and Potomac immediately undertook swift and decisive action to remedy the situation by firing or disciplining anyone who had uttered a racial slur, demoting anyone who had witnessed the harassment but had failed to do anything about it, instituting a better reporting system, and sending all employees and managers to anti-harassment training. Under such circumstances, we would think that Potomac would be entitled to present this evidence as tending to demonstrate that it was capable of mending its ways without being hit over the head with the club of a significant punitive damages award. But such circumstances were not present in this case.

[**55] Turning, then, to the instant case, we conclude that the district court did not abuse its discretion in limiting, in response to Swinton's motion in limine, evidence of remedial action undertaken after Swinton filed his lawsuit. In fact, it appears that, despite the court's ruling, Potomac was still able to introduce evidence of remedial action undertaken after the filing of the suit. Specifically, human resources manager Vickie Thompson testified about the steps she undertook to investigate Swinton's charges, including interviews she conducted after Swinton filed suit. As a consequence, the court's ruling had the effect of excluding only one piece of evidence: the fact that all U.S. Mat supervisors and managers underwent anti-harassment training in September 1997, approximately seven months after Swinton quit, five months after he filed his unemployment claim alleging racial harassment, and two months after he filed suit. The district court was within its discretion to exclude this single piece of evidence. Such evidence, if introduced, would have done little, if anything, to undermine the uncontroverted evidence that, even after everyone in management became fully cognizant of Swinton's [**56] allegations, no one -- not Pat Stewart, none of those at U.S. Mat who had witnessed the harassment and had done nothing about it, and none of the workers who had actually hurled the epithet "nigger" at Swinton -- was ever fired, demoted, or in any way disciplined. [8]

8 Fosdick himself quit soon after Swinton left, leaving Potomac little opportunity to discipline him. We can only speculate whether the company would have disciplined him had he not quit on his own.

Potomac also argues that the exclusion of evidence of remedial action undertaken after the suit was filed was particularly prejudicial because Swinton's counsel stated in his closing argument, while discussing punitive damages, that U.S. Mat "did nothing . . . . They should have done something." Potomac asserts that it was unfair to allow Swinton to argue that U.S. Mat "did nothing" in response to the harassment, but to preclude Potomac from introducing evidence tending to rebut this charge. Potomac's argument is unavailing, for two reasons. First, [**57] Potomac never made a contemporaneous objection to this argument, thus subjecting the error alleged only to the highly deferential "plain or fundamental error" standard of review, where we will reverse only "where the integrity or fundamental fairness of the proceedings in the trial court is called into serious question." *Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1148 (9th Cir. 2001).* Even were we to assume that Swinton's

counsel's argument unfairly prejudiced Potomac, the level of prejudice does not rise to the level of "plain or fundamental error . . . where the integrity or fundamental fairness of the proceedings in the trial court is called into serious question." *Id.* Second, a close reading of [*817] the argument to which Potomac now objects reveals that the allegation that Potomac "did nothing" is a reference to a failure to train workers not to engage in harassment *before* the events about which Swinton complained -- not to any actions that Potomac may have taken, or failed to take, after the filing of the suit. Recognizing that statements by Swinton's counsel were argument, not evidence, we also note that Potomac did introduce evidence of its investigation [**58] and follow-up, thus belying the claim that it did nothing.

In sum, given the particular circumstances presented here, the district court did not abuse its discretion in excluding, on a limited basis, evidence of remedial actions undertaken after Swinton filed suit.

C. Constitutional limits on punitive damages

Lastly, we must consider de novo whether the punitive damages award of $ 1,000,000 was constitutionally excessive under *BMW. Cooper Indus., 121 S. Ct. at 1683.* In *BMW*, the Supreme Court held that [HN27] an award of punitive damages violates constitutional due process requirements if" grossly excessive." *BMW, 517 U.S. at 562.* The Court announced three "guideposts" to assist courts in determining whether an award violates this standard: the "degree of reprehensibility" of the tortfeasor's actions; "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damage award"; "and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id. at 575.* Although the district court did not conduct a *BMW* analysis, we need not remand because" the [**59] constitutional issue merits de novo review." *Cooper Industries, 121 S. Ct. at 1683.*

1. Reprehensibility

We first must assess the degree of reprehensibility of Potomac's conduct. In so doing, we are mindful of the fact that the conduct for which Potomac was found liable was not Fosdick's "nigger" jokes per se, but rather the action -- or, rather, inaction -- of the company's proxies in response to them. But, of course, the reaction to the jokes cannot be divorced from the jokes themselves; one can only judge the reaction of the company with reference to that to which it reacted (or failed to react).

Potomac asserts on appeal that, though "tasteless, objectively offensive joking" occurred in its workplace, it was, at the end of the day, nothing more than "joking," and did not justify such a large punitive damages award. We reject this benign characterization of the evidence presented at trial. Swinton made clear on the witness stand that he did not consider the language to which he was subject a joke. The only African-American employee of about 140 at the U.S. Mat plant, he was subject to daily abuse featuring the word "nigger," "perhaps the most offensive and [**60] inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry." *Merriam-Webster's Collegiate Dictionary* 784 (10th ed. 1993). Potomac presented its "joke" theory of the case to the jury. Had they believed it, they would have found for Potomac, as mandated by the jury instructions that required Swinton to prove that "the plaintiff regarded the conduct as undesirable and offensive." As signaled by the jury's verdict on liability and damages, they believed that what went on at U.S. Mat was "undesirable and offensive," -- not a "joke" -- and we do not hesitate before agreeing.

Nor do we agree with Potomac's contention that a large punitive damages award is unjustified because "this [is not] a case where the plaintiff complained and his [*818] complaints went unaddressed." As explained above, Potomac made Stewart its proxy by placing him in the position as recipient of Swinton's harassment complaints. For the purposes of liability and damages, what Stewart knew, Potomac knew, and what Stewart failed to do, Potomac failed to do as well. Despite witnessing the constant barrage of racial harassment directed at Swinton, Stewart (and thus Potomac) did absolutely nothing [**61] to stop it. Despite testimony that offensive racial language was ubiquitous at U.S. Mat, there is nothing to indicate that anyone in the company did anything to combat this problem until officially informed by a state agency that Swinton was charging racial harassment.

Without minimizing the effect of the ugly word and the racially-charged jokes that permeate this case, we do note, however, that the Supreme Court in *BMW* outlined what one court has termed a "hierarchy of reprehensibility," with acts and threats of violence at the top, "followed by acts taken in reckless disregard for others' health and safety, affirmative acts of trickery and deceit, and finally, acts of omission and mere negligence." *Florez v. Delbovo, 939 F. Supp. 1341, 1348-49 (N.D. Ill. 1996)* (citing *BMW, 517 U.S. at 575-76*). Without deciding where exactly on the "hierarchy of reprehensibility" the conduct in this case falls, it is undisputed that it did not involve either actual violence or the threat thereof. While we certainly have nothing good to say about Potomac's conduct, we recognize that it does not amount to the worst kind of tortious conduct a defendant can commit.

[**62] In sum, we have no trouble concluding that the highly offensive language directed at Swinton, coupled by the abject failure of Potomac to combat the har-

assment, constitutes highly reprehensible conduct justifying a significant punitive damages award.

2. Ratio

We next examine the ratio of the punitive damages award to the amount of compensatory damages: $ 1,000,000 to $ 35,600, which yields a ratio of 28: 1. We admit to uncertainty as we undertake this analysis. Though we are instructed that [HN28] punitive damages must bear a "reasonable relationship" to compensatory damages, *BMW, 517 U.S. at 580*, the Supreme Court has also repeatedly held, "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case," *id. at 582-83* (internal citations and quotation marks omitted). "Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury [**63] is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Id. at 582.*

This is precisely the type of case posited by the Court in *BMW* -- the low award of compensatory damages supports a higher ratio of punitive damages because of "particularly egregious" acts and "noneconomic harm that might have been difficult to determine." *Id. at 582.* The back pay damages were necessarily low because Swinton was paid only $ 8.50 per hour. And the personal distress and indignity visited upon Swinton are difficult to calculate. Indeed, as the Tenth Circuit has noted, "where the injury is primarily personal, a greater ratio may be appropriate." *Deters, 202 F.3d at 1273.*

Recognizing that the defendant's wealth can also be a factor in assessing the ratio, [*819] Potomac conceded that" The award was [not] out-of-line with defendant's net worth." Potomac is a multi-million dollar company with net sales exceeding $ 90 million in recent years. The ratio of the award is not excessive in view of this financial picture.

We are left, then, with the Supreme Court's upper limit of a "breathtaking 500 to 1" ratio, [**64] *517 U.S. at 583*, which "raises a suspicious judicial eyebrow," *TXO Production Corporation v. Alliance Resources Corporation, 509 U.S. 443, 481, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993)* (O'Connor, J., dissenting), along with the Court's acknowledgment that "in most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified . . . .", *BMW, 517 U.S. at 583.* We find little comfort in trying to discern parameters from other cases because the circumstances vary so widely. Such an exercise simply results in a scatter graph that pushes the decision toward a mathematical bright-line, a path that we eschew in accord with the Supreme Court guidelines.

It also bears noting that the jury was warned not to go hog wild. Even in the face of repeated admonitions by *Swinton's* counsel that the jury "[should] not get carried away," that it would be "wrong" to award ten million dollars, and that they should "be more moderate," the jury awarded significant punitive damages. The large award appears to have been calculated by the jury to effect the twin goals of punitive damages: "punishing unlawful conduct and deterring [**65] its repetition." *Id. at 568.*

Finally, under *BMW* [HN29] we are permitted to address the reasonable relationship between the punitive damages and "the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." *Id. at 581* (quoting *Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991)).* But for Swinton's decision that he couldn't take it any longer and thus had to quit, nothing in the record suggests that U.S. Mat would have done anything to address a workplace replete with racial and ethnic slurs, not only about blacks, but also directed at other minorities and ethnic groups. The fact that the harm from unchecked racial harassment occurring day after day cannot be calculated with any precision does not deflate its magnitude.

In view of the factors articulated by the Court, we cannot say that the ratio is constitutionally excessive or jars our "constitutional sensibilities." *Haslip, 499 U.S. at 18.* Our conclusion is not inconsistent with results reached in other circuits. For example, in *Deters*, the plaintiff, a woman, was "daily" called a "F'ing B" and told "come here, [**66] you C," and subject to myriad other crude sexual comments. *202 F.3d at 1266-67.* The jury awarded her $ 5,000 in compensatory and $ 1,000,000 in punitive damages; the district court reduced the punitive damages award to $ 295,000 based on the Title VII damages cap established by *42 U.S.C. § 1981a(b)(3)*, resulting in a ratio of 59: 1, much greater than the ratio here. *Deters, 202 F.3d at 1266.* Notably, the Tenth Circuit, in upholding the high-ratio award, relied on *BMW's* admonition that a relatively low award of compensatory damages may support a high ratio "if a particular egregious act has resulted in a small amount of economic damages." *Id. at 1273*; *see also EEOC v. W&O, Inc., 213 F.3d 600, 616 (11th Cir. 2000)* (upholding punitive damages of twenty-six and sixteen times compensatory damages in pregnancy discrimination case); *Romano v. U-Haul Int'l, 233 F.3d 655, 673* (upholding punitive damages award nineteen times award of [*820] compensatory damages: "Given the low actual damages due to appellee's short period of employment

and the difficulty in measuring actual damages in a [**67] case involving 'primarily personal' injury, we hold that this is a constitutionally acceptable ratio between punitive and compensatory damages." (citing *Deters, 202 F.3d at 1273*)); *Lambert v. Ackerley, 180 F.3d 997* (upholding award to six plaintiffs of $ 4.1 million in punitive damages on back pay plus emotional distress damages of $ 75,000 per plaintiff; *not* discussing *BMW).*

3. Analogous civil penalties

The last of the *BMW* guideposts which we must consider is "the difference between this remedy [punitive damages] and the civil penalties authorized or imposed in comparable cases." *517 U.S. at 575.* There are no "civil penalties" for the type of conduct for which Potomac was held liable in this case. In applying this guidepost, however, several courts have analogized to Title VII's $ 300,000 damages cap. *See, e.g., Kim v. Nash Finch Co., 123 F.3d 1046, 1068 (8th Cir. 1997); Florez, 939 F. Supp. at 1348* (stating that Title VII cap "gives at least some indication of Congress's judgment as to the approximate level of punitive damages" in *§ 1981* cases). We do not mean here to imply [**68] that the Title VII damages cap applies in *§ 1981* cases; it does not. *See, e.g., Kim, 123 F.3d at 1067* ("[HN30] The Title VII statutory cap does not apply to limit the recovery under *42 U.S.C. § 1981.*"). But the Supreme Court has nonetheless directed us to refer to such analogous sanctions in determining the constitutionality of a punitive damages award. *See BMW, 517 U.S. at 583-585.* This factor, unlike the reprehensibility and ratio guideposts, weighs in favor of a reduction. That said, however, we also hasten to add that Congress has not seen fit to impose any recovery caps in cases under *§ 1981* (or § 1983), although it has had ample opportunity to do so since the 1991 amendments to Title VII.

In sum, after analyzing the punitive damages award here in light of the three *BMW* guideposts, we cannot say that the punitive damages award amounts to a constitutional due process violation.

CONCLUSION

We affirm the jury's verdict as to liability, as to the award of compensatory damages, and as to the amount of punitive damages.

AFFIRMED.

APPENDIX

Selected Jury Instructions

Instruction No. 3

Under the law, a corporation [**69] is a person. It can act only through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority.

Instruction No. 10

To establish his claim of racial harassment under federal or state law against the defendant the plaintiff has the burden of proving each of the following propositions:

1. That there was language or conduct of a racial nature, or that occurred because of the plaintiff's race; and

2. That this language or conduct was unwelcome in the sense that the plaintiff regarded the conduct as undesirable and offensive; and

3. That the conduct or language complained of was so offensive or pervasive that it could reasonably be expected to alter the conditions of plaintiff's employment;

[*821] 4. That management knew, through complaints or other circumstances, of the harassing conduct or language by Fosdick or co-workers and the employer failed to take reasonably prompt, corrective action designed to end the harassment, OR

5. That management should have known of the harassment [by] Fosdick or co-workers, due to the pervasiveness of the conduct or language, [**70] or through other circumstances, and the employer failed to take reasonably prompt, corrective action designed to end the harassment.

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff on the state and federal harassment claims.

Instruction No. 12

If you find that the defendant neither knew nor should have known of the racially harassing conduct, plaintiff may still prevail under federal law if he proves each of the following propositions:

1. That there was language or conduct of a racial nature, or that occurred because of the plaintiff's race; and

2. That this language or conduct was unwelcome in the sense that the plaintiff regarded the conduct as undesirable and offensive; and

3. That the conduct or language was so offensive or pervasive that it could reasonably be expected to alter the conditions of the plaintiff's employment; and

4. That John Fosdick was employed in a supervisory capacity and participated in the harassment.

The defendant has the burden of proving each of the following by a preponderance of the evidence:

1. That the employer exercised reasonable care [**71] to prevent and correct promptly any racially harassing behavior, and

2. That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

If the plaintiff has failed to prove each of the things on which plaintiff has the burden of proof, your verdict should be for the defendant on this claim.

If you find that each of the things on which plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff, unless you also find that each of the things on which the defendant has the burden of proof has also been proved, in which your verdict should be for the defendant on this claim.

LEXSEE

Caution
As of: May 06, 2010

Charlotte Lynn Rawlins Yates and Cheryl Jenkins Mathis, Plaintiffs-Appellees, v. Avco Corporation, Defendant-Appellant

No. 86-5288

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

819 F.2d 630; 1987 U.S. App. LEXIS 6571; 43 Fair Empl. Prac. Cas. (BNA) 1595; 43 Empl. Prac. Dec. (CCH) P37,086

February 10, 1987, Argued
May 21, 1987, Decided

SUBSEQUENT HISTORY: As Amended June 12, 1987.

PRIOR HISTORY: [**1] On Appeal from the United States District Court for Middle District of Tennessee.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant employer sought review of a judgment from the United States District Court for Middle District of Tennessee, which found defendant liable under 42 U.S.C.S. §§ 2000e- 2000e-17, for sexual harassment of plaintiff present and former female employees by their supervisor in the course of his duties. Defendant contended that the district erred in finding sufficient evidence of liability and in finding constructive discharge and retaliation.

OVERVIEW: Plaintiff former and present female employees filed a complaint against defendant employer under 42 U.S.C.S. §§ 2000e- 2000e-17 for sexual harassment of plaintiffs by their supervisor in the course of his duties. Defendant's supervisor incessantly asked plaintiffs to lunch, dinner, and drinks, and made frequent sexually suggestive comments. The district court adopted the report of and recommendation of the magistrate and found defendant had at least constructive knowledge of the supervisor's behavior based on earlier allegations against him. The court affirmed the finding of liability against defendant for sexual harassment. Defendant should have been held responsible for its supervisor's acts, for it reasonably should have known of its supervisor's sexual harassment and because its sexual harassment policy was ineffective. The court, however, reversed the district court's findings of constructive discharge and retaliation and remanded for the recalculation of damages.

OUTCOME: The court affirmed the judgment finding defendant employer liable for the sexual harassment of plaintiff former and present female employees because defendant should reasonably have known of the sexual harassment by a supervisor, and its sexual harassment policy was ineffective. The court, however, reversed the district court's finding of constructive discharge and retaliation and remanded for recomputation of damages.

CORE TERMS: supervisor, harassment, sick leave, sexual harassment, constructive discharge, supervision, secretaries, retaliation, notice, personnel files, prima facie case, foreseeable, back-pay, constructively discharged, personnel, harasser, sick, sex, female employees, respondeat superior, supervisory, corrective, unwelcome, guidelines, reporting, harassed, sexual, female, salary, grade

LexisNexis(R) Headnotes

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Coverage & Definitions > General Overview
[HN1]See 42 U.S.C.S. § 2000e-2(a)(1).

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > Sexual Harassment
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Quid Pro Quo
[HN2]Sexual harassment manifests itself in one of two forms: harassment involving the exchange of concrete employment benefits for sexual favors (quid pro quo discrimination) and harassment that creates an offensive or hostile working environment.

Civil Procedure > Trials > Bench Trials
Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
[HN3]An appellate court will not reverse a district court unless its factual findings are "clearly erroneous," Fed. R. Civ. P. 52(a).

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Coverage & Definitions > General Overview
[HN4]Notice is not an absolute requirement to hold employers liable when supervisors are involved.

Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Burdens of Proof > Objective & Subjective Standards
Labor & Employment Law > Discrimination > Harassment > Sexual Harassment > Employment Practices > Discharges & Failures to Hire
Labor & Employment Law > Wrongful Termination > Constructive Discharge > General Overview
[HN5]A finding of constructive discharge requires an inquiry into both the objective feelings of an employee, and the intent of the employer. A constructive discharge exists if working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. In a sexual harassment case involving a male supervisor's harassment of a female subordinate, it seems only reasonable that the person standing in the shoes of the employee should be the reasonable woman since the plaintiff in this type of case is required to be a member of a protected class and is by definition female.

Labor & Employment Law > Wrongful Termination > Constructive Discharge > Burdens of Proof
[HN6]Proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other aggravating factors. The court has also required some inquiry into the employer's intent and the reasonably foreseeable impact of its conduct on the employee.

Labor & Employment Law > Discrimination > Retaliation > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > General Overview
[HN7]Section 704(a) of Title VII, 42 U.S.C.S. § 2002-3(a), provides that an employer may not discriminate against an employee because she has opposed any practice made an unlawful employment practice by this subchapter. A prima facie case is made by an employee who shows that she engaged in a protected activity, she was subsequently subjected by her employer to adverse employment action, and that a causal link existed between the two events.

Labor & Employment Law > Discrimination > Retaliation > General Overview
[HN8]Where a plaintiff's transfer results in no pay or benefits reduction, no adverse action is established.

COUNSEL: Robert E. Boston, Waller, Lansden, Dortch, Davis, J. Kevin Hennessy (Argued), for Appellant.

Frank G. Clement, Jr. (Argued), Clement, Gibson, Mossman, Pate, Noel Place, for Appellee.

JUDGES: Martin, Wellford, and Nelson, Circuit Judges. Wellford, Circuit Judge, and Nelson, Circuit Judge, delivered separate concurring opinions.

OPINION BY: MARTIN, JR.

OPINION

[*631] BOYCE F. MARTIN, Jr., Circuit Judge.

Avco Corporation appeals the judgment holding them liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, for the sexual harassment of two female employees by their supervisor, Edwin Sanders, in the course of his duties. Sanders did not appeal the judgment entered against him personally. We feel on this record there is sufficient evidence to affirm on the issue of Avco's liability. However, Charlotte Yates (Street) did not adequately prove she was constructively discharged from her employment at Avco Corporation. We also find that the district court erred in finding that Avco retaliated against Cheryl Mathis. For the reasons stated below [**2] the judgment of the district court is affirmed in part, reversed in part, and re-

manded for a recalculation of damages consistent with this opinion.

I. *Facts*

The complaints in this case by Charlotte Yates (Street) and Cheryl Mathis arose from the actions of one individual, their supervisor, twenty-eight year Avco employee Edwin Sanders. Avco manufactures and assembles wing components for the aerospace industry in Nashville, Tennessee [*632] at five separate facilities. Mathis was hired in February, 1980, and was transferred to Sanders's supervision in June, 1982. Street was hired in the summer of 1982 and put under Sanders's supervision in June, 1983 while Mathis was on sick leave. Both plaintiffs were secretaries.

Cheryl Mathis's relationship with Mr. Sanders began on terms she described as good, but it later became clear that Sanders sought some kind of personal relationship with her. Whenever Mathis was in his office he wanted the door to outside offices closed, and he began discussing very personal matters with her, such as the lack of a sexual relationship with his wife. He then began bombarding her with unwelcome invitations for drinks, lunch, dinner, breakfast, and asking himself [**3] to her house. Mathis made it clear that she was not interested in a personal relationship with her married boss. On a couple of occasions Sanders did in fact insist on coming to her apartment during the day and at those times Mathis asked a girlfriend from Avco to come with her.

Sanders also commented on Mathis's appearance, making lewd references to parts of her body. As Mathis rejected Sanders's advances, he would become belligerent. By the spring of 1983 Mathis began to suffer from severe bouts of trembling and crying which became progressively worse and eventually caused her to be hospitalized on two separate occasions, once for a week in June, 1983, and again in July for a few days. During this entire summer Mathis remained out on sick leave, not returning to work until September, 1983. She received her full pay until July 18, when her sick leave benefits expired. She was then compensated at the lesser "disability" rate of pay. When she returned from extended sick leave in September, 1983, Mathis held the same job, title, grade and compensation rate and remained under Sanders's supervision.

As soon as she returned to work, Sanders's harassment resumed. He talked of "putting her [**4] on his mistress list" and made lewd jokes and comments. When Mathis resisted his advances Sanders became hostile, giving her more work than she could handle during her part-time hours. Once again she began to experience trembling, crying and emotional distress, and once again she was forced to seek medical help and did not work.

The other employee in this litigation, Charlotte Street, had been transferred to Sanders's supervision in June, 1983 while Cheryl Mathis was on sick leave. Sanders's behavior toward Street was similar to his behavior with Mathis. He incessantly asked her to lunch, dinner and drinks, mentioned sleeping together on more than one occasion, tried to discuss his and her personal relationships and made frequent sexually suggestive comments. He would call Street into his office "because [he] wanted to watch [her] walk out" and then make groaning sounds.

The harassment not only tormented Street and Mathis, it created hostility between them and other members of the department who apparently resented the plaintiffs' familiarity with Sanders. When Street could stand no more of this, she complained to Joe Baron, Manager of Personnel. In October, 1983, while Mathis was [**5] out on sick leave, Avco became aware that Mathis's emotional problems were connected to the work situation at Avco and questioned her. Avco then began an investigation of both complaints. During the initial part of the investigation Sanders continued in his job; however, he was later put on administrative leave pending a decision about his future with Avco.

In late November, 1983, Mathis informed Baron that she wanted to be transferred out of Sanders's supervision to another facility, and November 29, she was assigned to the lower position of Secretary II, Grade 05, at the Cumberland River Facility. Her salary and benefits remained the same. Avco documented Mathis's transfer as being due to "return from extended sick leave." When Mathis was later offered a new Secretary III job at the main plant she was asked to sign a statement which said that her transfer to the Secretary II position had been at her request. Mathis chose to remain at the CRF Secretary II position [*633] rather than sign the statement which she believed would exculpate Avco from any liability. It is the actions surrounding her transfer and its documentation which Mathis contends constitute Avco's retaliation.

When both [**6] Street and Mathis complained of harassment, they were asked not to go to the EEOC and were assured that Avco would be their representative in the matter. The company refused to give them transcripts of the tape recorded statements each had made in connection with the company's investigation. Though both asked for written assurance that their jobs would be protected and for corrections in their personnel files regarding the sick leave each was forced to take because of the uncomfortable positions in which they had been placed, neither of these things were ever done. The original sick leave was never reinstated for either Mathis or Street.

As a result of the Avco internal investigation Ed Sanders was found to have harassed employees, was

drastically demoted, and received a substantial cut in salary. Though this meant Sanders would no longer be a supervisor, the plaintiffs were forced to endure unnecessary personal hardship to get to this stage. Both of their personnel files contained references to extended sick leave rather than giving any indication of the true reason for their absences. Even after Sanders was penalized, Avco refused to correct their personnel records. Though the company [**7] arranged an administrative leave for Sanders while he was under investigation, this same arrangement was never made for Mathis or Street. These discrepancies help to demonstrate that Avco's sexual harassment policy was not functioning properly nor implemented equitably.

II. *Proceedings Below*

Pursuant to 42 U.S.C. § 2000e-5(f)(5), the claims were referred to a magistrate on August 14, 1984, and a hearing was held in April, 1985. The magistrate found that the plaintiffs had established a prima facie case against both defendants in that (1) as women they were members of a protected class; (2) they were subject to unwelcome sexual harassment, as it was not solicited and not desired; (3) the harassment was based on sex because there was no evidence that men were subjected to similar harassment; (4) because the harassment was sufficiently persistent and severe to affect the psychological well-being of the plaintiffs it affected a "term, condition, or privilege of employment;" and (5) a sufficient respondeat superior relationship existed to hold Avco liable for Sanders's actions. *See* *Highlander v. K.F.C. National Management Co.*, 805 F.2d 644, 649 (6th Cir. 1986); *Rabidue v. Osceola* [**8] *Refining Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986). The magistrate found not only that Sanders had been given the authority to hire, fire and promote, but Avco had at least constructive knowledge of Sanders's behavior based on earlier allegations against him. Thus, he found both Sanders and Avco liable to Mathis and Street and ordered that they be awarded back-pay for the time they were out on sick leave, plus prejudgment interest; that Street be awarded incidental expenses incurred in her job search; that Street be reinstated if she desired; that Avco correct the misleading impressions in the personnel files, including placing a copy of his report in the files; and that Mathis and Street be awarded their expenses in bringing the action, including reasonable attorney's fees. The magistrate also found that should either plaintiff return to Avco, the Court should use its broad powers to ensure no contact between them and Sanders, including but not limited to, transferring him to another facility.

The district court adopted the magistrate's report with the exception that it did not agree with the injunctive order to transfer Sanders.

III. *Issues on Appeal*

As we noted above, Sanders [**9] did not appeal the judgment entered against him by the district court. Avco, on the other hand, argues that the decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 2407-08, 91 L. Ed. 2d 49 (1986), [*634] holds that traditional agency principles should be applied to questions of employer liability for harassment carried out by supervisors, and that consequently, the district court was in error. Though *Vinson* does adopt an agency standard, we find that under an agency theory and the facts of this case, Avco remains bound by Sanders's actions. Avco also argues that the district court's finding that Street was constructively discharged was in error. We agree on this issue and reverse the finding of constructive discharge. On the issue of retaliation against Mathis, we also believe the district erred and reverse. On the question of Mathis's back-pay for the time she was out on sick leave, we affirm. However, it is our belief that the magistrate's grant of damages to Street incurred in her job search and in pursuing this litigation constituted an abuse of discretion and we reverse on the award of these damages.

A. Avco's Liability for Sanders's Acts

The claim here is based on Title VII's [**10] provision stating that [HN1]"it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1).

The courts have found that [HN2]sexual harassment manifests itself in one of two forms: harassment involving the exchange of concrete employment benefits for sexual favors (*quid pro quo* discrimination) and harassment that creates an offensive or hostile working environment. *See* *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 2403, 91 L. Ed. 2d 49 (1986); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 618 (6th Cir. 1986); Equal Opportunity Commission's guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(1986). It is the latter type of discrimination which we are faced with here.

Unlike the situation the Supreme Court saw in *Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49, there is no question that the sexual harassment complained of here did in fact occur and that the sexual advances were unwelcome. These factual findings are not disputed. The primary question here is whether as the district court found, Avco should be held [**11] responsible for its supervisor's acts. To the extent that this is a question of fact, as with the issue of discrimination, [HN3]we will not reverse the district court unless its

findings were "clearly erroneous," Fed. R. Civ. P. 52(a); *Pullman-Standard v. Swint*, 456 U.S. 273, 276, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982); *Geisler v. Folsom*, 735 F.2d 991, 994 (6th Cir. 1984).

Even when we apply traditional agency principles to this record, in accordance with *Vinson*, 106 S. Ct. at 2408, the district court's decision holding Avco liable for Sanders's actions remains correct. Though in *Vinson*, the Court held that employers would not be automatically liable for the sexual harassment of supervisors, *id.* at 2408, it also stated that neither would employers be insulated from liability merely because of absence of notice or because they have grievance procedures and anti-discrimination policies which plaintiffs failed to follow. *Id.* at 2408-09. The company's policies and procedures, the Court held, are simply facts to be considered in conjunction with others. *Id.* at 2409.

In *Vinson* the Supreme Court stated that employers are not strictly liable for the harassment carried out by their supervisors, and [**12] we must now review the effect of this statement on EEOC regulations which the magistrate below relied on in part in making his determination. These regulations appear at 29 C.F.R. § 1604.11(c) and read:

> an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.

This provision applicable to supervisory employees is different from the standard applied to co-workers which states that an employer is liable only if it "knew or should have known" and failed to take immediate [*635] and appropriate corrective action. 29 C.F.R. § 1604.11(d). Needless to say we are not bound by these agency regulations, rather, they are to operate as guidelines. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141, 50 L. Ed. 2d 343, 97 S. Ct. 401 (1976); *Downes v. Federal Aviation Admin.*, 775 F.2d 288, 291 n.3 (Fed. Cir. 1985).

In this case Avco had a published procedure regarding sexual harassment. That procedure provided that the employee should report any conduct or circumstances [**13] which may constitute sexual harassment to the Employee Relations Department and to his immediate supervisor; that the Department would investigate complaints, determine corrective action and notify the supervisor of steps to be taken; and that the supervisor would promptly implement the corrective action. Though the intent of this policy was commendable, the facts of the case demonstrate that not only was it vague on paper, it was vague and ad hoc in its implementation and did not function effectively to eliminate harassment in the Avco Nashville plants.

First, the policy assumes that the supervisor is not the harasser, and gives the supervisor the responsibility for both reporting and correcting the harassment. Such a policy must necessarily discourage reporting and diminish an employee's faith in the system's ability to alleviate the problem when the supervisor is in fact the harasser.

Second, when Mathis and Street finally complained to Joe Baron about the harassment they were experiencing, the matter was not dealt with effectively. Upon complaining, both Mathis and Street were told *not* to go to the EEOC, and that their complaints would be handled promptly within the company's [**14] harassment investigation framework. Taped testimony was taken and an investigation was begun, yet when Mathis and Street requested copies of their testimony their requests were denied. Street was told that if she felt uncomfortable continuing to work under Sanders's supervision while he remained under investigation, an administrative leave could be arranged. However, when Street went to Joe Baron seeking such a leave, she was told repeatedly just to call in sick. When she complained to Baron about the practice, he told her to get a note from her doctor to make the sick leave legitimate. When Street attempted to do that, her doctor correctly refused, telling her that her leave should be handled by the company. The "confidential" procedures of the department meant that the plaintiffs' personnel files documented excessive absenteeism, and for all intents and purposes Charlotte Street believed she was endangering her position as an Avco employee. In addition, Street was not free to explain to Sanders why she was absent from work. This resulted in one visit by Sanders to her house during which she was terrified that he might realize she was in fact at home and try to come in. Avco's policy [**15] of not placing documentation of sexual harassment in personnel files seems to protect only Avco and the harasser, rather than the affected employee. An effective anti-harassment policy does not operate this way.

Third, evidence was offered to indicate that Sanders harassed women as early as 1980. This evidence suggests that Avco had notice of Sanders's tendencies at this earlier date, and also constitutes additional proof that the anti-harassment policies of Avco were not functioning properly. This testimony related to Sanders's harassment of three women, Kathy Kelley, Sherry Billingsley, and Wanda Bennett. Kelley testified that she mentioned Sanders's behavior to Bill Minnear, who was a member

of Avco management, just as a friend, but that she was afraid of losing her job and did not want to go to the Director of Personnel or the Director of EEO Compliance. Cheryl Mathis's predecessor, Sherry Billingsley had found Sanders's desire to be personally involved with her offensive, but did not complain to management. She testified that she "just did not feel the matter would be taken care of." The evidence indicates that Billingsley's complaint did reach Avco management through a third [**16] party but that no action was taken. Paul Fisher, the Director of Personnel at Avco in 1981 and 1982, testified that Wanda Bennett had once come into the office complaining [*636] of advances made by Sanders. He then stated that the company did not deal with this matter according to its stated policy. This testimony was later contradicted by Bennett herself.

Though it is difficult to say unequivocally that Avco had actual notice of Sanders's behavior prior to Mathis's and Street's complaints in 1983, such a finding is not necessary. The magistrate found that Avco "knew, or upon reasonably diligent inquiry should have known, that Sanders was sexually harassing the plaintiffs and other females." The district court adopted this factual finding and we conclude that such finding was not clearly erroneous. As the district court pointed out, the magistrate had the opportunity to observe the demeanor and credibility of the witnesses and his observations should be accorded great deference. *Anderson v. Bessemer City*, 470 U.S. 564, 573, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985). A review of the record has not left us with the "definite and firm conviction that a mistake has been committed." *See Anderson*, 470 U.S. at 573 (citing *United States v.* [**17] *United States Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 (1948)). The Supreme Court made it clear in *Vinson*, 106 S. Ct. at 2408, that [HN4]notice is not an absolute requirement to hold employers liable when supervisors are involved. The magistrate found at least constructive notice here, and we affirm that finding.

Here we have a company with a sexual harassment policy that did not function properly, coupled with a twenty-eight year supervisory employee who harassed women on a daily basis in the course of his supervision of them. Thus, even under traditional agency principles, Avco should be liable. The essential question in applying agency principles is whether the act complained of took place in the scope of the agent's employment. This determination requires an examination of such factors as *when* the act took place, *where* it took place, and whether it was *foreseeable. See generally* Restatement (Second) of Agency §§ 217-232 (1958). The Restatement specifically provides that even though an act is forbidden it may still be within the scope of employment. Restatement (Second) of Agency § 230. Here the harassment took place at the office, during working hours and was carried out by [**18] someone with the authority to hire, fire, promote and discipline the plaintiffs. There is no question that it was foreseeable. Had it not been, Avco would not have had a policy attempting to deal with it. Thus, none of the "agency factors" would indicate that Avco should be absolved of the responsibility for Sanders's actions.

Thus, we agree with the district court that the magistrate's finding that Avco at least reasonably should have known of Sanders's actions was not clearly erroneous. We believe that because Sanders was both an agent and supervisor of Avco, it is easier to impute his own knowledge to the Avco management. [1] We also find that although Avco took remedial action once the plaintiffs registered complaints, its duty to remedy the problem, or at a minimum, inquire, was created earlier when the initial allegations of harassment were reported. In addition, although its remedial action with regard to the plaintiffs' complaint was prompt, it was not adequate.

1 We distinguish our opinion in *Rabidue*, 805 F.2d 611, because of the differing levels of responsibility of the harassers. *Rabidue* involved parties who were peers and we expressly reserved judgment on the issue of the scope of respondeat superior liability when a supervisor is involved. 805 F.2d at 621 n.6.

[**19] B. Constructive Discharge

As Avco points out in its brief, constructive discharge is, at least partially, a question of law and must therefore be reviewed by this Court *de novo*. *Jacobs v. Martin Sweets Co.*, 550 F.2d 364, 370-71 (6th Cir.), *cert. denied*, 431 U.S. 917, 53 L. Ed. 2d 227, 97 S. Ct. 2180 (1977). [HN5]A finding of constructive discharge in this circuit requires an inquiry into both the objective feelings of an employee, and the intent of the employer. A constructive discharge exists if "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes [*637] would have felt compelled to resign." *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982), *cited in Henry v. Lennox Industries*, 768 F.2d 746, 752 (6th Cir. 1985); and *Geisler v. Folsom*, 735 F.2d 991, 996 (6th Cir. 1984). In a sexual harassment case involving a male supervisor's harassment of a female subordinate, it seems only reasonable that the person standing in the shoes of the employee should be "the reasonable woman" since the plaintiff in this type of case is required to be a member of a protected class and is by definition female. [2]

2 Were this a sexual harassment case involving a male subordinate, the "reasonable man" stan-

dard should be applied. We acknowledge that men and women are vulnerable in different ways and offended by different behavior. *See Rabidue*, 805 F.2d 611, 626 (Keith, J., dissenting).

[**20] This court has previously held that [HN6]"proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other 'aggravating factors.'" *Geisler*, 735 F.2d at 996 (quoting *Clark v. Marsh*, 214 U.S. App. D.C. 350, 665 F.2d 1168, 1173-74 (D.C. Cir. 1981)). We have also required some inquiry into the employer's intent and the reasonably foreseeable impact of its conduct on the employee. *Henry*, 768 F.2d at 752; *Easter v. Jeep Corp.*, 750 F.2d 520, 522 (6th Cir. 1984); *Held*, 684 F.2d at 432. Because we must look both at the employer and the employee, it is foreseeable that one of these tests could be fulfilled while the other would not. Thus, it would appear that the courts have been trying to create a two-pronged test whereby the feelings of a reasonable employee would not be enough to show discharge without at least some foreseeability on the part of the employer. Here, we do not believe that test has been met.

Because Street resigned from Avco on January 9, 1984, after the return from the Christmas holidays and after Sanders's demotion, it is the continuing, post-remedy work situation which is relevant to our inquiry. Her allegation of constructive [**21] discharge stems primarily from events which occurred on January 5. An examination of those events reveals neither discriminatory intent nor foreseeable negative impact on her by Avco.

Edwin Sanders had returned to work at Avco on January 3, 1984, as an administrator on the seventh floor of the Highland Ridge building. Street worked on the fifth floor of the Highland Ridge building. On January 5, Street had called into work sick and Avco contends that it therefore saw a good opportunity to have Sanders organize the materials in the desk of Herschel Travis who had died over the Christmas holidays. Travis had worked at a desk adjacent to Street's. Street admits that she came into work unexpectedly, fifteen minutes before the end of the shift because she needed to get some insurance forms. She then encountered Sanders at the adjacent desk and asked him what he was doing there. He replied that he had been assigned there indefinitely. Street then reportedly stormed out and made no attempts to contact any Avco officials for an explanation before she delivered her resignation on January 9. Joe Baron learned of these events, and on January 6 he telephoned Street to explain the mix-up and [**22] apologize. He asked her to return to work but she refused.

Regardless of whether Street's appearance at work was contrived by her for the purpose of encountering Sanders or whether it was completely innocent, we find that no constructive discharge took place. Avco did not *intend* that Street and Sanders see each other, and could not have reasonably foreseen the result, given that Street had called in sick that day. Also, Street's behavior was not reasonable; though she was understandably upset upon seeing Sanders and being told he would remain there indefinitely, Street sought no outside confirmation or explanation, and refused to listen when Baron called her.

Accordingly, we reverse the district court's finding that Street was constructively discharged and need not reach the issue of tolling of back-pay.

C. Retaliation

The district court found facts which it held constituted a prima facie case for [*638] Avco's retaliation against Mathis and that the inference of retaliation was not dispelled by Avco. We feel that the court's findings of adverse employment action were clearly erroneous and reverse on this issue.

[HN7]Section 704(a) of Title VII provides that an employer may not discriminate [**23] against an employee "because [she] has opposed any practice made an unlawful employment practice by this subchapter, . . ." 42 U.S.C. § 2000e-3(a). A prima facie case is made by an employee who shows that she engaged in a protected activity, she was subsequently subjected by her employer to adverse employment action, and that a causal link existed between the two events. *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). Though we agree with the district court that Mathis satisfies two of the three prongs of her prima facie case, we believe the court erred in finding that she suffered adverse employment action. The basis for her claim was that when Avco offered her a Secretary III position it asked her to sign an agreement stating that her transfer to the Secretary II position had been at her request. She also included in this claim Avco's failure to properly document her sick leave. It is clear from the record that Mathis's transfer to the Secretary II position took place because of her request not to work under Sanders's supervision. Though it is true that Mathis had never previously been required to sign any document when being promoted, we fail to see that such [**24] a requirement constitutes adverse action. In addition, though Mathis was demoted a grade level upon her return to work, she continued to receive the same salary and benefits and was assured that she would receive the next available Secretary III position. This situation is almost identical to the transfer which occurred in *Ferguson v. E.I. duPont deNemours and Co.*, 560 F. Supp. 1172, 1201 (D. Delaware 1983), an opinion with which we agree. There, [HN8]the plaintiff's transfer was temporary and resulted in no pay or benefits reduc-

tion. The court held that no adverse action was established and Ferguson had failed to prove her prima facie case. We believe that the same is true here and consequently, reverse on the issue of retaliation.

IV. *Damages*

A. Mathis's Lost Wages

As we noted above, we do not believe that the district court erred in awarding back-pay to Mathis for the time she was on sick leave. The award of back-pay is not the same as an award of damages for emotional distress which concededly is not recoverable under Title VII.

Because Mathis was forced to take extensive sick leave, she was compensated at a lower level than she would have been had she remained at work. We [**25] believe that she provided adequate proof that Sanders's behavior caused her absence from work and that the magistrate and district court properly ordered the company to compensate her.

B. Computation Errors

Because we find that Street was not constructively discharged in this case, it is necessary that her damages be recomputed and we remand to the district court on this matter.

As for Street's alleged expenses incurred in finding a new job and in pursuing this litigation, we find that the magistrate's award of damages was an abuse of discretion. Both the magistrate and the district court acknowledged that Street failed to document her expenses. To grant one half of the claimed amount without documentation was inappropriate. Consequently, we reverse the district court's award of these damages to Street.

V. *Conclusion*

On the record before us we cannot recompute damages and we therefore remand to the district court for a recalculation of the damage award to both Mathis and Street in accordance with this opinion.

CONCUR BY: WELLFORD; NELSON

CONCUR

WELLFORD, Circuit Judge, concurring:

I agree with most of Judge Martin's thorough analysis in this case. In my [*639] view, the question of Avco's knowledge [**26] of Sanders' propensity to harass female employees under his supervision is a very close call and particularly difficult under the circumstances. I remain doubtful that under traditional agency principles Avco should be held bound, since an employer is not automatically liable for untoward acts of a supervisor contrary to its announced and expressed policy against sex discrimination. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 2407-08, 91 L. Ed. 2d 49 (1986). The EEOC regulations dealing with agency or respondeat superior liability in this area are merely guidelines and are not deemed controlling. Avco's established procedure about reporting sexual harassment was not vague; it was apparent that if an immediate superior were alleged to have violated the Avco policy, the aggrieved employee was to report the conduct to the next highest supervisor in the line of authority.

With the benefit of hindsight, perhaps Avco should not have unduly emphasized the privacy considerations of the complaining employee or employees, and the alleged supervisor perpetrator. At the same time, the sensitive nature and potentially serious adverse affects of such a sexual harassment charge, [**27] particularly if unfounded, is a peculiarly difficult problem for the concerned employer. On balance, I concur, but with some considerable reservations, and agree that the district court's finding that Avco "knew, or upon reasonably diligent inquiry, should have known" of Sanders' activity and propensity was not clearly erroneous. I have no "firm conviction" that a mistake has been made in this respect.

I agree that damages in this case are restricted to those of Mathis for the limited period based upon proof that her sick leave was caused by Sanders' misconduct, and that none are due for claimed retaliation or claimed constructive discharge. I would find no basis for requiring administrative leave for either Mathis or Street so long as transfer was available to them during investigation of their charges.

DAVID A. NELSON, Circuit Judge, concurring.

The magistrate found, in substance, that Avco had long been on notice of Mr. Sanders' apparent inability to conduct himself properly toward the company's female employees, and like Judges Martin and Wellford, I believe we must accept that finding as not clearly erroneous. The company having done absolutely nothing about the problem before [**28] the plaintiffs lodged their complaints, it seems to me that Avco may be held liable for the plaintiffs' damages under traditional agency concepts. This court is affirming the finding of liability on that basis, as I understand it, and I write separately only to emphasize that Avco having been held responsible for Sanders' actions "under an agency theory and the facts of this case," our holding ought not to be construed as suggesting that the employer would be liable even if the facts of the case did not support a finding of liability under established agency principles.