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 10 UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION

14	ADRIENNE P. CLAYTON,)	No. CV 09-6479 R (VBKx)
)	
15	Plaintiff,)	<u>STATEMENT OF UNCONTROVERTED</u>
)	
16	v.)	<u>FACTS AND CONCLUSIONS OF LAW</u>
)	
17	JOHN E. POTTER,)	
)	
18	Defendant.)	Hearing Date: June 2, 2010
)	
19	_____)	Time: 10:00 a.m.

20
21 Honorable Manuel L. Real

22
 23 Defendant's Motion for Summary Judgment having come on for
 24 hearing, and the Court having considered the pleadings, evidence
 25 presented, and memorandum of points and authorities, the Court makes
 26 the following Findings of Fact and Conclusions of Law:

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28 I.

FINDINGS OF FACT

1
2 1. On approximately November 7, 2006 a vacancy announcement was
3 issued for the position of Supervisor, Postal Police for Tour 1
4 listing the hours as 9:15 pm to 6:00 a.m. Evidentiary Appendix -
5 Declaration of Nichole Cooper ("Cooper Decl.") at ¶ 5.¹ The position
6 involved supervising Tour 1 Postal Police officers engaged in the
7 protection of mail, life, and postal property at postal facilities and
8 surrounding areas and providing backup to officers for non-routine and
9 emergency situations. Id.

10 2. In December 2006 a review panel for the Supervisor position
11 was comprised of Assistant Inspector in Charge Nichole Cooper (African
12 American female), Los Angeles Division Postal Police Manager Karen
13 Parks (African American female), and Assistant Inspector in Charge San
14 Diego Field Office Robert Malaby (Asian Hispanic male). Cooper Decl.
15 ¶ 6.

16 3. The panel reviewed applications for the position from four
17 people, including the Successful Applicant (Hispanic female), an
18 unsuccessful applicant (Caucasian male), another unsuccessful
19 applicant (African American male), and plaintiff Adrienne Clayton
20 (African American female). Cooper Decl. ¶ 7. Each of the four
21 applicants submitted a P.S. Form 991 Application and were interviewed
22 by the panel on December 7, 2006. Id.

23 4. The panel believed the Successful Applicant was the best
24 choice for the position. Cooper Decl. ¶ 8; Declaration of Karen Parks

25
26 ¹ Defendant's evidentiary references are contained in a separate
27 Evidentiary Appendix filed concurrently with defendant's Motion for
28 Summary Judgment.

1 ("Parks Decl.") ¶ 7.

2 5. The vacancy was for a Tour 1 supervisor position and the
3 Successful Applicant was familiar with the Tour 1 postal police
4 officers. Cooper Decl. ¶ 8; Parks Decl. ¶ 7. The Successful
5 Applicant had primarily worked on Tour 1 (approximately 9:30 p.m. to
6 6:00 a.m.) during her career as a Postal Police Officer including
7 serving as an Acting Supervisor since 2004. Cooper Decl. ¶ 8; Parks
8 Decl. ¶ 7.

9 6. The panel believed that the Successful Applicant had a good
10 rapport and familiarity with the Tour 1 Postal Police Officers.
11 Cooper Decl. ¶ 8; Parks Decl. ¶ 7. They also believed that the
12 Successful Applicant had good interpersonal skills that would assist
13 her as a Supervisor. Cooper Decl. ¶ 8; Parks Decl. ¶ 7.

14 7. The panel also considered the Successful Applicant's
15 familiarity and good working relationship with the Tour 1 Officers to
16 be a benefit because morale had been low due to, among other things,
17 a loss of approximately 25-30 Postal Police Officer positions in 2006,
18 the removal of the prior Captain, and other supervisors being out on
19 leave. Cooper Decl. ¶ 8; Parks Decl. ¶ 7.

20 8. Plaintiff had primarily worked on Tour 3 (approximately 2:00
21 p.m. to 10:00 p.m.) during her career as a Postal Police Officer.
22 Cooper Decl. ¶ 9; Parks Decl. ¶ 8.

23 9. After the interviews, the panel's recommendation of the
24 Successful Applicant was conveyed to Inspector in Charge Oscar
25 Villanueva and in December 2006 he selected her for the position.
26 Cooper Decl. ¶ 10.

27 10. On February 11, 2007, plaintiff was in a motor vehicle
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1 accident while on duty. Parks Decl. ¶ 12.

2 11. A Postal Service employee who suffers job related
3 disabilities is eligible to receive continuation of Postal Service pay
4 ("Continuation of Pay") rather than using sick leave or leave without
5 pay, from the 4th day of the period of the disability up to a maximum
6 of 45 calendar days. Id. The USPS Employee and Labor Relations
7 Manual ("ELM") § 545.724, provides that to be eligible to receive
8 Continuation of Pay the employee must, among other things, 1)complete
9 and submit to the Postal Service a Department of Labor Office of
10 Workers Compensation ("DOL OWCP") Notice of Traumatic Injury and Claim
11 for Continuation of Pay/Compensation (Form CA-1), and 2) submit
12 medical evidence from the attending physician within 10 calendar days
13 after filing the claim for Continuation of Pay, showing that a
14 disability resulted from the claimed traumatic injury and indicating
15 when the employee can return to work. Id.

16 12. On approximately March 5, 2007, Postal Police Manager Karen
17 Parks received plaintiff's CA-1 Form through inter-office mail. Parks
18 Decl. ¶ 14. When she received the CA-1 Form it had a signature from
19 plaintiff dated February 14, 2007, a signature from Lt. Hawkins dated
20 February 14, 2007, and a witness statement signature from Postal
21 Police Officer Amanda Culbert dated February 23, 2007. Id. No
22 medical documentation accompanied the CA-1 Form when she received it.
23 Id.

24 13. After receiving the CA-1 form Manager Parks contacted the
25 Postal Service Injury Compensation Office in Washington, D.C. and
26 determined that the form had not yet been forwarded to them. Parks
27 Decl. ¶ 15. Manager Parks forwarded the CA-1 Form to the Injury
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1 Compensation office on approximately March 5 or 6th, 2007. Id.

2 14. On approximately March 12, 2007, Manager Parks received
3 medical documentation regarding Ms. Clayton in the form of after care
4 emergency room discharge instructions and forwarded that to Lisa
5 Armstrong at the Postal Service Injury Compensation Office in
6 Washington, D.C. Parks Decl. ¶ 16. Based on her discussion with Ms.
7 Armstrong, Parks believed that without proper medical documentation
8 this was insufficient to authorize continuation of pay because the
9 documents were after-care discharge instructions and not an actual
10 diagnosis of the injury. Id.

11 15. On approximately March 22, 2007, plaintiff faxed to Parks
12 and Ms. Armstrong additional medical documentation. Id. Thereafter,
13 based on a conversation with Ms. Armstrong, Parks believed that the
14 Postal Service was now authorized to pay plaintiff Continuation of Pay
15 and to do a pay adjustment to change her sick leave to Continuation
16 of Pay for the 4th through 45th day period after the February 11th
17 accident (i.e. the period from February 15th to March 28th 2007).
18 Parks Decl. ¶ 17.

19 16. Even prior to the Continuation of Pay being authorized,
20 plaintiff continued to receive pay in February and March 2007 from the
21 Postal Service based on sick leave being used. Id.

22 17. The pay adjustment was done in March 2007 and the sick leave
23 plaintiff had used prior to the authorization to use Continuation of
24 Pay was restored by April 2007. Id.

25 18. After the February 2007 car accident, plaintiff returned to
26 work in approximately April 2008. Declaration of Mahmoud Shooshtari
27 ("Shooshtari Decl.") ¶ 3 Sergeant Shooshtari was one of the

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1 Supervisors at that time. Id.

2 19. Plaintiff asked about the location of her badge which is an
3 access card to the facility with an employee's picture on it. Id.
4 Sergeant Shooshtari told plaintiff that he would look into this. Id.

5 20. Because he did not know where the badge was, he asked
6 Manager Karen Parks about it and said that Ms. Clayton was looking for
7 her badge. Id. Manager Parks did not know where Ms. Clayton's badge
8 was, but recalled that there was a Postal Service plastic tub that had
9 items such as her uniform, boots, and duty belt. Id.

10 21. Sergeant Shooshtari thought the badge might be in the tub
11 with her belongings. Id. He obtained the plastic tub and gave it to
12 Ms. Clayton on April 15, 2008. Id.

13 22. Any statement of Uncontroverted facts erroneously designated
14 as a conclusion of law is incorporated herein.

15 **II.**

16 **CONCLUSIONS OF LAW**

17 To withstand summary judgment, the non-moving party must show
18 that there are genuine factual issues that properly can be resolved
19 only by a finder of fact because they may reasonably be resolved in
20 favor of either party. If the factual context makes the non-moving
21 party's claim implausible, that party must come forward with more
22 persuasive evidence than would otherwise be necessary to show that
23 there is a genuine issue for trial. Celotex Corp. v. Catrett, 477
24 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); Anderson v.
25 Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d
26 202 (1986); Matshushita Elec. Indus. Co. v. Zenith Radio Corp., 475
27 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); Cal.Arch. Bldg.

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1 Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987),
2 cert. denied, 484 U.S. 1006 (1988).

3 The burden of proof in an employment discrimination case is:

- 4 (1) plaintiff must carry the initial burden of proof by
5 establishing a prima facie case of discrimination;
6 (2) If plaintiff successfully establishes a prima facie case,
7 the burden shifts to defendant to articulate a legitimate,
8 nondiscriminatory explanation for the action taken; and
9 (3) If defendant articulates a legitimate nondiscriminatory
10 explanation², the burden shifts back to plaintiff to prove,
11 by a preponderance of the evidence, that the defendant
12 intentionally discriminated against him and accordingly
13 that the explanation articulated by defendant is actually
14 a pretext or ruse for discrimination. The burden of going
15 forward remains with plaintiff.

16 St. Mary's Honor Center, et al., v. Hicks, 509 U.S. 502, 125 L.Ed.2d
17 407, 417, 113 S.Ct. 2742 (1993); U.S. Postal Service Bd. of Governors
18 v. Aikens, 460 U.S. 711, 714-15, 103 S.Ct. 1478, 75 L.Ed.2d 403
19 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67
20 L.ED.2d 207, 101 S.Ct. 1089 (1981); McDonnell Douglas Corp. v. Green,
21 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d. 668 (1973).

22
23 ² Should plaintiff succeed in establishing a prima facie case, this creates a presumption of
24 unlawful discrimination, and defendant must then articulate a legitimate nondiscriminatory reason for
25 the challenged action. To carry its burden of production, defendant must "introduce evidence which,
26 taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse
27 action." St. Mary's Honor Center, et al., v. Hicks, 509 U.S. 502, 125 L.Ed.2d 407, 417, 113 S.Ct. 2742
(1993). Defendant does not have a burden of proof on this issue, rather defendant merely has the burden
28 of producing such a reason. Id. If defendant carries this burden, "the McDonnell Douglas framework --
with its presumptions and burdens -- is no longer relevant." Id.; U.S. Postal Service Bd. of Governors
v. Aikens, 460 U.S. 711, 714-15, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

1 Defendant is entitled to judgment because plaintiff cannot
2 establish a prima facie case of disparate treatment based on race.
3 Plaintiff alleges that she was discriminated against based on race
4 (African American) when she was not selected for the Supervisor
5 position in December 2006. To establish a prima facie case of
6 disparate treatment discrimination plaintiff must show that: 1) he
7 belongs to a protected class, 2) he was performing according to his
8 employer's legitimate expectations, 3) he suffered an adverse
9 employment action, and 4) similarly situated persons outside the
10 protected class were treated more favorably. Godwin v. Hunt Wesson,
11 Inc., 150 F.3d 1217, 1220 (9th Cir. 1998); Villiarimo v. Aloha Island
12 Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002); Pejic v. Hughes
13 Helicopters, Inc., 840 F.2d 667, 672 (9th Cir. 1988).

14 Plaintiff has the burden of establishing a prima facie case of
15 disparate treatment based on race. However, two of the three review
16 panel members (Nichole Cooper and Karen Parks) were African American.
17 Moreover, the selecting official Oscar Villanueva had previously
18 promoted African Americans when he selected Nichole Cooper (African
19 American, female) for the position of Assistant INC for the Los
20 Angeles Division and Karen Parks (African American, female) for a June
21 2005 detail as Acting Manager of the Postal Police Security Force, Los
22 Angeles Division. Declaration of Oscar Villanueva at ¶ 3. Defendant
23 is entitled to summary judgment on the disparate treatment claim.

24 Defendant is entitled to judgment because plaintiff can not
25 establish a prima facie case of retaliation. Title VII prohibits
26 retaliation against an employee for opposing a practice prohibited
27 under Title VII or participating in a Title VII investigation, hearing

1 or proceeding. 42 U.S.C. §2000c-3(a). The prima facie elements of
2 a retaliation case are: 1) plaintiff engaged in protected activity;
3 2) the agency subjected him to an adverse action; and 3) there was a
4 causal connection between the protected activity and the adverse
5 action. Villiarimo v. Aloha Island Air, Inc., 281 F.3d at 1064;
6 Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987). To
7 demonstrate a causal connection, plaintiff bears the burden of
8 presenting "evidence sufficient to raise the inference that [the]
9 protected activity was the likely reason for the adverse action."
10 Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982); Miller
11 v. Fairchild Industries, Inc., 797 F.2d 727, 731 (9th Cir. 1986).

12 Plaintiff contends that due to retaliation for protected EEO
13 activity she was not selected for the Supervisor Position, her
14 Continuation of Pay was delayed, and items were returned to her in
15 April 2008. Plaintiff can not establish a causal connection between
16 the alleged adverse action and protected EEO activity. Clark County
17 School Dist. V. Breeden, 532 U.S. 268, 273 (2001) (action taken 20
18 months later does not establish an inference of causation, the
19 temporal proximity must be very close); Villiarimo, 281 F.3d at 1065
20 (an 18 month lapse does not establish an inference of causation).
21 Moreover, timing alone would not necessarily show causation as there
22 must be evidence that "but for" the protected activity there would
23 have been no adverse action. Villiarimo, supra, 281 F.3d at 1064-1065.

24 Further, plaintiff can not establish that a delay in processing
25 the Continuation of Pay claim or the return of items constitutes an
26 adverse employment action. Accordingly, defendant is entitled to
27 summary judgment on the retaliation claim.

1 Plaintiff cannot rebut defendant's legitimate reasons for its
2 actions. Even assuming arguendo that plaintiff could establish a
3 prima facie case of discrimination based on race or retaliation,
4 summary judgment should still be granted in defendant's favor.
5 Defendant has articulated a legitimate non-discriminatory reason
6 regarding its actions. Accordingly, plaintiff can not establish that
7 the articulated reason is pretextual. Villiarimo, 281 F.3d at 1062-
8 1063 (summary judgment affirmed where employee failed to present
9 evidence that employer did not honestly believe its proffered reasons
10 for termination).

11 Plaintiff has the ultimate burden of persuasion, and must offer
12 specific and significantly probative evidence that defendant's
13 intentional purpose was to take action against him because of his
14 national origin, disability, or in retaliation for protected activity.
15 Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097, 2111-2112
16 (2000) (the ultimate question in every employment discrimination case
17 is whether the plaintiff was the victim of intentional
18 discrimination); St. Mary's, supra, 125 L.Ed.2d at 422; Aikens, supra,
19 460 U.S. at 714-15 (the ultimate factual inquiry is whether the
20 defendant intentionally discriminated against plaintiff). Plaintiff
21 must do more than simply make out a prima facie case and attack the
22 credibility of defendant's witnesses. Id.

23 Plaintiff has no direct evidence, nor any specific substantive
24 circumstantial evidence that defendant's actions were the result of
25 intentional discrimination. Godwin, supra, 150 F.3d at 1222 (where
26 plaintiff relies upon circumstantial evidence to show that an
27 employer's proffered motives were pretext, such evidence must be
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1 "specific" and "substantial"' in order to create a triable issue with
2 respect to whether the employer intended to discriminate); Villiarimo,
3 281 F.3d at 1062. Since plaintiff cannot meet his ultimate burden of
4 persuasion as a matter of law, defendant is entitled to judgment in
5 its favor.

6 Any conclusions of law erroneously designated as an
7 Uncontroverted fact is incorporated herein.

8 DATED: June 7, 2010



10 _____
11 MANUEL L. REAL
12 UNITED STATES DISTRICT JUDGE

13 PRESENTED BY:

14 ANDRÉ BIROTTE JR.
15 United States Attorney
16 LEON W. WEIDMAN
17 Assistant United States Attorney
18 Chief, Civil Division

19 /s/ Gwendolyn M. Gamble _____
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