IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
- against -	)	**10 Civ. 01660 (RJL)**
FOX NEWS NETWORK, LLC,	)	
Defendant.	)	

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Fox News Network, LLC ("Fox News") moves to dismiss the complaint on the grounds that it is devoid of factual allegations sufficient to state a claim upon which relief can be granted. Alternatively, pursuant to Fed. R. Civ. P. 56, Fox News moves for summary judgment on the grounds that there is no genuine issue as to any material fact, and it is entitled to judgment as a matter of law.

Accordingly, and for the reasons set forth in detail in its accompanying memorandum of law, Fox News respectfully requests that the complaint be dismissed with prejudice in its entirety.

Dated: November 4, 2010

Respectfully submitted,

EPSTEIN BECKER & GREEN, P.C.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, - against - FOX NEWS NETWORK, LLC, Defendant.	)	10 Civ. 01660 (RJL)

DEFENDANT FOX NEWS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The U.S. Equal Employment Opportunity Commission ("EEOC") has filed a frivolous lawsuit against the Fox News Network ("Fox News").

More than two years ago, Catherine Herridge, a long-time, highly-compensated, on-air reporter employed at Fox News' Bureau in Washington, D.C. ("the D.C. Bureau"), filed a charge with the EEOC, alleging that Fox News was discriminating against her because of her sex (female) and age (early 40s) and was retaliating against her in several ways because she had complained internally about the alleged discrimination. Notwithstanding the pendency of her EEOC charge, on June 18, 2009, Fox News and Ms. Herridge completed their negotiations and signed a three-year renewal employment agreement ("Agreement"), which increased her $460,000 annual salary to $495,000 in year 1, $530,000 in year 2, and $570,000 in year 3. The Agreement was signed after Ms. Herridge abandoned her wholly unrealistic salary demands, which at one point reached $900,000 for year 1 of the Agreement.

On March 31, 2010, more than nine months after the Agreement was signed, the EEOC issued its Determination concerning Ms. Herridge's discrimination and retaliation charges. The EEOC found insufficient evidence of sex or age discrimination against Ms. Herridge and insufficient evidence concerning most of her retaliation claims. It stated, however, that Fox News had proposed during negotiations that certain "retaliatory" language be included in the Agreement, which, although *not* contained in the final Agreement, allegedly contributed to a delay in contract negotiations and resulted in harm to Ms. Herridge because she was purportedly "denied full wages." When Fox News asked the EEOC to reconsider its Determination because, *inter alia*, Ms. Herridge's salary increase was, in fact, paid *retroactively*, the EEOC declined to reconsider, but cavalierly stated that it recognized that the salary increase had been retroactive.

The "anti-retaliation provision [in Title VII of the Civil Rights Act] protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006), *see Geleta v. Fenty*, 685 F. Supp.2d 99, 102 (D.D.C. 2010) (quoting *Burlington*, 548 U.S. at 67) (Leon, J.). Here, Ms. Herridge did not experience any injury or harm. Instead, she received a retroactive $35,000 annual salary increase, which escalated to a $110,000 increase by year 3 of the Agreement.

For this reason, and as addressed in detail in this memorandum of law, the EEOC has not stated a plausible claim upon which relief can be granted and cannot even establish a *prima facie* case of retaliation on Ms. Herridge's behalf. Fox News respectfully requests that the Court dismiss the EEOC's complaint as a matter of law pursuant to Fed. R. Civ. P. 12(b)(6) or, alternatively, grant summary judgment on Fox News' behalf as a matter of law pursuant to Fed. R. Civ. P. 56.

STATEMENT OF FACTS

From November 2006 to March 2008, Catherine Herridge, a well-known, on-air reporter employed by Fox News, periodically complained internally that she was being discriminated against because of her sex and age, particularly with respect to Fox News' decision not to allow her to continue to function as a weekend on-air anchor/weekday on-air reporter and reassigning her to her former full-time position as an on-air reporter. (Complaint ¶ 10; Brandi Aff. Ex. A)[1] On March 17, 2008, after a lengthy in-house investigation, Ms. Dianne Brandi, Fox News' Senior Vice President for Legal and Business Affairs (who has since been promoted to Executive Vice President), determined that Ms. Herridge's claims lacked merit. (Complaint ¶¶ 10-11;

[1] For the convenience of the Court, the Complaint is attached as Exhibit A to the accompanying affidavit of Dianne Brandi, Esq.

Brandi Aff. ¶ 1) Ms. Herridge disputed the findings, and questioned whether the investigation was impartial and whether its outcome was predetermined. (Complaint ¶ 11)

At the time Ms. Herridge disputed the findings, she was employed pursuant to a written three-year Agreement and paid an annual salary of $460,000 in the final year of the Agreement. (Complaint ¶ 12 at 2; Brandi Aff. Ex. B) Thereafter, on August 6, 2008, Dianne Brandi forwarded a proposed three-year renewal Agreement to Ms. Herridge's agent, Henry Reisch of the William Morris Agency, for his and his client's consideration. (Complaint ¶ 12; Brandi Aff. Ex. C) The proposed Agreement called for increased annual salaries of $495,000 in year 1, $530,000 in year 2, and $570,000 in year 3. (Complaint ¶¶ 12, 14; Brandi Aff. Ex. C at 2) The initial proposed Agreement also contained the following language, proposed in an effort to "clear the air" going forward, which the EEOC alleges in paragraphs 12 and 13 of its Complaint was retaliatory and "an adverse action" against Ms. Herridge:

> Performer agrees that she will not serve as an anchor/co-anchor, or an occasional anchor/co-anchor during the Term hereof, unless Fox, in its sole discretion, decides otherwise. Both Performer and Fox acknowledge that Performer has raised allegations of discrimination in the past concerning her non-assignment to anchor positions and concerning other matters, and that Fox has investigated Performer's allegations. Performer and Fox also acknowledge that Fox has determined that discrimination did not occur and that Performer does not agree with Fox's determination.

(Complaint ¶¶ 12-13; Brandi Aff. Ex. C at 1) (Emphasis added)

On August 15, 2008, Ms. Herridge objected to the above language and the proposed salary increases, among other things, and refused to sign the three-year Agreement. (Complaint ¶ 13; Brandi Aff. Ex. D) She proposed deleting the above language and entering into a five-year Agreement with the following annual salaries: (1) $621,000 for year 1, (2) $714,150 for year 2, (3) 821,272 for year 3, (4) $903,399 for year 4, and (5) $993,739 for year 5. (Brandi Aff. Ex. D)

On September 12, 2008, after Fox News rejected her proposal and salary demands, Ms. Herridge actually increased her salary demands as follows: (1) $900,000 in year 1, (2) $925,000 in year 2, (3) $950,000 in year 3, (4) $975,000 in year 4, and (5) $1,000,000 in year 5. (Brandi Aff. Ex. E) On September 17, 2008, Fox News responded and rejected her escalating salary demands, advising that she was already the highest-paid reporter in the D.C. Bureau, and it was not helpful for negotiation purposes to demand a 95% salary increase in year 1 of a new Agreement and to increase her prior August 15, 2008 salary demand by $279,000. (Brandi Aff. Ex. F)

Unbeknownst to Fox News, a day earlier, on September 16, 2008, Ms. Herridge filed a charge with the EEOC alleging sex discrimination, age discrimination, equal pay discrimination, and retaliation. (Complaint ¶¶ 8, 14; Brandi Aff. Ex. G) Specifically, she asserted that: (1) her weekend anchor/part-time reporter position was converted into a full-time reporter position because of her sex and age, (2) her internal discrimination complaint was not properly investigated, (3) she was retaliated against in various respects for complaining, and (4) other employees were discriminated against as well. (Brandi Aff. Ex. G)

In November 2008, contract negotiations stalled. (Complaint ¶ 13) On February 5, 2009, Mr. Reisch, Ms. Herridge's agent, asked Dianne Brandi to respond to his client's recent proposal. (Brandi Aff. Ex. H) On February 13, 2009, Ms. Brandi replied that he and Ms. Herridge had not actually proposed anything at all recently, as they still had not responded to Fox News' last counter-proposal made almost four months earlier. (Brandi Aff. Ex. I) On March 5, 2009, Mr. Reisch made a new proposal and did not challenge Ms. Brandi's statement that he and Ms. Herridge had not made a proposal in almost four months. (Brandi Aff. Ex. J)

On June 18, 2009, Fox News and Ms. Herridge finally entered into a new three-year Agreement. (Complaint ¶ 14) The Agreement did not contain the language to which

Ms. Herridge had objected and set her annual salary at $495,000 for year 1, $530,000 for year 2, and $570,000 for year 3, the same substantial increases that Fox News originally proposed on August 6, 2008. (Complaint ¶ 14; Brandi Aff. Ex. K at 2) Ms. Herridge's salary increase to $495,000 in year 1 of the Agreement *was retroactive*. (Brandi Aff. Ex. J at 2)

On March 31, 2010 – 1½ years after Ms. Herridge filed her EEOC charge and more than nine months after she and Fox News entered into their new Agreement – the EEOC issued its Determination concerning the claims set forth in Ms. Herridge's EEOC charge. (Brandi Aff. Ex. L) The EEOC did not find merit regarding any of her discrimination claims and the majority of her retaliation claims, stating as follows: "With respect to Charging Party's allegations that she was demoted, denied equal wages, denied assignments and denied promotion based on her sex, age, or in retaliation, or that a class of individuals was discriminatorily denied promotions, there is insufficient evidence to establish a violation of the statutes as to these allegations." (*Id.*)

As to other alleged retaliatory conduct, however, the EEOC inexplicably stated: "Respondent included new language in Charging Party's proposed employment contract that referenced Charging Party's allegations of discrimination and contributed to the delay in contract negotiations, which resulted in Charging Party working without an employment contract and being denied full wages." (Brandi Aff. Ex. L) After issuing its Determination, however, the EEOC conceded that Ms. Herridge's salary increase was paid retroactively. (*Id.*, Ex. M)[2]

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[2] The EEOC Determination also stated that "the evidence shows that Charging Party complained of discrimination on several occasions, and within close proximity of one of those complaints, the Respondent disseminated a company-wide email discouraging employee complaints." The EEOC references this e-mail in the Complaint. (Complaint ¶ 11) Ms. Herridge, however, did not claim in her EEOC charge that the e-mail was retaliatory; her EEOC charge does not even mention the e-mail; nor does the e-mail refer to Ms. Herridge in any way. (Brandi Aff. ¶ 3 and Ex. G) Moreover, during its investigation, the EEOC failed to advise Fox News that the e-mail was part of its investigation. (Brandi Aff. ¶ 3 and Ex. L) *Fox News learned that the e-mail was one of the subjects of the investigation only upon reading the EEOC's Determination.* (*Id.*)

Ms. Herridge remains employed by Fox News as a full-time reporter at the D.C. Bureau and is paid an annual salary of $530,000. (Complaint ¶ 14; Brandi Aff. ¶ 2 and Ex. K at 2) The EEOC contends, however, that Ms. Herridge was somehow materially adversely affected by Fox News' proposed language during negotiations and before the Agreement was signed because, throughout negotiations, she was in constant fear of being discharged and losing her livelihood and employment benefits. (Complaint ¶ 15) The EEOC does not allege in its complaint that Fox News ever threatened Ms. Herridge with termination during negotiations, or that she was not paid during the negotiations period, or that she experienced any financial harm. (*See* Complaint generally) Nor does the EEOC allege that the proposed language was ultimately included in the Agreement. (Complaint ¶ 14)

APPLICABLE LEGAL STANDARDS FOR MOTIONS TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT

Fox News seeks the dismissal of the EEOC's complaint as a matter of law pursuant to Fed. R. Civ. P. 12(b)(6) or, alternatively, pursuant to Fed. R. Civ. P. 56. The relevant legal standards applicable to each rule are addressed in turn.

A. Applicable Legal Standards Under Rule 12(b)(6)

Dismissal of a complaint is appropriate when the plaintiff has "fail[ed] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the complaint must set forth "sufficient factual material," which if accepted as true, states a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949 (2009). Although detailed factual allegations are unnecessary to survive a Rule 12(b)(6) motion, a complaint must set forth "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Similarly, a court need not consider a complaint's legal conclusions couched in the form of factual

allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *McManus v. District of Columbia*, 530 F. Supp.2d 46, 64 (D.D.C. 2007).

When evaluating a Rule 12(b)(6) motion, a court is limited to considering "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint, and matters of which [it] may take judicial notice." *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997); *Schmidt v. Shah*, 696 F. Supp.2d 44, 58 (D.D.C. 2010). "A court can consider materials outside the complaint without converting the motion to one for summary judgment when the documents are incorporated into the complaint and are central to the plaintiff's claim." *Cole v. Powell*, 605 F. Supp.2d 20, 26 (D.D.C. 2009) (Leon, J.). Thus, when "a document is referred to in the complaint and is central to the plaintiff's claim ..., the defendant may submit an authentic copy to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment." *See* 11 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 56.30[4] (3d. ed. 2010).

Here, as to Fox News' motion to dismiss, the Court can readily rely on most of the documents attached to Dianne Brandi's Affidavit including the February 21, 2006 Agreement (Ex. B), Fox News' August 6, 2008 proposed Agreement (Ex. C), Ms. Herridge's EEOC charge (Ex. G), the Agreement that is currently in effect (Ex. K), the EEOC's Determination concerning Ms. Herridge's discrimination and retaliation claims (Ex. L), and the EEOC's denial of Fox News' request for reconsideration (Ex. M). All are incorporated into the complaint, central to the claims presented in the complaint, or matters of which judicial notice can be taken. *See St. Francis Xavier Parochial School*, 117 F.3d at 624; *Cole*, 605 F.Supp.2d at 26. If this Court also opts to rely on the other documents attached to the Brandi Affidavit as Exs. D-F and H-J, which

are not incorporated into the complaint, but provide the 2008-09 negotiations history between Ms. Herridge and Fox News, it can readily convert Fox News' motion to dismiss into a summary judgment motion. *See Ahuja v. Detica Inc.*, __ F. Supp.2d __, 2010 WL 3833956, at *4 (D.D.C. Sept. 30, 2010); *Martin v. Locke*, 659 F. Supp.2d 140, 144-45 (D.D.C. 2009) (Leon, J.).

B. Applicable Legal Standards Under Rule 56

A court, in its sound discretion, may convert a motion to dismiss into a motion for summary judgment. *Hollis v. U.S. Dept. of the Army*, 856 F.2d 1541, 1543 (D.C. Cir. 1988); *see* 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366 at 159 (3d ed. 2004). Courts should be mindful, however, that "no useful purpose can be served by [converting a motion to dismiss to one for summary judgment] where it is clear that the dispositive facts will remain undisputed and unchanged." *Hollis*, 856 F.2d at 1544; *Ahula*, 2010 WL 3833956, at *4.

Summary judgment should be granted where the record demonstrates that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A party opposing summary judgment "may not rest upon the mere allegations ... of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing Fed. R. Civ. P. 56(e)). A dispute about a material fact is not genuine unless "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

As next shown, under either Rule 12(b)(6) or Rule 56, the EEOC's complaint should be dismissed in its entirety with prejudice.

ARGUMENT

THE COMPLAINT SHOULD BE DISMISSED AS A MATTER OF LAW BECAUSE THE EEOC HAS NOT STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND CANNOT ESTABLISH A *PRIMA FACIE* CASE OF RETALIATION.

To establish a *prima facie* case of retaliation, an employee must show that she engaged in a statutorily protected activity; she suffered a "materially adverse action" by her employer; and a causal link connects the two. *Gaujacq v. EDF, Inc.*, 601 F.3d 565, 577 (D.C. Cir. 2010); *Martin*, 659 F.Supp.2d at 149. A materially adverse action is an action that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* (quoting *Burlington*, 548 U.S. at 68). Thus, not all alleged retaliation is actionable; rather, the only alleged retaliatory actions that state a claim are those that are "materially adverse" in the sense that they produce "an injury or harm" to an employee. *Burlington*, 548 U.S. at 67; *see Brown v. Mills*, 674 F. Supp.2d 182, 189 (D.D.C. 2009); *Beckford v. Geithner*, 661 F. Supp.2d 17, 22 (D.D.C. 2009). Unless the injury or harm pleaded is sufficient to rise to the level of a materially adverse action, the retaliation claim is not even plausible on its face and should be dismissed as a matter of law. *See Iqbal*, 129 S.Ct. at 1949; *Burlington*, 548 U.S. at 68-69.

Moreover, in assessing whether the alleged injury or harm could well dissuade an employee from bringing a discrimination charge, the Supreme Court emphasized that courts should utilize a *reasonable* employee standard, and therefore an alleged injury or harm premised upon an employee's "unusual subjective feelings" is not actionable. *Burlington*, 548 U.S. at 68-69; *see Geleta*, 685 F. Supp.2d at 102. The Court also stressed that context matters. By illustration, the Court explained that a supervisor's refusal to invite an employee to lunch is immaterial and non-actionable, but excluding an employee from a weekly training lunch that

could affect his future advancement prospects might rise to the level of a materially adverse action. *Id.* at 69.

A. The Proposed Language At Issue Was Not Retaliatory On Its Face.

The EEOC alleges that Fox News retaliated against Ms. Herridge by merely proposing during negotiations that certain language be included in their Agreement, language that did not even survive the negotiation process and is not contained in the final Agreement. Notably, Fox News proposed the language before Ms. Herridge filed a charge with the EEOC. (*See* Brandi Aff. Exs. C and G) The language set forth that: (1) Ms. Herridge would not be an anchor unless Fox News decided otherwise; (2) she alleged discrimination concerning her non-assignment to an anchor position and other matters; (3) Fox News investigated her allegations and determined that discrimination did not occur; and (4) *she did not agree with Fox News' determination.* (Complaint ¶ 12; *see* Brandi Aff. Ex. C. at 1)

This proposed language was neutral, completely true, did not require Ms. Herridge to waive her allegations of discrimination at the EEOC or in court and, obviously, did not dissuade her from filing a discrimination and retaliation charge with the EEOC. The language simply memorialized what Ms. Herridge and Fox already knew -- Fox News did not intend to make her an anchor again; she alleged discrimination; Fox News had investigated and concluded that there was no discrimination; and she did not agree. *Moreover, the proposed language actually demonstrates that Fox News was ready and willing to enter into a new Agreement with Ms. Herridge notwithstanding her allegations of discrimination, which is the antithesis of retaliation.*

Nonetheless, the EEOC contends that the proposed language, standing alone, "constituted an adverse action against Herridge because it was placed in Herridge's employment contract because of her previous complaints of discrimination, was intended by Defendant to dissuade Herridge from making further complaints of employment discrimination, and would have

dissuaded a reasonable person from making further complaints of employment discrimination." (Complaint ¶ 13) Attempting to show that Ms. Herridge was injured or harmed as a consequence of the proposed language, the EEOC can only muster that she allegedly feared for her job and employment benefits during the negotiations period. (Complaint ¶ 15)

These allegations, even if taken as true, do not rise to the level of a "materially adverse action" against Ms. Herridge for two reasons. First, the language did not produce any employment injury or harm, or even threaten any employment injury or harm, of the nature that would dissuade a reasonable employee from complaining about discrimination; second, her alleged emotional distress during negotiations is not enough as a matter of law to establish a materially adverse action.

B. The Proposed Language Was Not A Materially Adverse Action. It Was Only A Proposal That Was Never Adopted, And It Did Not Result In Any Injury Or Harm To Ms. Herridge.

Assuming solely for the sake of argument that the language at issue is retaliatory, Ms. Herridge still did not suffer from any "materially adverse action" by Fox News, and thus the complaint fails to state a claim for purposes of Rule 12(b)(6) and fails to allege a *prima facie* case of retaliation for purposes of Rule 56. Fox News paid Ms. Herridge throughout the negotiations period; she received her initial $35,000 salary increase retroactively; the so-called retaliatory language was deleted in the final Agreement as part of the negotiation process; and by the Agreement's third year, Ms. Herridge's salary will have increased by $110,000. (Complaint ¶ 14; Brandi Aff. Exs. B, K and M)

Since the Supreme Court's 2006 decision in *Burlington*, the D.C. Circuit Court of Appeals has repeatedly dismissed employees' retaliation claims based on their inability to show that they suffered a materially adverse action. In *Baloch v. Kempthorne*, 550 F.3d 1191, 1198-99 (D.C. Cir. 2008), the employee claimed that after he lodged an internal discrimination

complaint, he was threatened with suspensions, one for two days and the other for 30 days, and although the suspensions were not carried out, the threats tarnished his reputation and caused him emotional distress. In affirming the summary judgment awarded by this Court, the Court of Appeals instructed that "courts have been unwilling to find adverse actions where the suspension is not actually served." *Id.* at 1199. The parallel here is clear: The language about which the EEOC complains is not contained in the final Agreement between Fox News and Ms. Herridge, and therefore an adverse action cannot be found. (*See* Complaint ¶ 14)

In *Taylor v. Solis*, 571 F.3d 1313, 1320-21 (D.C. Cir. 2009), an employee's supervisors criticized her behavior, required her to submit biweekly work status reports, declined to recommend her for a position that was not ultimately created, and lowered her performance evaluation rating in a manner that did not affect her salary or promotional potential. The Court of Appeals concluded that these actions, taken separately or as a whole, were not materially adverse because they were not substantial enough to dissuade a reasonable employee from filing a discrimination charge. Summary judgment was affirmed. *Id.* at 1321-22. Similarly, in *Porter v. Shah*, 606 F.3d 809, 817-18 (D.C. Cir. 2010), the Court of Appeals affirmed summary judgment as to an employee's retaliation claim, explaining that criticism of an employee's work performance, which did not affect his position, grade level, salary or promotional opportunities, did not rise to the level of a materially adverse action. *See also Gaujacq*, 601 F.3d at 577-78 (oral statement threatening employee's job was, in context, not a materially adverse action because a reasonable employee would have perceived it only as an expression of exasperation).

Adhering to *Burlington* and the above Court of Appeals decisions, this Court has dismissed retaliation claims pursuant to Rule 12(b)(6) or 56 on multiple occasions. In *Cole*, 605 F. Supp.2d at 26, Judge Leon granted the employer's Rule 12(b)(b) motion, holding that a

materially adverse action did not arise by the employer's demand that the employee submit a physician's note concerning any unscheduled future absences and, accordingly, the plaintiff had not stated an actionable retaliation claim. In *Geleta*, 685 F. Supp.2d at 102-04, Judge Leon granted summary judgment for the employer and held that the employee's job reassignment, one in which he actually received salary increases, was not a materially adverse action. Likewise, here, Fox News provided Ms. Herridge with very substantial salary increases after she complained about alleged discrimination, which belies the EEOC's contention that she was the victim of a materially adverse action.

In *Booth v. District of Columbia*, 701 F. Supp.2d 73, 79-81 (D.D.C. 2010), Judge Leon granted summary judgment because diminished performance evaluations and letters of admonition, neither of which was consequential in financial terms, were not materially adverse actions. The same result ensued in *Martin*, 659 F. Supp.2d at 149-50, where Your Honor granted summary judgment because a lateral transfer was not a materially adverse action given that the plaintiff merely asserted "generalized impressions about the inferiority of her new job."

The other judges of this Court have also adhered to *Burlington* and the above Court of Appeals decisions. For example, in *Schmidt*, 696 F. Supp.2d at 66-67, the employee claimed retaliation because his employer requested that he refrain from submitting unsolicited statements to an EEO investigator. In dismissing his retaliation claim pursuant to Rule 12(b)(6), Judge Kollar-Kotelly, quoting *Burlington*, 548 U.S. at 67, stated that the anti-retaliation laws do not protect employees from all retaliation, but only "from retaliation that produces injury or harm." In *Diggs v. Potter*, 700 F. Supp.2d 20, 44 (D.D.C. 2010), Judge Sullivan granted summary judgment to the employer, observing that it is "well settled in this Circuit that 'absent some consequential harm or injury, a delay [in payment of money owed] does not affect the terms,

conditions or privileges of employment and does not constitute an adverse employment action.'" (citations omitted). And in *Benjamin v. Duncan*, 694 F. Supp.2d 1, 9 (D.D.C. 2010), Judge Friedman dismissed an employee's retaliation claim, quoting *Baloch*, 550 F.3d at 1199, that poor "[p]erformance appraisals typically constitute material adverse actions only when attached to financial harms."

As these cases amply demonstrate, threatened suspensions that do not come to pass, criticism of employees' job performances, poor performance appraisals not tied to salary increases or promotions, and requests not to volunteer information to EEO investigators, all fall short of materially adverse actions under D.C. Circuit case law because of the absence of sufficient injury or harm. Here, Ms Herridge was not injured or harmed in any way; she was not ever threatened with injury or harm. Instead, she received substantial raises and the proposed language to which she objected was deleted before the Agreement was executed. Accordingly, the EEOC has not stated an actionable retaliation claim on her behalf and cannot even establish a *prima facie* case of retaliation.

C. Ms. Herridge's Alleged Emotional Distress, Which Allegedly Was Caused By The Proposed Language, Is Insufficient To Create A Materially Adverse Action.

Given that the EEOC is unable to tie the objected-to proposed language to any financial harm suffered by Ms. Herridge, the EEOC claims that the harm that Ms. Herridge experienced was the fear of losing her job and emotional distress. (Complaint ¶ 15) Ms. Herridge's alleged subjective fear that she might be terminated at any time during negotiations is legally insufficient to establish a material adverse action and a *prima facie* case of retaliation. Moreover, it should not be overlooked that her exorbitant salary demands and her failure to respond to one of Fox News' proposals for four months betray the claim of fear. (Brandi Aff. Exs. D-E, H-J)

In any event, as a matter of law, this Court has repeatedly rejected emotional distress as the type of underlying injury or harm necessary to support a materially adverse action. In *Johnson v. Bolden*, 699 F. Supp.2d 295, 299-300 (D.D.C. 2010), Judge Leon granted summary judgment to the employer on the employee's retaliation claim, explaining that "[o]ur Circuit has made clear that the harm must be 'objectively tangible' rather than 'purely subjective injuries' ... [because] not everything that makes an employee unhappy is an actionable adverse action." (citations omitted). *See also Booth*, 701 F. Supp.2d at 80 (Leon, J.) "dissatisfaction with a job assignment, public humiliation or loss of reputation ... are not adverse actions").

In *Totten v. Norton*, 421 F. Supp.2d 115, 121 (D.D.C. 2006), Judge Bates granted a Rule 12(b)(6) motion to dismiss an employee's retaliation claim, stating: "Courts in this Circuit ... have held that purely psychic injuries such as embarrassment do not qualify as adverse actions for purposes of the federal anti-discrimination statutes." Judge Huvelle reached the same conclusion in *Beckford v. Geithner*, 661 F. Supp.2d at 27-28, where the employer launched an investigation into the employee's background, which could have, but did not lead to the employee's termination, holding that an employee's "subjective fear" of a possible adverse outcome does not constitute a material adversity because "[p]urely subjective injuries ... are not adverse actions." *See Bowden v. Clough*, 658 F. Supp.2d 61, 95-97 (D.D.C. 2009) (Walton, J.) (while "it is understandable why the plaintiff would be unhappy"' with criticisms, such subjective feelings do not constitute an actionable adverse action).

As all of the above cases demonstrate, Ms. Herridge's subjective fear of being discharged does not transform the alleged retaliatory language in the proposed Agreement into a materially adverse action that is actionable.

CONCLUSION

Although the EEOC dismissed all of Ms. Herridge's discrimination claims and most of her retaliation claims at the conclusion of its investigation, it has unreasonably decided to pursue this action against Fox News based upon proposed language in a proposed Agreement that is not only non-retaliatory on its face, but was removed as part of the give-and-take bargaining process that resulted in a final three-year Agreement whereby Ms. Herridge received annual salary increases of $35,000, $70,000 and $110,000 respectively, with the initial $35,000 increase being retroactive. The EEOC's complaint is not only without merit, it is frivolous. Fox News respectfully requests that the Court dismiss the complaint in its entirety with prejudice pursuant to either Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure, and award costs, disbursements and reasonable attorneys' fees to Fox News.

Respectfully submitted,

Dated: November 4, 2010

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