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Scott M. McNair
Phoenix, Arizona

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

SCOTT M. MCNAIR
Plaintiff,

V.

County of Maricopa, et al,
Defendants,

No. CV-03-2119-PHX-NVW

**PLAINTIFF’S SECOND REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Assigned to the Hon. Neil V. Wake

I. PLEA FOR LENIENCY AND WAIVER OF FORMAL REQUIREMENTS

In that the Plaintiff (McNair) is a pro se litigant, he does hereby request leniency from the Court for the form and content of this pleading. (*“Pro se litigants’ pleadings are not to be held to the same high standards of perfection as lawyers.”*¹)

II. INCORPORATION OF EXHIBITS

In order to save on copying costs and storage space for the Clerk, plaintiff does hereby incorporate his previously filed Exhibits In Support of Reply for Summary Judgment (Doc. #56) filed 09/20/2005, as those exhibits are the same referenced herein.

¹ *Haines V. Kerner*, 92 S.Ct. 594; *Jenkins V. McKeithen*, 395 US 411, 421 (1969); *Picking V. Penna. Rwy. Co.* 151 F.2d 240; *Puckett V. Cox*, 456 F.2d 233.)

1 complaint against Ramsey (the self-proclaimed “*Boss’s Girl*” of defendant Medlin).³ Defendants
2 assert, a) they expired plaintiff’s contract,⁴ b) they eliminated plaintiff’s contract position,⁵ and c)
3 they supposedly offered to renew a contract for a position they eliminated.⁶ Defendants assert they
4 were under mandate by some fictitious budget council to eliminate contracts, yet refuse to provide
5 any evidence of such. As such, a trier may infer that evidence is unfavorable if the party who has the
6 power to produce it fails to do so. See *Graves v. United States*, 150 U.S. 118, 121 (1893). Peterson
7 then commits blatant perjury by claiming he offered to renew plaintiff’s contract after avowing that
8 the position had been eliminated. Further contradicting their assertions, defendants’ then renewed a
9 different employee’s contract,⁷ and, created new contracts for others.⁸ Peterson then compounds this
10 with perjury claiming there was no open position for the other “*programmer*”⁹, when in fact one did
11 exist.¹⁰ The second element is satisfied in defendants’ deliberate refusal to renew plaintiff’s contract.

12 **3) There was a causal link between the protected activity and the adverse action.**

13 Causation sufficient to establish the third element of the prima facie case may be inferred from
14 circumstantial evidence. *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (1987), *Cohen v. Fred Meyer,*
15 *Inc.*, 686 F.2d 793, 796 (9th Cir. 1982) (used employer’s awareness to show a causal link). In this
16 instance, there exists far more than a “*casual link*” between plaintiff’s complaint and defendants’
17 refusal to renew his contract. In fact, defendants’ actions show a *premeditated* pattern of retaliation,
18 culminating in their ultimate goal of quietly disposing of plaintiff and his complaint against Ramsey
19 (the “*Boss’s Girl*”). The court will note: a) Plaintiff *attempted* to file a complaint against Ramsey

³ (Doc. #56) Exhibit 1 at 55

⁴ Defendants’ Response To Plaintiff’s Motion For Partial Summary Judgment, pg. 3, ln. 11, 22

⁵ (Doc. #41) Defendants’ SOF, pg. 3, ln. 13-14

⁶ Defendants’ Proposed Case Management Plan, filed March 9 2004, pg. 2, ln. 18-22.

⁷ (Doc. #41) Defendants’ SOF, attachment A at 6

⁸ (Doc. #56), Exhibit 2, pg. 11, ln. 17 through pg. 12 ln. 7

⁹ (Doc. #41) Defendants’ SOF, attachment A at 6

¹⁰ (Doc. #56) Exhibit 4

1 in December 2001, b) While *on the phone* making his complaint to Peterson, is *immediately* put on
2 administrative leave by Peterson,¹¹ c) When plaintiff returns to work, Peterson makes vague threats
3 of retaliation should he formally pursue his complaint against Ramsey,¹² d) Defendants then
4 “*eliminate*”, “*expire*”, and *lie* about the possibility of plaintiff’s contract renewal, while renewing
5 and creating *new contracts* for those that did not complain about Ramsey. The third element is
6 therefore satisfied.

7 **B. Defendants Denied Plaintiff Proper Consideration For Employment As Regular Employee.**

8 To establish a cause of action for disparate treatment based upon circumstantial proof, the
9 charging party must show: 1) he was a member of a protected group; 2) was qualified for the
10 position 3) was rejected despite his qualifications; 4) after the rejection, the position remained
11 available, **or**, was filled by someone who was not a member of a protected class. *McDonnell*
12 *Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450
13 U.S. 248 (1981)) See also *Fowle v. C & C Cola*, 868 F.2d 59, 61 (3d Cir. 1989)

14 **1) Plaintiff was engaged in a protected activity under Title VII.**

15 Protected activity includes formal charges of discrimination "as well as *informal* protests of
16 discriminatory employment practices, including making complaints to management, *Sumner v.*
17 *United States Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990). Since plaintiff complained to
18 defendant Peterson of Ramsey’s unwelcome sexual behavior, and hostility for rebuffing such, the
19 first element of *McDonnell* is therefore satisfied.

20 **2) Plaintiff was qualified for the position, but deterred by defendants from applying.**

21 Any arguments as to plaintiff’s qualifications are mooted by the fact that he held the position for
22 the previous four years. Had he not been qualified, defendants had four years to dismiss him for any

¹¹ (Doc. #41) Defendants’ SOF, attachment A at 6

¹² (Doc. #41) Defendants’ SOF, exhibit 4, pg. 3, and (Doc. #56) Exhibit 5, pg. 3, (bottom para.)

1 reason at all (good, bad, or indifferent). They did not.

2 After “*eliminating*” plaintiff’s contract position under a menagerie of self-contradictory
3 premises, defendants then converted the contract position into a regular one and began a campaign
4 intended to deter him from applying, instilling upon him the fact that any attempt to obtain such
5 would be futile. Defendants’ own evidence and statements show both Peterson and Medlin sought to
6 prevent plaintiff from applying when they lied to plaintiff about the availability of the open position.

7 First Peterson lies to plaintiff in May claiming the position was no longer available,¹³ and then
8 Medlin echoes this same lie to plaintiff (id at 13.) When in truth, the position was listed as “*open*
9 until FILLED”.¹⁴ By defendants’ own statements and exhibits, the position remained vacant until
10 July 17 2002, almost three weeks after plaintiff was terminated.¹⁵ Defendants’ own HR manager
11 gave testimony that Peterson and Medlin were required to offer the position to plaintiff with first
12 right of refusal,¹⁶ but, never has any written offer been found or submitted into the record. The only
13 written evidence on the subject is plaintiff’s email to defendants in which he clearly states that he
14 would accept the currently OPEN position.¹⁷ Defendants’ *immediate* response was to order plaintiff
15 to perform a “*knowledge transfer*” to another employee. Inferring to him that any attempt to apply
16 for the position would be futile. Due to defendants’ devious strategy to “*legitimize*” their unlawful
17 actions by preventing a paper trail, the only written record on this subject is plaintiff’s email, clearly
18 stating that he wished to accept the position.

19 As stated in *Acha v. Beame*, 531 F.2d 648, 656 (CA2) a nonapplicant can be a victim of unlawful
20 discrimination entitled to make-whole relief when an application would have been a useless act
21 serving only to confirm that the job he wanted was unavailable to him. In *Teamsters V. United*

¹³ See Defendants Response To Plaintiff’s Motion For Partial Summary Judgment, pg 5 at 6.

¹⁴ (Doc. #56) Exhibit 8, Database Administrator job posting

¹⁵ (Doc. #41) SOF, Exhibit 5, pg. 3

¹⁶ (Doc. #56) Exhibit 6, pg. 2, ln. 16-23

¹⁷ (Doc. #56) Exhibit 7

1 *States*, 431 U.S. 324 (1977) our Supreme Court recognized that employers could not escape
2 prosecution by deterring applicants by making the application process futile.

3 Plaintiff therefore satisfies the second element of the *McDonnell* test.

4 **3) Despite his qualifications Plaintiff was rejected.**

5 Should the simple fact that plaintiff was not hired for the position (which he had previously held
6 for over FOUR YEARS) not be enough for the trier, one need only look to defendants Peterson's
7 and Medlin's direct refusal to consider him while they bold face lied about the position being
8 "closed".¹⁸ Plaintiff therefore satisfies the third element of the *McDonnell* test.

9 **4) After the rejection, the position remained available, or, was filled by someone who
10 was not a member of a protected class.**

11 Plaintiff's email clearly shows that defendants were in the process of interviewing candidates
12 while plaintiff was proclaiming his desire to accept the position.¹⁹ Furthermore, as plaintiff's email
13 was sent on May 20th of 2002, defendants' exhibit shows that the position was not "filled" until July
14 17th 2002.²⁰ The position remained *available* and unfilled over 50 days **after** defendants rejected
15 plaintiff, then, in their continuing effort to "*legitimize*" their unlawful acts, defendants waited until
16 almost three weeks **after** plaintiff was gone to fill such.

17 Plaintiff therefore satisfies the fourth and final element of the *McDonnell* test.

18 **C. Defendants Medlin and Peterson violated the non-retaliation clauses of Title VII of the**
19 **Civil Rights Act, and, Defendant Maricopa County's own non-retaliation policy.**

20 It is undisputed, and verified by defendants, that plaintiff *attempted* to file complaints against
21 Ramsey with Peterson and Medlin, but was rebuffed. Nor do defendants deny plaintiff was
22 immediately threatened with retaliation should he attempt to formally pursue such. As shown

¹⁸ (Doc. #56) Exhibit 8, MCDOT Database Administrator position posting.

¹⁹ (Doc. #56) Exhibit 7

²⁰ (Doc. #41) SOF Exhibit 5, pg. 3

1 herein, Medlin and Peterson carried out those threats by refusing to renew his contract and denying
2 him proper consideration for re-employment. According to defendants' own written policy,²¹ they
3 have "zero tolerance" toward such prohibited activity. Under this same policy, *any* violation,
4 including failure to record or document a complaint, is grounds for immediate dismissal.

5 Defendants Medlin and Peterson deliberately violated said policy in that: a) they [both] failed to
6 document Plaintiff's complaint against Ramsey, b) Peterson retaliated against Plaintiff by placing
7 him on "*administrative leave*" when he complained about Ramsey, c) Medlin and Peterson failed
8 to renew plaintiff's contract in retaliation for his complaint, d) Medlin and Peterson denied
9 plaintiff employment as a regular employee in retaliation for his complaint.

10 Any *one* of these acts is a violation of [both] County policy or Title VII, and according to the
11 County's policy are sufficient grounds for immediate dismissal. As shown herein, defendants Medlin
12 and Peterson not only violated them individually, but they conspired together to violate them as a
13 team. With, Maricopa County's blessing.

14 V. SUMMARY

15 In retaliation for Plaintiff *daring* to file a complaint against Ramsey (the self-proclaimed
16 "untouchable Boss's Girl"), defendants Medlin and Peterson refused to document the complaint,
17 threatened him into silence, eliminated his position under false, contradicting, and unsubstantiated
18 pretenses, refused to rehire him, then drove him into bankruptcy.

19 It was not until plaintiff filed a detailed, forty plus page sexual harassment complaint with the
20 EEOC (and defendants), that defendants took any action. Then, rather than hold an open and
21 *unbiased* inquiry defendants held a closed-door, one-sided, "Character Assassination Contest"
22 against plaintiff and labeled it an "*internal investigation*". When evaluating the credibility (or lack

²¹ See generally Exhibit 10, Maricopa County Work Place Professionalism: Avoiding Discrimination and Harassment

1 thereof) of this so-called “*investigation*”, the trier should take note that no one was under oath, the
2 interviews were untranscribed, and it is unknown as to the conditions the interviews were
3 conducted in. More importantly, the court will immediately recognize that rather than submit the
4 actual testimony of the interviewees, defendants summarized and reworded the statements of
5 *selected* employees to fit their goal of discrediting plaintiff. Clearly this “*investigation*” was
6 **pretextual**. Furthermore, though his initial complaint includes accusations of criminal activity, on-
7 the-job drug abuse, and government fraud and waste, nowhere is there any evidence that any of these
8 accusations were investigated either administratively or criminally. This refusal to investigate *all* of
9 plaintiff’s allegations is itself a violation of the defendants’ policies.²²

10 As stated in *Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994), a plaintiff satisfies the requisite
11 quantum of proof to rebut a defendant's stated “*legitimate*” business reason when the plaintiff
12 produces evidence which: (1) casts sufficient doubt upon the legitimate reasons proffered by the
13 defendant so that a fact finder could reasonably conclude they were fabrications, **or**, (2) allows the
14 fact finder to infer that discrimination was more likely than not a motivating or determinative cause
15 of the adverse employment action Id. at 762 (emphasis added). *Fuentes* also allows a plaintiff to
16 more generally submit evidence raising an inference of discrimination.

17 *Hicks* teaches that rejection of the employer's proffered nondiscriminatory reason will permit the
18 trier of fact to infer the ultimate fact of intentional discrimination. In other words, “[t]he fact finder's
19 disbelief of the reasons put forward by the [employer] . . . may, together with the elements of the
20 [employee's] prima facie case, suffice to show intentional discrimination.” *Seman*, 26 F.3d at 433
21 (quoting *Hicks*, U.S. at 113 S. Ct. at 2749 n.4) As clearly shown herein, plaintiff has satisfied all
22 prongs of the *prima facie* test for retaliation established in *Tarin*, *Yartzoff*, *Ruggles*, and *Cohen*. As
23 such, “once a plaintiff establishes a prima facie case, the law creates a presumption of unlawful

²² (Doc. #56) Exhibit 10, pg. 8, last paragraph.

1 discrimination.” See *Seman v. Coplay Cement Co.*, 26 F.3d 428, 432 (3d Cir. 1994).

2 Unmistakable to the court are the two simple facts that 1) Plaintiff’s statements have never
3 varied, changed, or wavered, 2) Defendants’ “story” continually changes to meet their current needs
4 or whims, constantly contradicts itself, and is nothing more than perjurious and pretextual attempts to
5 legitimize its retaliation against plaintiff, *after the fact*. Clearly the court will recognize that
6 defendants waited until *after* plaintiff filed his motions for summary judgment to submit
7 explanations for their actions, including the perjurious affidavits of Peterson and Ramsey. To this,
8 plaintiff directs the court to Peterson’s claims that a) in November of 2001 he offered plaintiff a
9 position that would not exist until April of 2002, and, b) that he offered to renew a contract that he
10 had been ordered to eliminate .The court is reminded that if there is conflicting testimony, the court
11 generally must disregard the testimony favoring the employer. See *Wilkerson v. McCarthy*, 336 U.S.
12 53, 57-60 (1949). As observed in *Purkett v. Elem*, 115 S. Ct. 1769 (1995), impossible, fantastic,
13 silly or superstitious justifications are pretextual. *Id.* at 1771. As *Burdine* teaches us, the plaintiff
14 may succeed by showing that the employer's proffered explanation is *unworthy of credence*. See
15 *McDonnell Douglas*, 411 U.S., at 804 -805." *Ibid.* If evidence is susceptible to two interpretations,
16 the court must reject the interpretation favorable to the employer and instead accept the
17 interpretation that supports the employee. See *Continental Ore Co.*, 370 U.S. at 701.

18 As a matter of both common sense and federal law, an employer's submission of a discredited
19 explanation is itself evidence that such unlawful discrimination actually occurred." *MacDissi v.*
20 *Valmont Indus., Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988). It is reasonable to conclude that an
21 employer who gives a false explanation for conduct that has been challenged as discriminatory is
22 dissembling to cover up the discrimination. See *Hicks*, 509 U.S. at 511, 517; 5 *Leonard B. Sand et*
23 *al.*, *Modern Federal Jury Instructions* ¶ 87.01, at 87-86 (1999) (Instruction 87-27).

24 If the plaintiff raises an inference of discrimination and defendants’ explanation is discredited,

1 the court must conclude that the logical explanation for the action was the unlawful discrimination.
2 Syl. Pt. 5, *Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996) Thus, a plaintiff
3 who can offer sufficient circumstantial evidence on intentional discrimination may prevail, just as in
4 any other civil case where the plaintiff meets his or her burden of proof. Syl. Pt. 7, *Skaggs v. Elk*
5 *Run Coal Co., Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996)

6 VI. CONCLUSION

7 Plaintiff has satisfied all relevant tests as specified in *McDonnel, Hicks, Tarin, and Cohen*. As
8 shown herein, defendants defense is based upon pretextual reasoning, and, as stated in *Hicks*, "once
9 plaintiff proved defendants' proffered reasons for the adverse employment actions to be pretextual,
10 plaintiff is entitled to judgment as a matter of law. . . No additional proof of discrimination is
11 required." *Hicks v. St. Mary's Honor Center*, 970 F.2d 487, 492-93 (8th Cir. 1992). Thus, as the
12 court of appeals directed the district court to enter judgment in favor of the plaintiff in *Hicks* (Id. at
13 493) this court must do so for this plaintiff now.

14 VII. DAMAGES

15 The Court of Appeals has held that an employer is absolutely liable for sexual harassment [and
16 retaliation] practiced by supervisory personnel, whether or not the employer knew or should have
17 known about the misconduct. The court relied chiefly on Title VII's definition of "employer" to
18 include "any agent of such a person," 42 U.S.C. 2000e(b), as well as on the EEOC Guidelines. 243
19 U.S. App. D.C., at 332, 753 F.2d, at 150. As such, Plaintiff is entitled to "make whole"
20 compensatory damages that can be calculated directly by this court. In consideration of the manner
21 in which the County acted with such egregious behavior towards plaintiff, he requests the court
22 award a treble amount for each of the above counts.

23 Furthermore, in keeping with defendants' own "zero tolerance" for such unlawful activity, the
24 Court should issue an order directing that defendant Maricopa County immediately, permanently,

1 and retroactively, terminate defendants Peterson and Medlin effective December 31 2001, the date of
2 plaintiff's original attempt to file a complaint against Ramsey.

3 Lastly, plaintiff respectfully requests that any punitive damages be under Title VII, 42 USC
4 1983, or any other statute, be reserved for the discretion of the jury.

5
6 RESPECTFULLY SUBMITTED this 17th day of OCTOBER 2005.

7
8 By _____
9 Scott M. McNair, Plaintiff Pro Se

10
11 ORIGINAL and COPY FILED with:

12 Clerk of the Court
13 United States District Court
14 District of Arizona
15 Sandra Day O'Connor U.S. Courthouse
16 401 W. Washington Street, Suite 130
17 Phoenix, AZ 85003-2118

18
19 COPY of the forgoing HAND-DELIVERED to:

20
21 Office of the Maricopa County Attorney
22 Attn: Dan Brenden
23 222 North Central Avenue, Suite 1100
24 Phoenix, Arizona 85004
(Counsel for Defendants: Maricopa County, Medlin, Peterson, & Ramsey)

25
26 COPY of the forgoing MAILED to

27
28 Jones, Skelton & Hochuli, P.L.C.
29 Attn: Eileen Dennis GilBride
30 2901 N. Central Avenue, Suite 800,
31 Phoenix, Arizona 85012,