IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-00364-PSF-MJW

SHERRY A. STONE,

Plaintiff,

v.

PETER D. KEISLER, Acting Attorney General,
U.S. Department of Justice, Bureau of Prisons,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Sherry A. Stone, by and through her attorney, Mark S. Bove, P.C., responds to the Motion for Summary Judgment and brief in support thereof filed by defendant on October 12, 2007, as follows:

INTRODUCTION

Sherry Stone was a loyal, dedicated, conscientious employee of the Bureau of Prisons ("BOP") at the Florence Correctional Complex for twelve years. She was skilled, experienced and highly professional in rendering her duties in the Facilities Department of the Administrative Maximum ("ADX") and Federal Correctional Institution ("FCI") components at the Florence complex. In every year after her first year on the job, Ms. Stone's performance was rated as outstanding.

Ever since she filed a complaint of discrimination and retaliation against the BOP in August of 1997, Ms. Stone has been subjected to illegal retaliation on the basis of her protected activity. Such retaliation has been very well documented, thoroughly litigated and judicially determined. In

January 2001, a jury verdict was returned in favor of Ms. Stone and against BOP, and judgment was entered by this Court in favor of Ms. Stone. In August of 2004, the BOP settled claims brought by Ms. Stone regarding unlawful retaliation in the selection of Rick Harriman over her to the position of General Foreman.

In the present case, immediately following the 2004 settlement, the BOP appointed Mr. Harriman to become the supervisor of Ms. Stone. Mr. Harriman, along with his subordinate and his superiors, engaged in a concerted campaign to force Ms. Stone out of her position and out of the Bureau. BOP management at Florence acceded to Mr. Harriman's actions, ratified his actions, and supported him.[1]

The adverse actions against Ms. Stone included, most prominently, the appointment of Harriman as Ms. Stone's supervisor, and also included a verbal attack on Ms. Stone by Mr. Harriman's secretary, Tammy McGlothlin, resulting in a reprimand for violence in the workplace, and, on or shortly after the date of Harriman's appointment, the issuance of an order for removal of Ms. Stone's time and attendance key, the locking out of Ms. Stone from the time and attendance system, movement of Ms. Stones files and cabinets, instructions that Ms. Stone's office door remain open at all times so that Harriman could observe what was going on in her office, a meeting between Ms. Stone and Assistant Warden Whitehead regarding Mr. Harriman's actions, including her complaint of retaliation and her information about Harriman's false employment application, Mr. Whitehead's refusal to take any action on behalf of BOP, a conversation of November 22, 2004, in

[1]In his introduction, defendant lists five actions taken by Harriman, suggesting that these were the only adverse actions taken against Ms. Stone. This is inaccurate and certainly is disputed, as detailed in the Statement of Additional Disputed or Undisputed Material Facts below. Thus, it appears that the nature and extent of the adverse actions taken against Ms. Stone is a genuine issue of material fact for trial.

which Mr. Harriman confronted and attempted to intimidate Ms. Stone, the relocation of Ms. Stone's office so that she was more isolated from other employees, a second discussion with Assistant Warden Whitehead again resulting in no intervention by BOP, application of Ms. Stone for medical leave due to stress caused by Mr. Harriman's actions, the use of available sick and annual leave, a conversation between Ms. Stone and Warden Rios regarding retaliation, refusal of Warden Rios and the BOP to address or remedy the retaliation, statements by Mr. Harriman asserting his refusal to accept any return to work by Ms. Stone, and exhaustion of sick and annual leave by Ms. Stone. Damages from these adverse actions are documented by the award to Ms. Stone of workers compensation total disability benefits by the U.S. Department of Labor, the award to Ms. Stone of disability retirement benefits by the Office of Personnel Management, the expert report of Dr. Robert Atwell, and the independent medical report of Dr. Kenneth Krause, among other evidence.

Surprisingly, in light of the complete ruination of Ms. Stone's life, health and career as a federal employee, defendant seeks summary judgment primarily on the basis that no materially adverse employment action was taken by BOP. Second, defendant's Motion asserts, in spite of the fact that at least sixty employees of the Bureau of Prisons have signed formal declarations regarding retaliation against them for prior protected EEO activity, that Ms. Stone is unable to establish any causal connection between the adverse employment actions and her prior protected activity. Finally, in spite of the fact that defendant barely offers any legitimate reasons for its action, it argues that Ms. Stone cannot contest the issue of pretext. These arguments are without merit, and defendant's Motion should be denied.

RESPONSE TO UNDISPUTED MATERIAL FACTS

1. Admitted.

2. Admitted.

3. Admitted, with the notation that additional protected activity concerning Mr. Bauer's conduct began in late 1996. Statement of Additional Disputed or Undisputed Material Facts ("Additional Facts"), ¶¶ 1 and 2.

4. Admitted, that Plaintiff engaged in protected activity by virtue of the filing of her EEO complaint, and also engaged in protected activity by virtue of the litigation of that EEO complaint, the subsequent district court action, the settlement conference of July 22, 2004, and further events in Case No. 03-D-2308; denied, that this is the only protected activity engaged in by Ms. Stone. See, *e.g.*, Additional Facts, ¶¶ 1, 2, 3 and 4.

5. Admitted.

6. Admitted.

7. Admitted, that there is a memo allegedly issued by Mr. Banda on this subject, but denied that Ms. Stone was ever informed of the deletion of duties, and denied that the duties were ever transferred to another employee prior to November 9, 2004.

8. Denied. The back up time and attendance keeper only needed to perform the duties when the primary time keeper, Ms. McGlothlin, was on leave. This did not occur in March or April of 2004. Exhibit A7, pg. 8, Affidavit of Tammy McGlothlin; Exhibit 14, Deposition of Sherry Stone, pg. 23. Ms. Stone only learned of the removal of the back up attendance duties on November 9, 2004, when her key was being removed. Exhibit 9; Defendant's Statement of Undisputed

Material Facts, ¶10. Mr. Johnson was aware that Ms. Stone had no prior knowledge of the removal of her time and attendance duties and key. Exhibit A6, pp. 3-4.

9. Denied. The key was not "requested" to be removed, rather, an order for its removal was issued to the security officer via Ms. McGlothlin, the Department head, Mr. Harriman and the acting captain, Captain Diehl. Exhibit A3.

10. Admitted.

11. Paragraph 11 is not a material fact, and should be stricken. The relevant events in this case took place at the Federal Correctional Institution (FCI); Ms. Stone's previous duties as time keeper at the Administrative Maximum Facility (ADX) are not material.

12. Denied. The date of the key removal was November 9, 2004. Exhibit 14, p. 43.

13. Denied. The removal of the time and attendance duties also required Ms. Stone to spend additional time obtaining the lost man hours figures for each month for her monthly reporting duties. Exhibit 14, pp. 52-53.

14. Admitted.

15. Admitted, that the office relocation took place on or about December 1, 2004.

16. Denied. According to Harriman's Affidavit, Exhibit A4, pp. 8-9, management, including Mr. Whitehead, Mr. Harriman, Mr. Sciumbato, Mr. Moore and Ms. Teter, decided upon the relocation of Ms. Stone's office. According to this section of Exhibit A4, one of the reasons for the relocation was that Ms. Stone had other staff in the Department come in and make allegedly derogatory remarks and tell allegedly untrue stories about supervisors and other people in the Department. Mr. Harriman's real reasons for moving Ms. Stone are clearly set forth in his Memorandum, Exhibit 8, which directly refers to the office relocation in its final paragraph. As a lead up to that paragraph, Mr. Harriman makes it clear that he feels he has been attacked by Ms.

Stone through the EEO and litigation process, and is fully justified in defending himself by whatever means necessary. For example, he states as follows:

> "Putting up with a woman like her is asking too much. She is the aggressor here and she can do a lot of damage to me like she has damaged the whole department. I can be her supervisor and be tough, but she could ruin me and get away with it, because no one will back me even though people know how she is. I don't want to put myself in that position. I am willing to step down and let someone else take the position. I know this would be the last of any type of promotion, and she would get what she wanted, but integrity, life and family is more important than taking a chance and losing everything. Am I weak? No way! Am I scared of her? No way! Am I smart and can see the writing on the wall? You bet. She has picked me out of the crowd and will attack and it will not change. She has gotten away with a lot of things and she thinks she is running the Department, no one better get in her way. She has sued BOP twice and won. People know how she is. Does this not make it clear what kind of person she is? I am a good and honest employee and I will be the one that will be going down, and she will keep going, making problems for everyone she comes in contact with.
>
> In regards to the moving of Ms. Stone to a different office, ..." Exhibit 8, p. 152.

17. Admitted, that these dates are approximately correct.

18. Admitted.

19. Denied. Only Mr. Johnson went to the Engineering Tech office. Exhibit A6.

20. Admitted.

21. Admitted.

22. Admitted.

23. Denied. The new office did not have a fax machine, it did not have a coffee pot, it did not have the mailboxes of the foremen, it did not have outgoing mailbox, it did not have a wash up area, it required going in to the General Foreman's office sometimes during private conversations. It was an arrangement that made absolutely no sense, and it did not permit Ms. Stone's job to be done efficiently. Exhibit 14, pp. 103-106.

24. Paragraph 24 does not concern a material fact, and should be stricken. Ms. Stone could keep the office door open or closed as circumstances warranted in the old office, which she occupied until approximately December 1, 2004. See, Defendant's Statement of Undisputed Facts, ¶15. Whether the door was open or closed at a given point in time during the many years she occupied this office is completely immaterial.

25. Denied. Mr. Harriman has made it quite plain to Ms. Stone and to everyone else why he hated Ms. Stone and why he moved her office. See, Exhibit 8, including the segment quoted above.

26. Paragraph 26 does not pertain to a material fact and should be stricken. Speculation as to why an individual has animus or hatred, while an interesting philosophical question, is not material to this Motion.

27. Denied. Mr. Harriman has made many disparaging and retaliatory comments about Ms. Stone. Exhibit 8, pp. 151-2. For example, Mr. Harriman has stated that Ms. Stone accused him of getting a job because he was friends with the selecting official; he has stated that Ms. Stone has done the very thing that she accused him of doing, in going to a selecting official and asking him to select her because she was his friend. He has stated that Ms. Stone "painted a terrible picture" of him to the foremen. He has stated that Ms. Stone "lied and degraded me." He has stated that Ms. Stone has told " lies and twisted stories." He has stated that Ms. Stone "made my first year very bad." He has stated that Ms. Stone made his reputation like "scum." He has stated that Ms. Stone stirs things up and generates hate and distrust. He has stated that Ms. Stone has a "problem with authority." He has stated that Ms. Stone calls those in authority "idiots." These comments are contained in a single paragraph of Mr. Harriman's memo, Exhibit 8, p. 1.

28. Admitted.

29. Admitted.

30. Denied. The time in the new office was approximately one week. Defendant's Statement of Undisputed Facts, Paragraph 17.

31. Admitted.

STATEMENT OF ADDITIONAL DISPUTED OR UNDISPUTED MATERIAL FACTS

1. In April 1996, James Bauer arrived at the Florence Correctional Complex and assumed the position of Facilities Manager at ADX Florence, and thus became Ms. Stone's supervisor. Over the following months, Mr. Bauer engaged in a pattern and practice of conduct including sexual harassment, sex discrimination and creation of a hostile work environment against Ms. Stone, including a long sequence of grossly illegal, improper and aggravated actions, culminating in a violent incident on November 27, 1996. Exhibit 1, Complaint, Case No. 99-B-222, ¶¶ 1-10.[2]

2. When Ms. Stone reported Mr. Bauer's conduct to fellow employees, supervisors, management officials, medical personnel and EEO officials, Mr. Bauer confronted Ms. Stone, and engaged in a campaign of intimidation and retaliation, culminating in the reassignment of Ms. Stone to Correctional Services. Exhibit 1, ¶¶ 11-15.

[2] In an effort to avoid voluminous exhibits, pursuant to the guidelines of the local rules, the events from the two earlier litigated cases, Case No. 99-B-222 and Case No. 03-D-2308 are generally verified by citation to the district court complaints and other district court documents, rather than the original source documents in the respective Reports of Investigation or in other litigation files related to those two cases. All of these events, however, are extremely well documented, and, at this point, cannot be a subject of serious dispute

3. Ms. Stone was placed on stress leave by her physician. BOP refused to process her EEO complaint in a timely manner. BOP investigated Mr. Bauer's misconduct and issued a suspension against him. BOP management continued to engage in retaliatory actions against Ms. Stone, including denial of a position she had applied for, and eventually, forced Ms. Stone to return to work under the supervision of Mr. Bauer. Ms. Stone was forced to transfer to a downgraded position at a different institution in order to get out from under the supervision of Mr. Bauer. She filed a formal complaint of discrimination with the BOP on or about August 7, 1997. Exhibit 1, ¶¶ 16-23.

4. The formal complaint filed by Ms. Stone in August of 1997 resulted in an EEO investigation and the issuance by BOP of a Report of Investigation, consisting of two volumes, in Case No. P-97-9216. This formal complaint then became the subject of an action filed in this Court, Case No. 99-B-222. Exhibit 1.

5. On or about September 30, 1999, Dr. Robert Atwell issued his first report concerning psychological damages to Ms. Stone as a result of the unlawful actions of the Bureau of Prisons. Exhibit 2, Report of Dr. Atwell, dated August 19, 2006, p. 1, Background Information.[3]

6. Following full discovery and pretrial litigation, Case 99-B-222 proceeded to trial before a jury of nine from January 16 through January 19, 2001. The jury found in favor of Ms. Stone on her claim of unlawful retaliation and awarded compensatory damages in the amount of $110,000.00. Judge Babcock entered judgment on the jury verdict on January 23, 2001. Exhibit 3, Judgment.

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[3]Similarly, rather than attach earlier reports of Dr. Atwell, the fact that they were issued by him is verified by the background summary in his most recent report.

7. In October 2002, Ms. Stone applied, for the fourth time, for the position of General Foreman, and for the fourth time, she was rated best qualified for the position, but was passed over in favor of a male employee who had not engaged in protected EEO activity. In the 2002 non-selection, the individual selected over Ms. Stone was Rick Harriman. Exhibit 4, Complaint, Case No. 03-D-2308, ¶¶ 7-11.[4]

8. A number of the management officials and witnesses adverse to Ms. Stone the administrative investigation of the Bauer matters and during the litigation of Case No. 99-B-222, were also involved in the non-selection of Ms. Stone for the General Foreman position. Ms. Stone initiated EEO contact regarding her non-selection, and followed that with a formal complaint, Case No. P-2003-0111. That complaint was investigated by the Agency, and a lengthy Report of Investigation was issued.[5] Exhibit 4, ¶¶ 17-18.

9. On July 29, 2004, Magistrate Judge Shaffer conducted a settlement conference in Case 03-D-2308. At the conference, Ms. Stone and her counsel presented evidence establishing that Mr. Harriman had falsified his employment application for the General Foreman position. For example, on his application, Mr. Harriman represented that he held licenses as a General Contractor, a Master Plumber and a Real Estate Broker. However, it was only Mr. Harriman's wife who had held a general contractor license, and this had expired at the end of 1998, years before his application was prepared and filed. At the time he filed the application, Harriman did not hold a general contractor license. Exhibit 5, Deposition of Rick Harriman, pp. 13-15. A master plumber

[4]Mr. Harriman's name is misspelled as "Herman" in the Complaint.

[5]Once again, source documents from the Report of Investigation and the litigation in Case 03-D-2308, are available should the Court desire to refer to them.

license previously held by Mr. Harriman had expired on August 31, 1999, years before he filed his application for the General Foreman position, and he held no master plumber license at the time he claimed that credential on his application. Exhibit 5, p. 18. And, any real estate license, if it ever existed in the name of Mr. Harriman, expired sometime in the 1980's, and certainly was not active at the time he filed his General Foreman application. Exhibit 5, pp. 18-20.

10. Since the evidence was overwhelming that Mr. Harriman had falsified his application for the very position at issue in the litigation, Judge Shaffer was able to convince the government to make a substantial settlement offer, and a settlement was agreed upon at the conference, resulting in a written agreement signed by the parties on or about September 7, 2004. Exhibit 6, Stipulation for Compromise Settlement.

11. Immediately upon her return to work following the settlement conference in August of 2004, Ms. Stone was verbally attacked by Tammy McGlothlin, a friend and work associate of Mr. Harriman, who shortly thereafter became Mr. Harriman's secretary, and then took over Ms. Stone's duties after Ms. Stone was forced out as Facilities Assistant. Ms. McGlothlin cursed at Ms. Stone, and told her she could "kiss my ass and fuck off." Exhibit 7, Deposition of Tammy McGlothlin, pp. 22-23. The Warden convened a workplace violence committee meeting about the incident, Ms. McGlothlin gave a letter of apology to the Warden, and he gave her a letter of reprimand for the incident. Exhibit 7, p. 24.

12. Mr. Harriman, in a memo prepared on May 11, 2005, described his animus toward Ms. Stone in excruciating detail, beginning with the summer of 2002, and extending to November of 2004, including the following: He felt that Ms. Stone had "painted a terrible picture" of him to the foremen at the FCI, that she had lied and degraded him, that she had disrespected authorities

above him. He stated that he did not trust Ms. Stone, and felt she would "do anything to ruin my career and my integrity." Exhibit 7, pp. 13-16. Mr. Harriman claimed that Ms. Stone was the aggressor against him and would cause a lot of damage. He felt he was being "left out to dry" by management and was not being supported in his confrontation with Ms. Stone. Exhibit 7, pp. 17-19. Mr. Harriman's memo specifically refers to the two prior lawsuits brought by Ms. Stone and his animus toward her in this regard: "She has sued the BOP twice and won. People know how she is. Does this not make it clear what kind of person she is?" Exhibit 7, p. 22; Exhibit 8, Memo of Rick Harriman, ROI 151-152.[6]

13. Mr. Harriman became Acting Facility Manager, and therefore Ms. Stone's supervisor, on October 28, 2004. Exhibit 5, pp. 35-36; Exhibit 8.

14. On November 4, 2004, Mr. Harriman and Ms. McGlothlin issued a Security Work Request to remove from Ms. Stone the time and attendance key, designated as Key #BS. ROI 141. Ms. Stone was not advised of this change of duties or authorizations, and only learned of it when the locksmith appeared to retrieve her key.

15. On November 14, 2004, a fellow employee, Jim Johnson, called Ms. Stone at home to advise her that while she had been out on leave, Mr. Harriman and Ms. McGlothlin emptied her fireproof safe and relocated it to Ms. McGlothlin's office. Mr. Johnson also advised her that the combination to that safe had been changed, and that files were left on the floor when the safe was emptied. When Ms. Stone returned to work on November 15, 2004, she was locked out of the time and attendance filing cabinet, and the combination had been changed on her fireproof safe. Affidavit

[6] References to the Report of Investigation in the present case are by the abbreviation ROI, followed by the page numbers.

of Jim Johnson, Exhibit A6, pp. 118-119. She was also told by Mr. Harriman that she could no longer close her office door because he wanted to monitor what was going on her office. ROI 3-4.

16. Also, on November 15, 2004, Mr. Harriman ordered Ms. Stone to prepare minutes of a meeting that she had not attended, without providing her with any notes. When Ms. Stone got up on one occasion to close her office door, she was specifically ordered by Mr. Harriman not to close her door anymore. Ms. Stone met with Assistant Warden Whitehead and told him she could not work with Mr. Harriman any longer. Mr. Whitehead acknowledged that he was aware of the false application filed by Mr. Harriman, and was also aware of Mr. Harriman's conduct in the office from Jim Johnson. Exhibit 17. Ms. Stone sent a follow up memo to Mr. Whitehead. Exhibit 9, Memo of November 22, 2004. Mr. Harriman had also been required to explain the misrepresentations in his job application in a "detailed memorandum" to Warden Rios. Exhibit 10, Affidavit of Rick Harriman, p.2.[7]

17. On November 22, 2004, Mr. Harriman ordered Ms. Stone to move her office to a new location. Mr. Harriman advised Ms. Stone that she was "making problems for everyone she comes in contact with" and that there was "a lot of negativity coming out of her office." Exhibit 8, at p. 152; see also, Exhibit 17, at p.162.

18. On November 23, 2004, Ms. Stone had a meeting with Assistant Warden Whitehead. She advised him of the derogatory comments made to and about her by Mr. Harriman. Mr. Whitehead indicated that "that is how he feels" (referring to Harriman), and that it was Ms. Stone's

[7] In this affidavit, Mr. Harriman also admits to improperly awarding "double compensatory time," an issue that was the subject of an Internal Affairs investigation commenced after a complaint from Ms. Stone.

responsibility to be sure that Mr. Harriman succeeded in his new position. He indicated that Harriman would need all of Ms. Stone's knowledge if he were to be successful. Exhibit 17, p.163.

19. On December 2, 2004, an electronics technician came into the Facilities office regarding problems with a project. He indicated that he wanted to go into Ms. Stone's office to sit down and look over the file, but Mr. Harriman responded that Ms. Stone "better not" have any chairs in her office. Exhibit 17, p.163.

20. On December 6, 2004, Ms. Stone went for a doctor visit, was informed that she had an ulcer and was advised to take two weeks off work, commencing December 8, 2004. Exhibit 17, p.163.

21. Ms. Stone sought psychotherapy with Dee McKinna in December 2004. She was diagnosed with generalized anxiety and severe depression. Exhibit 2, pp. 4-5.

22. On January 7, 2005, Warden Rios called Ms. Stone at home. She informed him of the retaliatory actions taken against her by Mr. Harriman and the lack of remedy or response from Assistant Warden Whitehead. Ms. Stone advised Warden Rios that she could not work for Mr. Harriman. Warden Rios stated that he was not going to transfer either her or Mr. Harriman. He did not offer any other resolution. Exhibit 17, p. 163.

23. On January 24, 2005, Mr. Harriman stated to a number of employees, including John Moore, Tom Masar and Mike Berger, that he did not trust Ms. Stone either as a person or as an employee. He stated that if Ms. Stone ever came back to work, he would refuse to work in the same office with her. Exhibit 17, p.163.

24. As of March 7, 2005, Ms. Stone, who was still not cleared to return to work by her doctors, had exhausted all annual and sick leave. She was placed by BOP on leave without pay

status. Many months later, on December 16, 2005, Ms. Stone's claim for worker's compensation benefits was approved, retroactive to March 7, 2005. The U.S. Department of Labor, Office of Worker's Compensation Programs, accepted the claim and certified that, as a result of the workplace injuries inflicted on her by Mr. Harriman and BOP, she had incurred the conditions of Post Traumatic Stress Disorder, Major Depression, Irritable Bowel Syndrom, Common Migraine and Temporomandibular Joint Disorder. Exhibit 11, Acceptance Notice.[8]

25. On March 10, 2005, Dr. Atwell issued an evaluation of Ms. Stone in connection with her worker's compensation claim. Exhibit 2.

26. A second opinion was ordered by the Department of Labor concerning Ms. Stone's condition, which resulted in an evaluation report by Dr. Kenneth Krause, dated December 14, 2005. Dr. Krause's report concurred with Dr. Atwell in determining, among other things, that Ms. Stone's Major Depressive Disorder and Post Traumatic Stress Disorder were proximately caused by the "compensable events" at work. Dr. Krause specifies that Ms. Stone was disabled as of her last day at work at BOP, December 7, 2004, and extending up at least to the date of his report, December 10, 2005. Exhibit 12, Report of Dr. Krause, pp. 7-9.

26. On March 14, 2005, Ms. Stone filed her formal complaint of discrimination with BOP, leading to the Report of Investigation, and eventually to the filing of the present case. ROI 1. 27. On July 18, 2005, Dr. Atwell issued his evaluation concerning Ms. Stone's Disability Retirement Application. Exhibit 2, p. 1.

[8]This particular exhibit does not indicate the retroactivity date, which appears in other worker's compensation materials.

28. The Office of Personnel Management approved Ms. Stone's Disability Retirement Application on March 4, 2006. Exhibit 13, OPM approval of disability retirement.

29. On August 19, 2006, Dr. Atwell issued his evaluation of Ms. Stone for purposes of the present case. He found, among many other things, that Ms. Stone's experiences at BOP, beginning with Mr. Harriman's appointment as her supervisor, are the "direct and proximate cause of her disabling psychological distress", diagnosed as Major Depressive Disorder and Post-traumatic Stress Disorder.

30. Suzanne Teter did not have proper training to become the backup time and attendance keeper. Affidavit of Jim Johnson, Exhibit A6, p. 4.

31. On December 2, 2005, Administrative Judge Kelly Humphrey of the EEOC issued a Decision certifying a class action initiated by an employee of the Florence Complex and including hundreds of BOP employees, including Ms. Stone, for unlawful retaliation by Bureau management against employees who had engaged in protected EEO activity. Judge Humphrey relied in part on the sworn statements of 60 BOP employees attesting to such illegal retaliation. Exhibit 16, Decision of Administrative Judge.

STANDARD OF REVIEW

Summary judgment is appropriate only if there is no genuine issue as to any material fact. Fed.R.Civ P. 56(c). The moving party bears the burden of demonstrating beyond a reasonable doubt that it is entitled to summary judgement. *Ewing v. Amoco Oil Co.*, 823 F.2d 1432, 1437 (10th Cir. 1987). The Court is to examine the record and all reasonable inferences to be drawn therefrom in the light most favorable to the non-moving party. *Woodman v. Runyon*, 132 F.3d 1330, 1337 (10th Cir. 1997); *Bullington v. United Airlines*, 186 F.3d 1301, 1313 (10th Cir. 1999). Therefore, all of the

additional disputed or undisputed material facts referenced above, must be taken as true for purposes of this Motion. In addition, the Court must disregard evidence favorable to the moving party which a jury would not be required to believe. *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 151 (2000).

ARGUMENT

Adverse Employment Action

Defendant argues that it is entitled to summary judgment on the basis that there is no genuine issue of material fact as to whether Ms. Stone was subjected to an adverse employment action, as that term is now defined. The definition of the term is the subject of the Supreme Court's unanimous decision in *Burlington Northern and Sante Fe Railway Co. v. White*, ___ U.S. ___, 126 S. Ct. 2405 (2006).[9]

The initial question presented in the *Burlington* case is whether the anti-retaliation provision of Title VII is limited to actions that directly affect the terms and conditions of employment, as is the case under the anti-discrimination provision of Title VII. The Court concludes "that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." *Id.*, at 2409. Thus, the scope of the actions and harms covered by the anti-retaliation provision is quite broad, indeed, broader than necessary to cover the actions alleged by Ms. Stone. Two of the employment actions found by the *Burlington* Court to be

[9]The opinion in *Burlington Northern* authored by Justice Breyer, is also unanimous, with the exception of Justice Alito, who filed a concurring opinion. In a nutshell, Justice Alito holds that the anti-discrimination provision of §703(a) is coextensive with, not broader than, the anti-retaliation provision of §704(a), but concludes that Ms. White has proven her case of retaliation even under the more restrictive standard.

actionable retaliation are similar to actions in the present case: the removal of Ms. White from forklift duty is similar to the removal of Ms. Stone's time and attendance duties, and the suspension of Ms. White, though later reversed, is analogous to Ms. Stone's forced use of sick and annual leave, due to the refusal of BOP to remedy the Harriman situation. *Id.*, at 2409. In the present case, defendant does not argue that the actions complained of by Ms. Stone fall outside the scope of the retaliation provision. Indeed, such an argument is effectively foreclosed by *Burlington*. See also, *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996) (cited with approval in the *Burlington* case at 2412).

Rather, defendant focuses solely on Part B of the Court's Opinion, the requirement of a material adverse action. However, the first sentence of Part B is unhelpful in the extreme to defendant's position: "The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Burlington* at 2414.[10] In the present case, there is no question that the retaliatory acts of BOP produced not only significant, but indeed massive, injuries and harm to Ms. Stone. These injuries are documented by both doctors who examined Ms. Stone, her doctor, Robert Atwell, and the Department of Labor doctor, Kenneth Krause. Dr. Atwell's evaluation of August 19, 2006, found that the events at Ms. Stone's workplace, beginning with Mr. Harriman's appointment as her supervisor, were the "direct and proximate cause of her disabling psychological distress" which he diagnosed as Major Depressive Disorder and Post Traumatic Stress Disorder. Exhibit 2, Report of Dr. Atwell; Additional Facts, ¶29. Dr. Kenneth Krause, who was appointed by the Department of Labor to perform an

[10]Ironically, defendant quotes a portion of this sentence in the first page of his Argument, although he miscites the page number as 2415. Defendant's Brief, p. 8.

independent evaluation, in his report dated December 14, 2005, concurred with Dr. Atwell in diagnosing Ms. Stone with Major Depressive Disorder and Post Traumatic Stress Disorder, which he found were proximately caused by the "compensable events" at work. Dr. Krause certified that Ms. Stone was disabled as of December 7, 2004, her last day of work at the Bureau of Prisons, continuing up to the time of his report in December of 2005. Exhibit 12, Report of Dr. Krause, pp. 7-9; Additional Facts, ¶26. The severity of the harm caused to Ms. Stone and its causation by the events in the workplace have also been conclusively determined by two agencies of the U.S. government: The Department of Labor, Office of Worker's Compensation Programs, accepted the claim of Ms. Stone and certified that, as a result of the workplace injuries inflicted on her by Mr. Harriman and the Bureau of Prisons, she had incurred the conditions of Post Traumatic Stress Disorder, Major Depression, Irritable Bowel Syndrome, Common Migraine and Temporomandibular Joint Disorder. Exhibit 11, OWCP Acceptance of Claim Notice; Additional Facts, ¶24. Likewise, the U.S. Office of Personnel Management approved Ms. Stone's disability retirement application, which was also based on the adverse actions of Mr. Harriman and BOP in the final months of Ms. Stone's employment, as described by Dr. Atwell in his disability evaluation. Exhibit 13, OPM approval of disability retirement; Additional Facts, ¶28.

Although the context and language of the *Burlington* Opinion suggests that serious injury or harm would, of itself, make the retaliation actionable, the Court also discusses another formulation, adopted from the opinions of the Seventh and District of Columbia Circuits. This standard requires a showing that a reasonable employee would have found the challenged action materially adverse, which means that it might well dissuade a reasonable worker from making or supporting a charge of discrimination. *Burlington*, at 2415. In what has become a somewhat famous

quote in this section of the Opinion, Justice Breyer included a two-word sentence: "Context matters." He went on to give a couple of examples: What may be a minor schedule change to most employees could very adversely affect a young mother with school age children; what may be merely an impolite act of excluding an employee from a lunch invitation could be an adverse action if the lunch was tied to training or professional advancement. In the present case, context does indeed matter: The key event is the appointment by BOP of Rick Harriman to be acting Facilities Manager of the Federal Correctional Institution. This appointment, which occurred on October 28, 2004, is obviously an official action of the Bureau of Prisons. It made Mr. Harriman the direct supervisor of Ms. Stone, and, indeed, made Ms. Stone his assistant. The Facilities Assistant (Ms. Stone's position) and the Facilities Manager act very closely together, analogous to a judge and his law clerk, or an attorney and his secretary. The third party involved in this very close relationship is the Facilities Secretary, who was Tammy McGlothlin, the friend and ally of Mr. Harriman. Indeed, the sequence of events following the settlement of Ms. Stone's lawsuit at the court settlement conference on July 29, 2004, commenced with a confrontation wherein Ms. McGlothlin called Ms. Stone a "fucking bitch," a "fucking liar," told her to "go fuck herself."[11] Although the Bureau of Prisons convened a Violence in the Workplace Committee meeting concerning this incident, the charges against Ms. McGlothlin were dismissed by the Committee. While an interesting question might be presented under *Burlington* as to whether the verbal attack by Ms. McGlothlin would be sufficient to support a retaliation charge, no such analysis is necessary,

[11]Ms. McGlothlin claims a slightly different sequence of profanity, claiming that she cursed at Ms. Stone, told Ms. Stone to "kiss her ass" and told Ms. Stone to "fuck off." Exhibit 7, Deposition of Tammy McGlothlin, pp. 22-23; Additional Facts, ¶11. Moreover, although the deposition testimony does not disclose the date of this incident, according to the SIS Affidavit, Exhibit 7 to Ms. McGlothlin's deposition, the incident occurred on August 17, 2004.

because this incident was merely the precursor to the central events, which commenced with the appointment of Mr. Harriman as manager of the Facilities Department.

Once again, context matters. It was Mr. Harriman who was the competitor with Ms. Stone for the General Foreman position, the subject of Ms. Stone's prior lawsuit, Case No. 03-D-2308. Ms. Stone claimed blatant acts of sex discrimination and retaliation by BOP management in selecting Mr. Harriman, who was utterly unqualified, over her for the General Foreman position. In the course of the litigation, Ms. Stone and her counsel were able to document the fact that Mr. Harriman's application for the position involved several material misrepresentations. When this documentation was disclosed to the government and the settlement judge at the settlement conference of July 29, 2004, the Bureau of Prisons, which had previously shown no inclination to settle the case, immediately proposed a substantial settlement, and an agreement was reached shortly thereafter. Thus, we have the appointment of Mr. Harriman to the Facilities Manager position, an even higher position than the General Foreman position, for which he was unqualified and which he gained by virtue of a falsified application, accompanied by sex discrimination and retaliation against Ms. Stone, with the added fact this appointment made him the direct and personal supervisor of Ms. Stone. This was a deliberate and aggravated act of retaliation by the Bureau of Prisons. Nor was this an administrative accident or coincidence: Ms. Stone specifically told Assistant Warden Whitehead and Warden Rios that Mr. Harriman had been made her supervisor, that she had disclosed the falsification of his Foreman application at the recent settlement conference, and that these circumstances made it inappropriate and intolerable for her work under the direct supervision of Mr. Harriman. She advised them that she was becoming physically and psychologically ill as a result of their assignment of Mr. Harriman to be her supervisor. Exhibit 17, p. 163; Additional

Facts, ¶¶18 and 22. Indeed, Assistant Warden Whitehead, at his meeting with Ms. Stone on November 23, 2004, justified the negative comments made by Mr. Harriman about Ms. Stone, and admonished Ms. Stone that it was her responsibility to make sure that Mr. Harriman succeeded in his new position. Additional Facts, ¶18. BOP knew full well what it was doing when it appointed Mr. Harriman as Facilities Manager, and, ignoring and rebuffing the protests of Ms. Stone, it ratified and affirmed that decision. Given the history and context, it is clear that a reasonable employee in Ms. Stone's position would have considered the appointment of Mr. Harriman as her supervisor to be a materially adverse action. Knowing that the very individual who benefitted from the previous discrimination and retaliation against her, and who she exposed as a fraud, is now in a position of complete power over her employment status, fully supported by management, would certainly dissuade a reasonable employee from making or pursuing a charge of discrimination.

Defendant seeks to minimize the retaliation against Ms. Stone by focusing on several discrete actions of Mr. Harriman; defendant misses the point and ignores the context. These actions were taken by Mr. Harriman to emphasize and remind Ms. Stone that from that point on, he was her boss and he was going to take advantage of that situation to exact his revenge.[12] Thus, the actions of Mr. Harriman in removing Ms. Stone from time and attendance duties, ordering her to move her office to a new location, requiring her to keep her office door open at all times, removing a key from her key ring, taking her files out of a safe and moving it to Ms. McGlothlin's offfice, etc., though important to Ms. Stone's conditions of employment, were also manifestations of Mr. Harriman's power and control as the supervisor of Ms. Stone. Defendant also tries to emphasize that Mr.

[12]Lest the reader feels the term "revenge" is an exaggeration, he or she is reminded to review Mr. Harriman's vicious memo concerning his thoughts and feelings of animus toward Ms. Stone based on her prior protected activity. Exhibit 8.

Harriman was only appointed as "acting" Facilities Manager, but there was certainly no restriction on Mr. Harriman moving permanently into that position. Ms. Stone had no way of knowing how long Mr. Harriman would remain as her supervisor, and indeed her discussions with Assistant Warden Whitehead and Warden Rios reasonably led her to believe the situation would likely be permanent.[13]

In support of his position, defendant cites the case of *O'Neal v. Ferguson Const. Co.*, 237 F.3d 1248 (10th Cir. 2001). The *O'Neal* case, of course, predates *Burlington*, and in any event, supports Ms. Stone's position and not that of the defendant. In *O'Neal*, the reassignment of work duties and reduction of hours were deemed to be adverse employment actions sufficient to support a retaliation claim. Indeed, the defendant in the *O'Neal* case did not even contest the fact that the reduction in work hours alleged by Mr. O'Neal was an adverse employment action. *Id.*, at 1253. Defendant also cites one Tenth Circuit case decided after *Burlington*, *Williams v. W. D. Sports, Inc.*, 497 F.3d 1079 (10th Cir. 2007). In *Williams*, the Tenth Circuit determined that the former employer's action in opposing a claim for unemployment benefits, was a sufficient adverse action to support a retaliation verdict. The court also found that there was sufficient evidence of a causal connection between the protected activity and the employer's opposition to the unemployment claim, and that the question of pretext was one for the jury. Thus, in *Williams*, an act of retaliation further removed from the workplace than the actions at issue in the present case, was found by the Tenth Circuit to be sufficient to support a retaliation claim.

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[13]As it turned out, Mr. Harriman continued in the Facilities Manager position until March 7, 2005, more than long enough to inflict devastating harm upon Ms. Stone. As noted above, she was permanently disabled by his actions as of December 8, 2004.

Defendant also puts forward a "survey of authority" without arguing the applicability of any given case to Ms. Stone's situation. The only post-*Burlington* Tenth Circuit case cited is *Jencks v. Modern Woodman of America*, 479 F.3d 1261 (10th Cir. 2007). The facts of the *Jencks* case, involving a former employer which declined to offer an independent contractor position to its former employee, where there was a prior "no reemployment" agreement between the parties, are clearly inapplicable to the present case, where concrete, adverse job actions were taken against an existing employee of long tenure and sterling performance, causing her massive harm and injury. Moreover, in *Jencks,* the Tenth Circuit declined to decide the adverse employment action issue, disposing of the case on other grounds. *Id.*, at 1265-1266.

Under any of the formulations put forward by the Supreme Court in the *Burlington* case, the challenged actions in the present case state a claim for retaliation. The appointment of Mr. Harriman as the supervisor of Ms. Stone was a material change to her job situation, analogous to the change of job duties found to qualify for retaliation coverage in *Burlington*. The adverse actions imposed by Mr. Harriman after he became Ms. Stone's supervisor are analogous to the reversed suspension action considered sufficient in *Burlington*. Under the standard requiring action that produces injury or harm, certainly the termination of Ms. Stone's career as a federal employee and rendering her totally disabled are very serious injuries and harms; and, under the reasonable employee test, the appointment of Mr. Harriman as the supervisor of Ms. Stone in the context of the history and circumstances of this case, and the documented animosity of Mr. Harriman, would certainly be considered materially adverse by a reasonable employee.

Causal Connection

A causal connection may be shown by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *Burrus v. United Tel. Co. Inc.*, 683 F.2d 339, 343 (10th Cir. 1982). However, where a plaintiff presents additional evidence from which a reasonable jury could find causation, the court need not address whether the temporal proximity involved is sufficient to support a *prima facie* case of retaliation. *O'Neal, supra., at* 1253. In the present case, there is both temporal proximity and substantial, direct evidence of causation.

The retaliatory events in question began with the verbal attack on Ms. Stone by Ms. McGlothlin on August 17, 2004, continued with the appointment of Mr. Harriman as Ms. Stone's supervisor on October 28, 2004, and then proceeded with the adverse actions of Mr. Harriman and BOP, until Ms. Stone was forced off the job and disabled as of December 8, 2004. This sequence of events followed closely Ms. Stone's protected activity, which included the settlement conference of July 29, 2004 before Judge Shaffer and the execution of the settlement agreement between the parties on September 7, 2004.[14] Defendant argues that Ms. Stone's protected activity in Case 03-D-2308 is limited to the filing of her EEO Complaint on January 17, 2003, but this argument is without merit. The anti-retaliation statute, 42 U.S.C. 2000e-3(a) prohibits discrimination because an individual has "made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this subchapter." Obviously, the court-ordered settlement conference

[14]Because of delays in the payment process, the actual settlement payment was not received by counsel for Ms. Stone until December 14, 2004, so the district court protected activity was still underway at the time Ms. Stone was forced out of BOP on December 8, 2004. Exhibit 15, Receipt and Satisfaction of Settlement.

of July 29, 2004, and the subsequent settlement agreement, stipulation and satisfaction of judgment were official court "proceedings" under Title VII, in which Ms. Stone "participated." Indeed, this activity may come under both the "opposition clause" and the "participation clause" of the anti-retaliation statute, but the participation clause has been interpreted to offer very broad protection, extending to persons who have participated in any manner in Title VII proceedings, even if the charges are not meritorious. *Slagle v. County of Clarion*, 435 F. 3d 262, 266-268 (3rd Cir. 2006) , citing numerous cases, including *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994); see also, *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3rd Cir. 2006). Thus, the initial verbal attack by Ms. McGlothlin occurred some eighteen days after the settlement conference; the appointment of Mr. Harriman as supervisor occurred about seven weeks after the parties signed their settlement agreement; and, the entire course of retaliation occurred while payment of the settlement funds was still pending.

In any event, a finding of temporal proximity is not necessary, because there is direct evidence of retaliatory motive. This evidence is in the form of Mr. Harriman's memo, Exhibit 8. As previously noted, this memo clearly and dramatically sets forth Mr. Harriman's retaliatory animus toward Ms. Stone for her protected activity. The quotations in the memo attesting to such animus are too numerous to itemize or quote, but certainly include the following: Mr. Harriman alleges that Ms. Stone falsely accused him of short-cutting the selection process for the General Foreman position, that she engaged in precisely such short-cutting herself, that she ruined Mr. Harriman's reputation, lied about him and degraded him, spread lies and twisted stories about him, made his first year very bad, caused other employees to disrespect him and think of him as scum, stirred up things in the department, caused the staff to hate and distrust each other, demonstrated a

problem with authority, called authority figures idiots, etc. Mr. Harriman makes clear his feeling that Ms. Stone, "will do anything to ruin my career and my integrity," will falsely accuse him of sexual harassment, will lie about him, will be the aggressor against him, will damage him and the whole department, etc. At the conclusion of his tirade, Mr. Harriman is quite clear that his feelings about Ms. Stone relate to her protected activity: "She has gotten away with a lot of things and she thinks she is running the department, no one better get in her way. She has sued the BOP twice and won. People know how she is. Does this not make it clear what kind of person she is?" There are many other passages in the memo which make clear the depth and strength of Mr. Harriman's feelings of distrust and distaste for Ms. Stone based on her prior protected activity. Alarmingly, it should be noted that this memo was written on May 11, 2005, some six months after Mr. Harriman had forced Ms. Stone out of her position; one can only imagine how violent his animus toward Ms. Stone was when they were actually interacting on a daily, indeed hourly, basis during the months of October, November and December of 2004.

Moreover, there is voluminous and overwhelming evidence of a policy and practice of retaliation for protected EEO activity throughout the management of the Bureau of Prisons, with its epicenter at the Florence facility. Specifically, in the case of *Dennis Turner v. Alberto Gonzales*, EEOC Nos. 320-2005-0046X and 320-2005-0333X, Administrative Judge Kelly M. Humphrey of the Denver District Office of EEOC made a determination of such a pattern and practice of retaliation. Exhibit 16. Mr. Turner, who is an employee at the Florence complex, filed a class action complaint with EEOC, alleging that BOP repeatedly retaliated against employees who engaged in EEO activity, by actions such as initiation of investigations, refusal to transfer, failure to promote, disparate treatment in the terms and conditions of employment, surveillance and harassment. Mr.

Turner worked at the FCI in Florence, the same institution as Ms. Stone. He specifically alleged that management unlawfully retaliated against him by denying him advancement and promotional opportunities, harassing him, placing him on home detention, initiating investigations into his conduct, denying his requests for transfer and disciplining him in retaliation for his EEO activity. Exhibit 16, p.3. The BOP campaign against Mr. Turner involved over ten investigations initiated by agency managers, the denial of some nine requested transfers and the denial of downgrade requests. In the investigation into Mr. Turner's complaints, it developed that there was a putative class, nationwide in scope, within BOP facilities, most likely in excess of 350 class members (including Mr. Stone). Exhibit 16, p. 6. Mr. Turner and his counsel obtained and submitted to EEOC the declarations of sixty Agency employees (including Ms. Stone) who verified that the Agency retaliated against them and others following EEO activity, and described an Agency-wide pattern and practice of retaliation. These individuals, including Mr. Turner and Ms. Stone, are listed in a chart in the Decision of Judge Humphrey. Exhibit 16, pp.7-11. Judge Humphrey's certification of the class was later reversed on appeal by the Office of Federal Operations of EEOC, on the basis of a failure to meet the certification criterion of commonality. No one, however, has ever suggested that any of the declarations of these sixty Bureau of Prisons employees was inaccurate or false, and they clearly demonstrate a pattern and practice of retaliation throughout the Agency. Pursuant to its regular operating procedure, once Ms. Stone forced the hand of BOP at the settlement conference of July 29, 2004 and extracted a settlement from the Agency, management struck back by appointing the very individual who had been the beneficiary of the previous discrimination and retaliation against Ms. Stone, and who eagerly sought an opportunity to retaliate against her, Mr. Harriman, as her supervisor.

Defendant suggests in passing (Defendant's Brief, p. 13) that perhaps management was not aware of the July 2004 settlement. This suggestion is unfounded, for several reasons. First, Warden Rios was on the telephone at the time of the settlement conference. Second, Ms. Stone specifically notified Assistant Warden Whitehead and Warden Rios of the events at the July 29, 2004 settlement conference, and the fact that it was impossible for her to work under the supervision of Mr. Harriman as a result. Additional Facts, ¶¶16, 18 and 22; Exhibit 17, pp.161-163; Exhibit 9, Memo of November 22, 2004; and third, Mr. Harriman was forced to explain his resume fraud to Warden Rios in a memo. Exhibit 10, Affidavit of Rick Harriman, p.2.

Thus, there is evidence of temporal proximity, there is direct, dramatic evidence of retaliatory motive in the form of Mr. Harriman's memo, and there is voluminous evidence of a pattern and practice of retaliation in BOP generally and at Florence in particular. As in the *O'Neal* case, Ms. Stone has presented sufficient evidence to establish an inference of retaliatory motive and thus a causal connection between her protected activity and the employment actions of defendant. *O'Neal*, *supra.*, *at* 1253.

Pretext

The memorandum of Mr. Harriman clearly laying out his retaliatory animus toward Ms. Stone, and the overwhelming evidence and judicial finding in the *Dennis Turner* class action case, are properly considered on the issue of whether defendant's explanation for its actions is pretextual. "The trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case and inferences properly drawn therefrom...on the issue of whether the defendant's explanation is pretextual." *O'Neal*, *supra. at* 1254, citing *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 120 S.Ct. 2097, 2106, 147 L.Ed. 2d 105 (2000).

In addition, a plaintiff may show pretext by demonstrating that defendant's proffered reason for the disputed employment action is unworthy of credence. *Munoz v. St. Mary-Corwyn Hospital*, 221 F.3d 1160, 1167 (10th Cir. 2000). Pretext can be shown by weaknesses, implausibilities, inconsistencies or contradictions in the employer's proffered reasons for its employment action. *Id.* at 1167. This burden is not onerous. *Hardy v. SF Phosphates Ltd.*, 185 F.3d 1076, 1080 (10th Cir. 1999). A plaintiff need not present direct evidence of discrimination to survive summary judgment. *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995). In the present case, however, direct evidence of retaliation is present, in the form of Mr. Harriman's diatribe against Ms. Stone and her protected activity, and in the form of the deluge of testimony from dozens of BOP employees in the *Turner* case.

Moreover, in the present case, defendant offers little in the way of legitimate business reasons for its actions. See, *Doebele v. Sprint Corp.*, 342 F.3d 1117, 1135 (10th Cir. 2003). As far as the verbal attack on Ms. Stone by Ms. McGlothlin, defendant offers no legitimate business reason, and indeed it is obvious that none exists for such conduct. As previously noted (Additional Facts, ¶11), the Warden himself demanded a letter of apology from Ms. McGlothlin for the incident, and gave her a letter of reprimand. Thus, it is clear that Ms. McGlothlin's actions were not legitimate and were not done for proper business reasons. As to the appointment of Mr. Harriman, defendant offers only a truism, that is, the fact that Mr. Harriman was appointed because the Facilities Manager position was open, i.e. because the prior Facilities Manager had left. What defendant omits, however, is that the management made both of these decisions: the prior Manager, Jesse Banda, was transferred to Englewood as part of a reduction in force, and management decided to place Mr. Harriman into Mr. Banda's position. As to the removal of time and attendance duties, defendant

offers two half-hearted reasons, one immaterial and the other false. The suggestion that these duties were removed from Ms. Stone back in April 2004 is immaterial, since neither Ms. Stone nor anyone else involved was aware of this change, if in fact, it was communicated to anyone at all, and it had never been implemented. It was only when Mr. Harriman became Manager that the change of duties was implemented and had any effect. Second, the false allegation by Ms. McGlothlin that Ms. Stone asked to be removed from the time and attendance duties is vigorously disputed. Exhibit 14, p. 50.

As to the relocation of Ms. Stone's office, defendant offers no legitimate business reason, merely suggesting that Ms. Stone cannot offer evidence that it was done for other than business reasons, an interesting formulation. (Defendant's Brief, p. 15). Although not required to do so, Ms. Stone can offer such evidence: At the time of the office relocation, Ms. Stone was specifically told by Mr. Harriman that it was being done because of her "negativity." Exhibit 17, p.163. Mr. Harriman admits that he made such statements about Ms. Stone, for example, characterizing her as the "ring leader of all the negativity." Exhibit 5, p. 30. Similarly, Mr. Harriman admits that he ordered that Ms. Stone's office door kept open at all times so that he could "stop any negativity." Exhibit 5, p. 60. It is a reasonable inference, indeed it is virtually a necessary inference, that when Mr. Harriman refers to "negativity" he means it in the sense expressed in his memo of May 11, 2005, Exhibit 8, that is, his extreme animus toward Ms. Stone as a result of her prior protected activity. Thus, there is strong evidence that Mr. Harriman moved Ms. Stone's office and ordered her door kept open in retaliation for her prior protected activity. Finally, defendant offers no legitimate business reason for Mr. Harriman's comment that Ms. Stone "was a source of negativity,"offering only the strange contention that Ms. Stone needs to know "why he made this

statement." Of course, no legitimate business reason exists for this hostile and unprofessional statement. Indeed, as discussed above, Mr. Harriman's use of the term "negativity" was his code word for Ms. Stone's protected EEO activity, and his justification for engaging in acts of retaliation against her. Given the strong, dramatic and direct evidence of retaliatory animus and intent, it is clear that there are, at the very least, genuine issues of material fact as to whether the business reasons proffered are pretextual.

Conclusion

For all of the above reasons and based on the above authorities, Ms. Stone requests that the Defendant's Motion for Summary Judgment be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on November 20, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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s/ Mark S. Bove