UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARY V. PHILLIPS,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	Case No.: 1:05 CV-00862 (ESH)
	)	
DAVID RUBENSTEIN, et al.,	)	
	)	
Defendants.	)	

PLAINTIFF MARY V. PHILLIPS' OPPOSITION TO DEFENDANT DISTRICT OF COLUMBIA'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Mary V. Phillips, by and through counsel, states that Defendant District of Columbia is not entitled to summary judgment as set forth in (1) Defendant's accompanying Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment; (2) Defendant's Statement of Material Facts Not in Dispute; and (3) exhibits attached thereto. As demonstrated more fully below, Defendant's Motion is grounded on a selective recitation of facts and a misapplication of the legal principles governing harassment, retaliation and administrative remedies and, as such, cannot be sustained.

WHEREFORE, Plaintiff Mary V. Phillips respectfully requests that Defendant's Motion for Summary Judgment by denied.

Dated: August 21, 2007

Respectfully submitted,

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PLAINTIFF MARY V. PHILLIPS' MEMORANDUM AND POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT DISTRICT OF COLUMBIA'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

On March 2, 2005, Plaintiff Mary V. Phillips brought suit against the District of Columbia alleging gender discrimination and retaliation in violation of Title VII. Plaintiff alleges that Defendant denied her promotions, subjected her to poor evaluations; reduced her pay; stripped her of responsibilities and transferred her to another agency. Plaintiff alleges Defendant's conduct was motivated in part due to her gender and in part in retaliation for complaints she filed against the District.

FACTS

Plaintiff was first hired as a trial attorney by the Juvenile Division of the Office of Corporation Counsel ("OCC") on September 25, 1989. Defendant's Motion for Summary Judgment,("Defendant's Motion") at 10. She was, by all accounts, an outstanding attorney and advocate. Plaintiff successfully prosecuted 42 of 45 trials in a nine month period with 101 guilty pleas, PX003(1) (Plaintiff's Exhibits will be referred to as "PX"), Plaintiff Dep. at 96:9-13; PX003(1) p. 647; obtained 8 adjudications in a single day, id.; made herself available to work while on leave, at home, on vacation and on sick leave and; canceled leave to attend last-minute

hearings, PX004 p. 728; was responsive to agency and court demands; PX004 p. 330; was chosen and funded by the Youth Services Administration to be the first YSA attorney in the Juvenile Division, PX002[1], Plaintiff Dep. at 113:6-13; successfully defended every show cause order, id. at 90:14-17; enjoyed "an excellent relationship with the judges" some of whom would "reset matters rather than proceed without her representations" or "call her from a hearing, on her cell phone, when she is on leave to get her input," PX004, p. 728; enjoyed "outstanding relationships . . . with attorneys at the Public Defender Service and with the private bar," id.; possessed "an extremely productive working relationship with the trial attorneys in the Juvenile Section," id.; handled complex post-disposition issues that contain several major issues with little supervision, id.; was "familiar with all relevant documents, facts, and the law necessary for her oral presentation," PX004, p. 732; founded the Multi-Agency Planning Team (MAPT) – a task force focusing on the welfare of juveniles in the District, PX002, Plaintiff Dep. at 34:7-9; was invited to lecture on issues pertaining to Juvenile Law; and was repeatedly asked to train Superior Court judges on rotation to the Family Division. PX001A, Plaintiff Aff at 2.

In 1997, Plaintiff filed an administrative complaint alleging she was sexually harassed by and discriminated against by her supervisor, Juvenile Section Chief, Paul Alper. The parties settled Plaintiff's complaint in 1998 and Alper was transferred from the Juvenile Division, as a result. PX008, Pipitone Dep. at 30:2-5.

Alper's position was assumed by Acting Section Chief Dave Rosenthal. PX008, Pipitone 30:2-5. Rosenthal first gave Plaintiff her first evaluation for the 1997-1998 period. PX004 at p. 423. Plaintiff took issue with the fact that Rosenthal's evaluation did not accurately reflect her accomplishments and asked Alper whether there was any relationship between her evaluation

[1] PX002 is the deposition transcript of Plaintiff Mary Phillips. The cover sheet to Plaintiff's deposition transcript was inadvertently omitted.

and the complaint she filed against him. PX002, Plaintiff Dep. at 23:4-8. He admitted there was. Id. Since then, Plaintiff's evaluations consistently declined resulting in a loss of pay on at least one occasion. PX001A, Plaintiff Aff at 5. Plaintiff consistently challenged these evaluations prompting the repeated intervention of Interim Corporation Counsel Arabella Teal and Senior Deputy Corporation Counsel Sharon Styles-Anderson. Ms. Styles-Anderson remarked on one occasion that Rosenthal's evaluations of Plaintiff were "inappropriate" and "derogatory." PX007, Styles-Anderson Dep. at 11 line 6-12.

Since being hired by the Juvenile Division in 1989, Plaintiff was never appointed to a supervisory position. During her tenure men were regularly promoted. PX008, Pipitone Dep. at 71: 5-17; PX002, Plaintiff Dep. at 79-80:20-2. It was not until July 1998, when the Juvenile Division promoted ACC Mary Pipitone, a six-year associate, to the position of Assistant Section Chief. PX008, Pipitone Dep. at 66: 4-20. She achieved this position after complaining for months that she had been working for months in a de facto supervisory capacity with no increase in pay – notwithstanding the fact that she was given added responsibilities and a greater workload and, notwithstanding the fact that her predecessor Dave Rosenthal was immediately given a pay raise when he assumed that identical position. PX008, Pipitone Dep. at 34:7-12. It was Ms. Pipitone's threat to stop working in that prompted the agency to create a position for her.

Since Ms. Pipitone's appointment in 1998, the agency promoted no other women to a supervisory position until March 26, 2003 when it appointed Laura Daily to the position of Assistant Section Chief for Papering and Operations. In those intervening five years, OCC promoted several men. In 1998, for example, the agency promoted Tom Gillice without competition to the position of Acting Trial Supervisor, PX008, Pipitone Dep. at 71,

notwithstanding that Gillice had graduated from law school in 1994 and was employed by the agency for only two years, PX 0088, Bates 686, and was managing a case load less than ten percent of Pipitone and Plaintiff. During the Spring of 2002, Rosenthal assumed the position of Acting Deputy Corporation Counsel, PX001A, Plaintiff Aff., at 8; Gillice was appointed Acting Section Chief of the Juvenile Section, id.; and Rubenstein who joined the agency in 1998 became Acting Trial Supervisor, PX005, Rubenstein Dep. at 32:11, and then Acting Section Chief.

The agency promoted Ms. Daily one month after Plaintiff filed her complaint with the Office of Human Rights alleging gender discrimination and harassment. Defendant's Motion, at PX005

During Plaintiff's tenure with the agency, only one promotion was advertised – the position of Acting Section Chief. On September 13, 2002, one day after the Interim Corporation Counsel intervened on Plaintiff's behalf, Rosenthal sent out an invitation to the division seeking interested applicants. Only Plaintiff and Acting Trial Supervisor David Rubenstein applied. Rubenstein graduated law school in 1996 and joined the Juvenile Division in 1998. On September 17, Rosenthal directed both applicants to tender a written submission illustrating how their experience qualified them to encumber the Acting Section Chief position based on seven criteria. Rosenthal directed that these submissions be tendered in one business day. Both applicants responded; Defendant maintains that Plaintiff failed to address four of the criteria or "otherwise" indicate how she was best qualified. Aside from his writing sample, Rubenstein had no qualifications or experience matching that of Plaintiff. In addition, Rubenstein was interviewed for the position and Plaintiff was not. On October 1, 2002, Rubenstein became the Acting Section Chief. PX 003B

Since 1998, the Department steadily eroded Plaintiff's authority by ordering her not to attend inter-agency meetings, refrain from taking telephone calls from other attorneys and ignore requests from judges who specifically requested her assistance in complex cases.

On May 21, 2003, shortly after she filed her claim with the Office of Human Rights, Defendant transferred Plaintiff to the Department of Mental Health.

LEGAL STANDARD

Summary judgment may be granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). In assessing a motion for summary judgment, a court must view all of the evidence in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). "[A]n added measure of 'rigor,' or 'cautio[n],' is appropriate in applying this standard to motions for summary judgment in employment discrimination cases. Courts reviewing such motions must bear in mind that a factfinder could infer intentional discrimination even in the absence of crystal-clear documentary evidence filed at the summary judgment stage." Aka v. Wash. Hosp. Ctr., 116 F.3d 876, 879-80 (D.C. Cir.1997) (en banc) (citations omitted). Courts must further be mindful that the task of determining the credibility of a witness is the exclusive domain of the finder of fact. Bayer v. United States Dep't of Treasury, 956 F.2d 330, 333 (D.C. Cir. 1992).

As demonstrated more fully below, there are genuine issues of material fact that place Defendant's motion beyond the reach of summary judgment.

ARGUMENT

Defendant presents three arguments in support of its motion for summary judgment ("Motion"). Each shall be addressed in turn.

I. Plaintiff Has Established a Prima Facie Case of Gender Discrimination Promotions Within the Juvenile Division.

a. 1998 through 2004 Promotions

Defendant maintains that Plaintiffs' allegation of gender discrimination must fail, as a matter of law, given that "[f]ive females received promotions in the Juvenile Section of the OCC from 1998 through 2004, and 3 males were promoted." Motion, at 10. In support, Defendant cites to the June 28, 1998 appointment of Mary Pipitone to the position of Assistant Chief of the Juvenile Section; the March 26, 2003 appointment of Laura Dailey to the position of Assistance Section Chief for Papering and Operations in the Juvenile Section; the March 8, 2004 appointment of Laura Dailey to the position of Chief of the Juvenile Section; the March 8, 2004 appointment of Barbara Chesser to the position of Assistant Section Chief for Papering and Operations in the Juvenile Section; and the March 8, 2004 appointment of Alicia Washington to the position of Assistant Section Chief for Trials of the Juvenile Section.

Defendant's position both is legally and factually infirm.

At the outset, Defendant's argument that OCC's promotion of other women nullifies Plaintiff's claim, is without legal merit. Five years ago, the D.C. Circuit in Stella v. Mineta, 284 F. 3d 135 (D.C. Cir. 2002), expressly adopted the ruling of "[n]early every Court of Appeals" and held that "a plaintiff in a discrimination case need not demonstrate that she was replaced by a person outside her protected class in order to carry her burden of establishing a prima facie case under McDonnell Douglas v. Green, 411 U.S. 792 (1973)]." Id. at 145, 146.

Defendant's argument independently must fail as it rests on a skewed recitation of facts.

For example, Defendant correctly notes that, on June 28, 1998, Mary Pipitone was appointed to the position of Assistant Chief of the Juvenile Section. Motion, at 10. Defendant does not, however, describe the circumstances leading to Ms. Pipitone's appointment.

Ms. Pipitone was employed by the Juvenile Section from 1992 until 2000. Deposition of Mary Pipitone ("Pipitone Dep."), at 5-6. During those eight years, OCC promoted several of her male colleagues of considerably less experience and background to supervisory positions. For example, Tom Gillice was appointed trial supervisor in approximately 1998, when he only had 11 cases in his caseload and everybody else had about 150. Pipitone Dep. at 71. At that time, Gillice had been working at the OCC for only two years.

In the fall of 1997, Ms. Pipitone assumed the position of Papering Supervisor – a job with considerably more responsibility and larger workload. Pipitone Dep. at 30:2-15. Her predecessor in that position was Dave Rosenthal. Id. Unlike Rosenthal, however, who automatically received an increase in pay when he became Papering Supervisor, id. at 65:9-11, Ms. Pipitone received no consideration for her added responsibilities. Id. at 34:7-12. After five or six months, id. at 65-66:17-17, Pipitone informed OCC that she was not going to continue working harder without a salary increase. Id. at 65. During the next five to six months, Pipitone continued to request a salary increase commensurate with her responsibilities, id. at 66:4-12, until Section Chief Mike Cobb informed her that then-Corporation Counsel John Ferren "who gave [Cobb] his word that it would be a raise in step or grade or whatever it was. And I said, okay, I'll do it then." Id. Pipitone "waited until it was confirmed," id., which did not take place until June 29, 1998, when Ferren officially appointed Pipitone to the position of Assistant Section Chief. See Defendant's Motion, PX004.

In short, Ms. Pipitone was not simply "appointed" to the position of Assistant Chief. She was forced to demand a pay increase for which the agency was compelled to create a position – unlike her predecessor Mr. Rosenthal who was simply given a salary increase upon assuming the

supervisory position – and had to endure the delay without additional compensation between the Fall of 1997 and June 1998 until her "promotion" and pay raise was ratified.

Defendant is also not entitled to summary judgment, as it contends, on the grounds that three other women were promoted in the Juvenile Division. While Defendant correctly notes that, on March 26, 2003, OCC promoted Laura Dailey to the position of Assistant Chief for Papering and Operations, Defendant does not mention that during the five intervening years between Ms. Pipitone's 1998 promotion and Ms. Dailey's promotion, OCC advanced several men in rank and no women were promoted. Defendant further obscures the fact that its promotion of Ms. Dailey took place one month after Plaintiff filed a complaint On February 25, 2003 with the Office of Human Rights ("OHR") alleging gender discrimination and retaliation. A reasonable inference one could draw from these facts is that the OCC systematically discrimentated against women in general and against the Plaintiff in particular between 1998 and 2003 and then only changed that practice after Plaintiff filed her final complaint in February 2003. The other promotions took place after that filing. On these facts, a reasonable jury could question the neutrality of Defendant's promotional practices.

b. Acting Section Chief Promotion

Between August and September of 2002, Rubenstein, with the knowledge and consent of Rosenthal, began serving as the de-facto section chief. On Thursday, September 12, 2002, Plaintiff was informed that she was to submit leave requests to Rubenstein for his approval. PX001A, Plaintiff Aff., at 19. When Plaintiff inquired why, Rosenthal informed Plaintiff that Rubinstein "is authorized to sign for him." Id. Rosenthal referred to Rubinstein as his "designee." Id. That same day, Plaintiff informed Acting Principal Deputy Corporation Counsel Eugene Adams that Rubinstein was acting in the role of Acting Section Chief. Id.

Adams assured Plaintiff that Rubenstein did not encumber that position, id., prompting Interim Corporation Counsel Arabella Teal to meet with Rosenthal and instruct him that the job must be advertised and that everyone in the Juvenile Division was to be given the opportunity to apply for the job. Id. at 18-19.

On Friday, September 13, 2002, Rosenthal sent an e-mail to all employees in the Juvenile Division entitled "Naming of Acting Section Chief and Possibly Acting Trial Supervisor." Rosenthal invited anyone interested in applying for the position of Acting Section Chief and possibly Acting Trial Supervisory to "review the following requirements and email me by close of business on September 16." PX003.

Rosenthal informed prospective applicants that, "[i]f interested in either of these positions, please be prepared to discuss in detail how your experience matchs [sic] with the requirements listed below." (Emphasis added.) PX 003. Those requirements included: (1) "experience litigating serious felony cases"; (2) "demonstrated knowledge of the Juvenile Section Policy and Procedures including the Section's Stand Operating Procedures; (3) Excelling writing skills; (4) Demonstrated ability to review and make constructive criticism to other's draft pleadings; (5) Demonstrated ability to quickly complete complex legal research, including working knowledge of LEXIS; (6) In depth knowledge of Title 16-2301, *et seq.* the Juvenile rules, and Supreme Court and appellate court decisions interpreting them; and (7) In depth knowledge of 4th, 5th, 6th Amendment law and ability to explain the legal concepts contained therein, citing case law." Id.

Both Plaintiff and Dave Rubenstein applied for the position of Acting Section Chief. Only Rubinstein was interviewed for the position; Plaintiff was not. Plaintiff Dep. at 245-46:17-4.

On Monday, September 17, 2002, Rosenthal sent another e-mail to the applicants for the position directing that they "submit an informal memo to me that responds to each of the selection factors indicated below. PX003. The response does not need to be exhaustive but it should demonstrate your experience as to each of the factors in your category." Id. Rosenthal also instructed the candidates to supply "three writing samples" that "demonstrate the required knowledge requirements that show a knowledge of Title 16-2301, et seq. and 4th 5th, and 6th amendment law." Id. Rosenthal directed Plaintiff and Rosenthal to "submit these items by September 18" – the very next day. Id.

According to Defendant, however, Plaintiff's submission was deficient insofar as it failed to demonstrate her "knowledge of Juvenile Policies and Procures"; her "ability to quickly complete complex legal research"; and her "in depth knowledge of Title 16-2301, the Juvenile Rules and 4th, 5th ad 6th amendment law." Defendant's Motion, at 12-13. Defendant concludes, as a result, that "Plaintiff cannot demonstrate that she complied with the directions given by Rosenthal or otherwise was qualified for Acting Section Chief Position." (Emphasis added.) Defendant's Motion, at 13.

On October 1, 2002, Rubenstein was appointed to the position of Acting Section Chief of the Juvenile Division. PX003. Bates 741

Plaintiff alleges she was denied a promotion to the position of Acting Section Chief in favor of David Rubenstein, a white male subordinate, who possessed none of the qualifications necessary to encumber the position. Complaint at ¶ 4. Defendant responds stating Plaintiff cannot sustain her claim of gender discrimination as she lacked the qualifications necessary to carry out the duties of that office. Defendant's Motion, at 11.

As demonstrated below, Defendant's contention that Rubinstein was the "best qualified" applicant is undermined by the record.

To establish a prima facie claim of discrimination, Plaintiff must show: 1) she is a member of a protected group; 2) she was entitled to the promotion; 3) she was qualified for the promotion; and 4) the individual promoted had the same or lesser qualifications. Bragg v. Navistar Intern. Transp. Corp., 164 F.3d 373, 377 (7th Cir.1998) (citing McDonnell Douglas Corp., 411 U.S. at 802)). Plaintiff has successfully overcome that burden.

It is undisputed that Plaintiff is a member of a protected class." McCain v. CCA of Tennessee, Inc., 254 F.Supp.2d 115, 121 (D.D.C. 2003). It is equally undisputed that Plaintiff is both entitled to and qualified to encumber the position of Acting Section Chief. When Defendant applied for the position of Acting Section Chief on September 16, 2002, she had been an assistant Corporation Counsel since 1989, Defendant's Motion Ex. 1, 1B; was responsible for an inordinate amount of cases, PX008, Pipitone Dep. at 57:10-17; successfully prosecuted 42 of 45 trials in a nine month period with 101 guilty pleas, PX002, Plaintiff Dep. at 96:9-13; PX003(1) p. 647; obtained 8 adjudications in a single day, id.; made herself available to work while on leave, at home, on vacation and on sick leave and; canceled leave to attend last-minute hearings, PX004 p. 728; was responsive to agency and court demands; PX004 p. 330; was chosen and funded by the Youth Services Administration to be the first YSA attorney in the Juvenile Division, PX002, Plaintiff Dep. at 113:6-13; successfully defended every show cause order, id. at 90:14-17; enjoyed "an excellent relationship with the judges" some of whom would "reset matters rather than proceed without her representations" or "call her from a hearing, on her cell phone, when she is on leave to get her input," PX004, p. 728; enjoyed "outstanding relationships . . . with attorneys at the Public Defender Service and with the private bar," id.;

possessed "an extremely productive working relationship with the trial attorneys in the Juvenile Section," id.; handled complex post-disposition issues that contain several major issues with little supervision, id.; was "familiar with all relevant documents, facts, and the law necessary for her oral presentation," PX004, p. 732; founded the Multi-Agency Planning Team (MAPT) – a task force focusing on the welfare of juveniles in the District, PX002, Plaintiff Dep. at 34:7-9; was invited to lecture on issues pertaining to Juvenile Law; and was repeatedly asked to train Superior Court judges on rotation to the Family Division. PX001A, Plaintiff Aff at 2.

David Rubenstein, the only other applicant for the position of Acting Section Chief, possessed no similar qualifications. The record before this Court demonstrates only that Rubenstein graduated from law school in 1996, Bates 653; was hired by OCC on January 1, 1998 (Bates 653); was trained by Plaintiff, PX002, Plaintiff Dep. at 89:13-19; and, in May 2002, was "appointed" to the position of Acting Trial Supervisor, PX005, Rubenstein Dep. at 32, without advertisement or competition.

Defendant not only puts forth no evidence supporting their contention that Rubinstein was qualified for the position of Acting Section Chief, it fails to address the obvious disparity between his qualifications and those of Plaintiff. Defendant asserts simply that Plaintiff's written submission in support of her application to the position of Acting Section Chief was inadequate. An examination of the record, however, underscores the pretextual nature of Defendant's contention.

Defendant's contention that Plaintiff's written response was inadequate implies that Rubenstein's response was superior. There is nothing in the record before this Court supporting this proposition. Assuming that to be the case, however, Defendant has failed to demonstrate how Rubenstein was "otherwise qualified" to encumber the position of Acting Section Chief –

especially in light of Plaintiff's demonstrated expertise in each of the areas she purportedly failed to address in her written response.

The record demonstrates that Plaintiff enjoyed one of the highest conviction rates in the Juvenile Division. PX002, Plaintiff Aff. at 20. During one nine-month period, alone, Plaintiff successfully prosecuted 42 out of 45 of her cases. Beyond this, Plaintiff's expertise with respect to the very factors she omitted from her written application was repeatedly noted by Rosenthal in his evaluations. For example, Rosenthal observed that Plaintiff "effectively represent[s] the interest of the agency at court hearings"; was "proactive"; worked "closely with the administration and social workers and YSA"; was "able to insure that the agency is in compliance with court orders"; and, "was able to satisfactorily resolve each case and have the Order to Show Cause withdrawn." PX004, p. 429 (Emphasis added).

Rosenthal further noted that "Ms. Phillips has demonstrated a comprehensive skill in interpreting and applying policies and court precedent to her arguments" and that "[m]embers of the judiciary have come to rely on her advice when fashioning or modifying disposition (sentencing) orders." Id. Indeed, Rosenthal acknowledged that, "[i]n her role as a YSA attorney representatives of the agency reported that Ms. Plaintiff has a thorough knowledge of statues relative to the Juvenile Justice system and that she routinely utilizes her knowledge of the statutes, regulations, and case law in her representation of the agency. She has fully immersed herself in juvenile post-adjudication law." PX004, p. 711. In a separate evaluation, Rosenthal commended Plaintiff for possessing "a thorough knowledge of statutes, regulations, and case law in her representation of the agency. She has fully immersed herself in juvenile post-adjudication law," PX004, p. 273, and as well as a "specialized knowledge of post-dispositional law, commitment alternatives, [and] residential placements." With respect to Plaintiff's writing skills,

Rosenthal took pains to note that, "[i]n one case, Ms. Plaintiff filed a comprehensive pleading which argued that the judge did not have the authority to issue the underlying order. After the court reviewed the pleading it discharged the Show Cause Order that it issued against YSA without argument."

Overall, Rosenthal observed that Plaintiff "shows great initiative"; identifies problems with YSA's ability to comply with court orders"; "assists, prods, and otherwise insures that the agency is in compliance with court orders"; "always willing to take on extra assignments"; and "possesses sufficient job knowledge to answer [YSA's] questions and give advice on emergency issues without always having the luxury of doing research." (Bates 722).[2]

There is nothing in the record indicating that Rubinstein received any such accolades or possessed similar credentials. And yet he was selected for promotion over Plaintiff on the thin reed that, in the one day the applicants were allowed to submit a response to Rosenthal's request, he was able to more thoroughly describe his expertise.

Indeed, Defendant's reliance on a submission produced in response to a one-day deadline without balancing other factors raises independent concerns. Defendant presented no evidence indicating any exigent circumstances that would have required Petitioner to demonstrate her credentials in writing within 24 hours. The stringent deadline imposed by Rosenthal cannot be found in the D.C. Personnel Regulations. Defendant has produced no document, memorandum or other directive from Rosenthal's supervisors requiring that a decision concerning the positions

[2] Indeed, the only criterion established by Rosenthal that Plaintiff was unable meet was that which inquired her "to review and make constructive criticism of other people's draft pleadings." This is readily explainable. Plaintiff "was never made a supervisor, and, therefore, [] was never given that opportunity. [She] was never a trial supervisor or any other supervisor." Ex. 2, Plaintiff Dep. at 302:4-7. At that time, Rosenthal had placed Rubenstein in the positions of Acting Trial Supervisor and Acting Section Chief. It can be readily inferred that Rosenthal, in drafting these criteria, was aware that Plaintiff lacked this experience as he was the one who repeatedly denied her access to supervisory roles.

of Acting Section Chief be encumbered by any such deadline. And, indeed, there are none. That he imposed such a deadline only after Plaintiff indicated her interest in applying for the position and then relied exclusively on that submission in making his decision could lead a reasonable jury to question the propriety of his actions.

In the final analysis, Rosenthal chose Rubenstein as the more qualified candidate for the position of Acting Section Chief:

- after being compelled to advertise the position by the Interim Corporation Counsel;
- after interviewing Rubenstein, presumably to "discuss in detail how [his] experience matchs [sic] with the requirements" and not interviewing Plaintiff;
- after imposing a draconian deadline for submissions and then assessing the respective merits of each candidate's qualifications solely on that submission; and
- .after ignoring his own evaluations acknowledging Plaintiff's expertise and experience in each of the criteria he established for the position.

Stated alternatively, Defendant asks this Court to summarily dismiss Plaintiff's claim of gender discrimination on the bare assertion that Rubinstein was a better candidate for the position of Acting Section Chief. And while Defendant, like all employers, has a right to select the most qualified employee, it cannot satisfy its burden of showing that it has in fact done so by a general statement that it hired the best qualified applicant. International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.24 (1977). And if Defendant wishes to rely on the Rubinstein's qualifications to rebut an inference of discrimination, it must produce legally sufficient proof to that effect. Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563, 567 (5th Cir. 1979), cert. granted, 447 U.S. 920 (1980). It has not done so and its claim that the promotion was neutrally motivated cannot be considered.

In sum, Defendant's stated rationale for refusing to promote Plaintiff to the position of Acting Section Chief is facially disingenuous. A jury can readily infer that Defendant's actions were guided by a discriminatory and retaliatory animus. Summary judgment should be denied.

II. Defendant Engaged in a Pattern and Practice of Retaliatory Behavior Following Plaintiff's Complaint Against Alper.

Defendant argues, in the first instance, that the lapse in time between the resolution of Plaintiff's complaint of discrimination against Alper in 1997 and Defendant's decision to reduce her salary in Spring 2002 creates too great a temporal disparity to infer causation.

Defendant is mistaken.

The record reflects that, in 1997, Plaintiff lodged a complaint against Paul Alper alleging sexual harassment and retaliation.[3] See PX002, Plaintiff Dep. at 7:14-15. Following a settlement between the parties, Defendant transferred Alper to the Civil Division, PX008, Pipitone Dep. at 10: 18-20, and Rosenthal was appointed his successor. Id. at 30:2-3. Immediately following Alper's transfer in 1998, members of the Juvenile Division circulated a letter seeking Alper's reinstatement. PX006,[4] Rosenthal Dep. at 26 – 27:16-17. That letter was circulated by Tom Gillice, PX008, Pipitone Dep. at 79:10-11, and was signed by Rosenthal, among others. PX006, Rosenthal Dep., at 28:1-12. Plaintiff was subjected to "rude and demeaning comments," PX001A, Plaintiff Aff., at p. 2, and there were attorneys in the office who "blamed Mary as being responsible for the removal of Paul Alper," PX008, Pipitone Dep. at 59:3, -- particularly Rubenstein and Gillice. Id. at 59:16-17. The record further reflects that immediately, after filing her complaint, Defendant lowered her performance evaluations; reduced her pay; denied her promotions; disciplined her; and finally transferred her to another agency.

[3] Plaintiff's complaint alleges, incorrectly, that she filed her complaint against Alper in 1998. The record subsequently reveals that her complaint was, in fact, lodged in 1997. See Ex. 2, Plaintiff Dep. at 7:14-15.

[4] PX006 is the Deposition of Dave Rosenthal. The cover sheet to Rosenthal's deposition was inadvertently omitted.

Defendant's contention that too great a temporal disparity existed between Plaintiff's protected activity and Defendant's retaliatory acts incorrectly assumes that the first retaliatory act occurred in Spring 2002. The record reflects otherwise. According to Plaintiff she was subjected to a pattern and practice of retaliation that began in 1998 and lasted until 2004. The first evidence took place June 1998 when Rosenthal conducted Plaintiff's first evaluation. Even assuming that too much time passed between Plaintiff's 1997 complaint and Rosenthal's initial evaluation of June 1998, it is settled that "Title VII and related laws do not provide a hard and fast rule that adverse employment actions must fall within a specified time frame for a retaliation claim to be actionable." Gipson v. Wells Fargo N.A., 460 F.Supp.2d 15, 25 (D.D.C. 2006). Moreover, Plaintiff's allegations rest on more than "mere temporal proximity." Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001). In this instance, "Plaintiff provides more evidence than mere temporal proximity to show possible retaliation." Gipson, 460 F.Supp.2d at 25.

1. Legal Standard

Plaintiff claims she was subjected to a retaliatory hostile work environment. Complaint at ¶ 1.

In this jurisdiction, an employee can establish a hostile work environment claim based on retaliation by showing must show that: (1) the employee is a member of a protected class; (2) the employee was subject to unwelcomed retaliatory harassment; (3) the harassment was based on the employee's protected activity; (4) the harassment created a hostile work environment; and (5) the employer failed to take reasonable care to prevent and correct any harassing behavior. Singletary v. District of Columbia, 225 F.Supp.2d 43, 62 (D.D.C. 2002) affirmed in part,

reversed in part and remanded by Singletary v. District of Columbia, 351 F.3d 519 (D.C. Cir. 2003). Plaintiff has met that burden.

2. Defendant Subjected Plaintiff to Performance Evaluation That Did Not Accurately Reflect Her Performance and Resulted in a Loss in Pay.

Plaintiff asserts that, immediately following the filing of her complaint against Alper, Rosenthal subjected her to progressively poorer evaluations that were not reflective of her accomplishments and resulted in a reduction in pay. She maintains that these continuing violations along with other acts constituted a retaliatory hostile work environment.

The evidence supports her allegations.

In June 1998, Rosenthal, in his new capacity as Division Chief, conducted his first evaluation of Plaintiff for her performance beginning April 1997 and ending March 1998. PX00 4, p. 423-426. Rosenthal gave Plaintiff an overall evaluation of "Excellent." The highest rating at the time was "Outstanding." PX004, Bates 423-26. Plaintiff protested her rating; Rosenthal justified his refusal to give a higher evaluation on the grounds that Plaintiff's "overall adjudication rate, while excellent, was not outstanding" and while her "trial record was commendable," she only tried 14 cases." PX00, 4, p. 424. In the body of the evaluation, however, Rosenthal notes that Plaintiff resolved 192 cases and had a conviction rate of 93%. Id.

Plaintiff complained about her reduced evaluation to Alper who had not yet been transferred from the Juvenile division. She recalls specifically asking Alper whether her failure to achieve an outstanding rating was related to her complaint. PX002, Plaintiff Dep. at 19:9-19. Alper responded "that is what it was." Id. According to Plaintiff, Alper "told me right out he knocked me down in my evaluation and it would go – from outstanding to satisfactory and said right out that it was because of my complaint against him." PX002, Plaintiff Dep. at 23:4-8.

For the period ranging from April 1, 1998 to September 30, 1999, Rosenthal gave Plaintiff two ratings of "substantially exceeds expectations" and two "meets expectations." PX004, p. 323. In the evaluation, Rosenthal criticized Plaintiff's writing ability and noted that she "shies away from filing pleadings." PX004, p. 325; PX002, Plaintiff Dep. at 209:1-3. Plaintiff took issue with the accuracy of Rosenthal's characterization, given that she never challenged an order to show cause without filing a written submission, PX002, Plaintiffs Dep. at 210:16-22, and consistently received "outstanding" evaluations from Mike Cobb (former Section Chief) and Paul Alper for her filings. PX002, Plaintiff's Dep. at 212:9-15.

For the period beginning October 1, 1999 ending September 30, 2000, Rosenthal rated Plaintiff's performance with two "meets expectations" and four "exceeds expectations." PX004, p. 76.

For the period beginning October 1, 2000 to August 31, 2001, Rosenthal again rated Plaintiff with four "exceeds expectation" and two "meets expectation." PX004, p. 710. This time, however, an OCC Evaluation Panel reduced the evaluation on the grounds that Rosenthal failed adequately to support three of his ratings as required by agency policy. PX004, p. 718. The Panel remanded the evaluation to Rosenthal for "more explicit justification" "examples," and a description of Plaintiff's "quality and quantity of work." PX004, p. 718. Plaintiff appealed the reduction in evaluation on February 4, 2002; the following day, Rosenthal formally requested a change in rating. Rosenthal did not, however, comply with the Panel's request and did not supply "more explicit justification"; provide additional "examples; or describe "the quality and quantity of Plaintiff's work." Rather, he simply attached a copy of Plaintiff's letter. As a result, Corporation Counsel Robert Rigsby granted Plaintiff's appeal in part and denied it in part and Plaintiff receiving a reduced overall rating and a commensurate reduction in salary.

Plaintiff obscures these facts, stating only that "Plaintiff's performance for fiscal year 2001 was rated by another supervisor as "meets expectations." The fact remains that it was Rosenthal's failure to supply the necessary level of detail, in derogation of agency policy governing evaluations, that resulted in the Panel's initial decision to lower two of Plaintiff's ratings. And on appeal, it was Rosenthal's failure again to comply with this policy, even when expressly directed to do so by the Panel that resulted in the Corporation Counsel's refusal to fully grant Plaintiff's appeal. A reasonable jury could find his deviations from policy and directives to be evidence of a retaliatory animus.

Indeed, the problems inherent in Rosenthal's 2000-2001 evaluation of Plaintiff were not only acknowledged by senior members of OCC, it compelled them to intercede on her behalf.

The record reveals that, at one point, Interim Corporation Counsel Arabella Teal agreed to intervene so Plaintiff would receive a raise in pay. PX001A, Plaintiff Aff. At 5, 10. Similarly, Senior Deputy Corporation Counsel Sharon Styles-Anderson conceded that "Dave [Rosenthal] had something to do with the negative performance evaluation. . . . I remember having a conversation at some point with Dave about the fact that Mary should have received a higher rating than what she received and their not evaluating her appropriately." Styles-Anderson Dep. at 19.

For the period beginning September 1, 2001 and ending August 31, 2002, Rosenthal and Gillice evaluated Plaintiff with three "exceeds expectations"; two "meets expectations"; and one "needs improvement." See PX004, p. 272. Plaintiff first received a copy of the evaluation on May 5, 2003. On May 12, 2003, Plaintiff challenged her evaluation through her union representative, Steven Anderson. PX002, Plaintiff Dep. at 142. In his memorandum, Mr. Anderson took issue both with the substantive findings as well as the fact that Plaintiff did not

received an interim evaluation as required by the Legal Services Act, effectively stripping her of the ability to respond to any perceived concerns. In addition, Plaintiff's evaluation was drafted both by Rosenthal and, for the first time since he assumed the position of Acting Trial Supervisor in 1998, by Gillice whose strained relationship with Plaintiff following the transfer of Alper is a matter of record.

On November 18, 2003, Rosenthal and Rubenstein rated Plaintiff with two "exceeds expectations"; two "meets expectations"; and two "needs improvement" for the period beginning September 1, 2002 and ending August 31, 2003. PX004, p. 1631. Plaintiff's overall rating for that period was "needs improvement." Particularly telling about this evaluation is the detail Rosenthal included to justify his lower ratings and the brevity with which he discussed Plaintiff's strengths.

As stated above, for each category of performance, supervisors are directed to support their rating by addressing each of the criteria within those categories. For those areas where Rosenthal gave Plaintiff a rating of "exceeds expectations," he supported his decision with a brief narrative which fails to address each of the criteria. (This is exactly the justification given by the Evaluation Panel and Corporation Counsel Rigsby for lowering Plaintiff's 2002 evaluation.) For those categories in which Plaintiff received a "needs improvement" rating, Rosenthal described Plaintiff's shortcomings in painstaking detail. A jury can infer that Rosenthal's failure to uniformly describe each of Plaintiff's performance criteria betrayed a retaliatory animus.

Beyond this, Rubenstein "insisted" on evaluating Plaintiff for the 2002-2003 time frame. PX002, Plaintiff's Dep. at 277:5-6. This constituted a violation of policy since Plaintiff was transferred to the Department of Mental Health (DMH) during the evaluation period. Even

Dave Norman, Plaintiff's supervisor at DMH, protested the evaluation and relying on D.C. Personnel Regulations, informed Rubenstein that he was authorized only to provide an "advisory opinion" and but it was Norman's responsibility to evaluate Plaintiff. PX002, Plaintiff's Dep. at 276-277:22-7. Rubenstein, "determine[d] that he was going to do it" ignored Norman's request and gave Plaintiff a reduced evaluation. Once again, Plaintiff's lowered rating automatically reduced her pay. Id.

In sum, a jury can reasonably infer that immediately following her complaint against Section Chief Paul Alper, Plaintiff was subjected to progressively poorer performance evaluations resulting in reductions in pay. That these evaluations were improperly motivated may be inferred from the animosity displayed by attorneys in the Juvenile Division toward Plaintiff following Alper's departure; from Alper's admission, and from Rosenthal and Rubenstein's non-conformity with agency and District policy.

Defendant's conduct is perhaps best captured in the testimony of the Senior Deputy Corporation Counsel who characterized Defendant's evaluations as "derogatory" and "inappropriate." PX007, Styles-Anderson dep. at 11. According to Styles-Anderson, Plaintiff

> was in a position to receive the bonuses that were available to the employees that got exceeds as opposed to meets, and based on what she was doing with respect to the whole family court transition, I felt that she was deserving of a higher evaluation because of the type of work that she was doing, and because, again, they were looking at things, in my view, from a more purely prosecutorial function as opposed to the direction that I felt that the administration was moving, I did not support them.

Id. at 11-12.

3 Defendant Repeatedly Failed to Promote Plaintiff in Favor of Lesser-Qualified Employees.

In addition to receiving negative evaluations and reductions in pay, Plaintiff was repeatedly denied promotions to supervisory positions.

Tom Gillice was hired by the Juvenile Division in 1996. In 1998, after only two years with the agency, Rosenthal appointed Gillice without competition to the position of Acting Trial Supervisor, PX008, Pipitone Dep. at 71, where he remained until May 2002, when the position was assumed by Rubenstein. PX005, Rubenstein Dep. at 32. At the time of his appointment, Gillice was responsible for only 11 cases. PX008, Pipitone Dep. at 71:14-17. Ms. Pipitone was responsible for 150 and Plaintiff even more. Id. According to Pipitone, Plaintiff

> was always trying cases. . . . she would have files everywhere and you would think "Oh my God how is she ever going to have her facts together to try a case." And then she would try a case and it would be zip, zip, zip, conviction, conviction. And that's how Mary tried cases, she got it all done. She got the right witnesses and got them convicted.

Pipitone Dep. at 57:10-17.

As stated, Rubenstein was hired by the Juvenile Division on January 1, 1998. PX005, Rubenstein Dep. at 23:2. In Spring 2002, he was appointed to the position of Acting Trial Supervisor and, in September 2002, to the position of Acting Section Chief. See PX005, Rubenstein Dep. at 11 and 32. Rubenstein's qualifications and experience compared to those of Plaintiff are a matter of record. The issues surrounding the latter promotion are amply described above and will not be repeated here.

During the Spring of 2002, Rosenthal assumed the position of Acting Deputy Corporation Counsel, PX001A, Plaintiff Aff., at 8; Gillice was appointed Acting Section Chief of the Juvenile Section, id.; and Rubenstein became Acting Trial Supervisor. PX005, Rubenstein Dep at 32:11. None of these positions were advertised. Id.

Eric Gallun joined the Juvenile Division on September 28, 1998. PX003A, p. 678. Although "not a supervisor," at one point began "organizing training and doling out assignments to his colleagues." PX00 9, p. 1880. These assignments including the training of a new attorney. Id. When he failed to include Plaintiff in any of the training exercises, Plaintiff informed Gallun

that she "would be happy to talk to Rachel about disposition and post-disposition matters – matters uniquely within her expertise. Id. Rubenstein responded stating: "Dave is absolutely intent upon doing that session. . . . But Mary, maybe you can do one on meeting etiquette??" Id. Rubenstein's response was not only insulting, but his ratification of Gallun's right to assign responsibilities prompted Interim Corporation Counsel Arabella Teal to confront Rubenstein, questioning "would you please explain to me why Eric, who is not a supervisor, is organizing training and doling out assignments to his colleagues?" Id.

Ms. Pipitone, an eight-year veteran in the Juvenile Division, noted that "almost everybody [] was a supervisor. Big on supervisors. They seem to find a need for one for every other thing that someone did." PX008, Pipitone Dep.at 25. Plaintiff proved the exception to that rule. A reasonable jury could readily find her consistent exclusion indicative of a retaliatory animus.

4. Defendant Stripped Plaintiff of Authority Without Cause.

In 2002, YSA colleague David Cumber contacted Plaintiff one evening concerning a pre-commitment case that involved YSA. The next day, Rosenthal told her "you're not allowed to take calls from defense attorneys, and you are not allowed to take calls at nighttime." PX002, Plaintiff Dep. at 137:15-18. Plaintiff reported Rosenthal's statement to Senior Deputy Corporation Counsel Styles-Anderson, who confronted Rosenthal, stating: "the judges, the lawyers, and the advocates, everybody knows Mary. Everybody knows her phone number, and everybody calls Mary to get things done. You cannot tell her not to take phone calls." PX002, Plaintiff Dep. at 138:5-9.

The Department of Mental Health was one of the agencies involved in the MAPT. Rosenthal tried to prevent her from contacting DMH, prompting Styles-Anderson to intervene

and state: “Yes, she can go. She’s my designee. She’s the agency representative.” PX002, Plaintiff Dep. at 140:4-5.

In late May or early June, 2002, Rosenthal informed Plaintiff she was no longer to attend MAPT meetings or be a part of the MAPT process, requiring Styles-Anderson immediately to intervene and overrule his order. PX001A, Plaintiff’s Aff. at 7; PX002, Plaintiff Dep. at 34:16-19.

During the Spring of 2002, Judges from the Superior Court began requesting Plaintiff’s involvement in complex cases. PX001A, Plaintiff Aff., at 7. Rosenthal, apparently angered by these inquiries, informed Plaintiff that he “runs the office and the judges are not to request particular involvement of any ACC.” PX001A, Plaintiff’s Aff. At 7. He directed her to ignore future requests. Id.

In June 2002, Rosenthal begins challenging Plaintiff’s involvement in MAPT meetings designed to plan for children with exceptional needs/issues. PX001A, Plaintiff Aff. at 7. That same month, the Department of Health asked Plaintiff to attend a Systems of Care Conference sponsored by Georgetown University. Rosenthal denied Plaintiff’s request to attend. Again, Styles-Anderson intervened, overruled Rosenthal’s denial; and ordered Rosenthal to put through the necessary paperwork allowing Plaintiff to attend the conference. PX001A, Plaintiff Aff. at 8. Again, in June 2002, Rosenthal ordered Plaintiff not to attend Multi-Agency Planning Team meetings or to be involved in that line of work. PX001A, Plaintiff Aff. at 8. Styles-Anderson overruled Rosenthal’s directive and ordered that Plaintiff continue to represent the agency at these meetings. Es. 1A, Plaintiff Aff. at 8.

Cumulatively, these actions prompted then-Deputy Corporation Counsel to state: "You've got to get out of here. They're gunning for you. They are out to get you." PX002, Plaintiff Dep. At 133:20-21.

5. Plaintiff's Reassignment Constituted an Adverse Action.

On February 25, 2003, Plaintiff filed a complaint with the Office of Human Rights alleging discrimination and retaliation. See PX001. On May 21, 2003, OCC informed her that she was reassigned to an attorney-advisor position a**t** the Department of Mental Health. Defendant's Motion, Ex 10, p. 269-271. Plaintiff was told she would not be working on "any matters involving youth who are involved in the District's juvenile delinquency system in any fashion" including programs administrated by the "police, OCC, Court Social Services or other juvenile justice agencies." Id. OCC further directed Plaintiff that she would not be assigned to work on any matters "directly or indirectly involving OCC's Juvenile Section or the Youth Services Administration ('YSA') of the Department of Human Services ('DHS')." Id.

Plaintiff was further directed to immediately empty her office of all personal belongings, return her laptop, cell phone and keys; relinquish all OCC access cards; .and, within two and one half hours prepare a written transfer memorandum of her outstanding cases and update her calendar. Id.

Defendant maintains that Plaintiff's allegation of retaliation based on this reassignment must be dismissed because "Plaintiff has not shown that she suffered any adverse action as a result of the transfer" Defendant's Motion, at 18-19, and "has not demonstrated that because of her lack of experience in the new position, her performance changed caused her to receive less pay or some other tangible injury." Id. at 19. Plaintiff cites extensively to the D.C. Circuit's opinion in Brown v. Brady, 199 F.3d 446 (D.C. Cir. 1999) in support of the proposition that

absent a diminution in pay or benefits or "some other materially adverse consequences affecting the terms, conditions, or privileges of her employment," Plaintiff's lateral transfer did not constitute an actionable injury. Id. at 457.

Defendant's argument is without merit.

Defendant's focus solely on Plaintiff's pay and benefits reflects an overly stringent interpretation of the law governing adverse actions. The Supreme Court has expressly defined a "tangible employment action" as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998). (Emphasis added).

The proposition that a reassignment with different responsibilities could constitute an adverse employment action was reaffirmed several months ago by the D.C. Circuit in Czekalski v. Peters, 475 F.3d 360 (D.C. Cir. 2007). There, the Court expressly rejected an argument identical to that pressed by Defendant here, namely that a reassignment did not constitute an adverse action where the plaintiff did not experience any loss of salary, grade level, or benefits. Id. at 364. The Court held that

> Although the government is "correct in considering this case as one of lateral transfer," it errs in its implied premise that a lateral transfer cannot constitute an adverse action. Stewart v. Ashcroft, 352 F.3d 422, 426 (D.C. Cir.2003). To the contrary, "there *are* lateral transfers that could be considered adverse employment actions." Id. "[W]ithdrawing an employee's supervisory duties," for example, "constitutes an adverse employment action." Id.; see Burke v. Gould, 286 F.3d 513, 522 (D.C. Cir.2002). So, too, does "reassignment with significantly different responsibilities." Forkkio v. Powell, 306 F.3d 1127, 1131 (D.C. Cir. 2002) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998)).

Id.

The holding in Czekalski is of compelling application. OCC's letter of May 21, 2003 made abundantly clear that Plaintiff would neither be working on the very issues she had been working on since 1989 nor interfacing with agencies with whom she had acted as a liaison since 1998, in other words, a "reassignment with significantly different responsibilities."

In short, Defendant reassigned Plaintiff to a position which, by its own admission, was one with "significantly different responsibilities," thereby constituted a "tangible employment action." A reasonable jury could conclude, on this basis, that Plaintiff's reassignment constituted an adverse employment action pursuant to Title VII.

6. Plaintiff Exhausted Her Administrative Remedies

Defendant next advances the argument that Plaintiff failed to exhaust her administrative remedies with respect to allegations ¶¶ 12-17 of her Complaint. Motion at 19. Those allegations focus on events that took place subsequent to OCC's issuance of the May 21, 2003 letter of reassignment, including: OCC's demand that, within two and one half hours, Plaintiff return her cell phone, laptop, keys and pass and update all case files and submit a written summation of all outstanding cases (Complaint, at ¶ 12); Defendant denied her access to any government computer preventing her from communicating with her new supervisor for two t three weeks (Complaint, at ¶¶ 13 and 14); Defendant informed her she would not be permitted to return to her position of record (Complaint, at ¶ 15); after she was transferred OCC attempted to demote her by giving her a poor evaluation in violation of D.C. personnel regulations and in defiance of her new supervisor's protests (Complaint, at ¶¶ 16 and 17). According to Defendant, these claims constitute "discrete allegations of discriminatory acts" which Plaintiff was obliged to explicitly raise in her 2003 Complaint to the Office of Human Rights. Defendant argues that Plaintiff's

failure to do so within the statutory time limits precludes them being raised here in the first instance. Motion, at p. 20.

In support of its argument, Defendant relies on the Supreme Court decision in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), holding that "[d]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act." Id. at 113. Defendant's citation is correct. Its interpretation of the holding, however, is not.

The Morgan Court went on to clarify that, "[h]ostile environment claims are different in kind from discrete acts" because "[t]heir very nature involves repeated conduct." Id. at 115 (emphasis added). Such a claim, the Court said, "is comprised of a series of separate acts that collectively constitute one unlawful employment practice." Id. at 116 (internal quotation marks omitted).

Plaintiff has alleged that the agency's continuing violations created a hostile work environment. Plaintiff asserts that all the adverse actions contained in Paragraphs 12-17 of her complaint are in reaction to her protected activity and, perforce, are connected to one another. See Morgan, 536 U.S. at 117 ("[a] hostile work environment is composed of a series of separate acts that collectively constitute one unlawful employment practice"). Claims of retaliation are particularly well-suited to the assertion of the continuing violation theory. Caliendo v. Bentsen, 881 F.Supp. 44, 47 (D.D.C. 1995). See Kim v. Nash Finch Co.,123 F.3d 1046, 1060 (8th Cir. 1997) (noting that "we need not decide in the present case whether each act in itself constituted actionable 'adverse employment action' because Kim essentially claimed that [defendant] had

systematically retaliated against him, that is, that all the acts were taken in response to his filing the employment discrimination charge and were thus connected to one another").

Beyond this, it is "generally accepted that the exhaustion of administrative remedies doctrine does not apply to claims based on alleged retaliation," Baker v. Library of Congress, 260 F.Supp.2d 59, 66 n. 4 (D.D.C. 2003), provided the Title VII lawsuit following the EEOC charge is limited in scope to claims that are "like or reasonably related to the allegations of the charge and growing out of such allegations." Park v. Howard Univ., 71 F.3d 904, 907 (D.C. Cir. 1995) (citations omitted).

The allegations set out in Paragraphs 12-17 of the Complaint do not represent "discrete discriminatory acts" requiring Plaintiff to file separate administrative claims. They were part of a continuum of repeated violations that comprised Plaintiff's claim of a retaliatory hostile work environment. These allegations should stand.

CONCLUSION

Defendant has failed to meet the standards necessary for summary judgment. Plaintiff has offered evidence of alleged statements by agency officials; evaluations unsupported by the record; inadequately explained refusals to promote; unwarranted disciplinary actions; stripping of responsibilities; and transfer to a position with significantly different responsibilities. Viewing the record in the light most favorable to Plaintiff, genuine issues of material fact exist regarding the role gender and retaliation played in these decisions. One cannot conclude at this juncture that a jury could not find these acts motivated either by discriminatory animus on the basis of gender; or a pattern of retaliation sufficiently severe, pervasive, and abusive to create an hostile working environment. See Pantazes v. Jackson, 366 F.Supp.2d 57, 71-72 (D.D.C. 2005); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

For the foregoing reasons, Plaintiff respectfully requests that Defendant's motion for summary judgment be denied.

Dated: August 21, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Curt S. Hansen, Esq., certify that on this 21st day of August, 2007, I served Kevin J. Tuner, Esq., Office of the Attorney General of the District of Columbia, 441 4th Street, N.W., Suite 1060 North, Washington, DC 20001 electronically via Pacer Case Service.

/s/ Curt S. Hansen
Curt S. Hansen