IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
	)	**CIVIL ACTION NO.**
Plaintiff,	)	1:10-cv-01660-RJL
v.	)	
FOX NEWS NETWORK, LLC	)	
Defendant.	)	

PLAINTIFF EEOC'S MOTION IN OPPOSITION TO FOX NEWS, LLC. MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to Rule 7 of the Local Rules of the United States District Court for the District of Columbia, Plaintiff, Equal Employment Opportunity Commission ("EEOC"), files the instant Motion in Opposition in the above styled case. For the reasons set forth in the attached Memorandum in Support of Its Motion, the EEOC respectfully requests that this Court enter an order dismissing Defendant's Motion.

Date: November 19, 2010

Respectfully submitted,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

P. DAVID LOPEZ
General Counsel

JAMES L. LEE
Deputy General Counsel

GWENDOLYN YOUNG REAMS

Associate General Counsel

LYNETTE A. BARNES
Regional Attorney
Charlotte District Office
129 W. Trade Street, Suite 400
Charlotte, N.C. 28202

/s/ Tracy Hudson Spicer
TRACY HUDSON SPICER
Supervisory Trial Attorney
Washington Field Office
131 M Street, N.E.
Washington, D.C. 20507

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify on the date indicated below I electronically filed the foregoing document (with exhibit(s) and proposed order(s), if any) with the Clerk of Court for the District of Columbia using the CM/ECF system, which system will send notification of such filing to the party listed below.:

Frank C. Morris, Jr.
Ronald M. Green
EPSTEIN BECKER & GREEN, P.C.
1227 25th Street NW
Washington, D.C. 20037-1175

This the 19th day of November, 2010

/s/ Tracy Hudson Spicer
TRACY HUDSON SPICER
Supervisory Trial Attorney
Washington Field Office
131 M Street, N.E.
Washington, D.C. 20507

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
	)	**CIVIL ACTION NO.**
Plaintiff,	)	1:10-cv-01660-RJL
v.	)	
FOX NEWS NETWORK, LLC	)	
Defendant.	)	

PLAINTIFF EEOC'S MEMORANDUM OF POINTS AND AUTHORITY IN OPPOSITION TO FOX NEWS, LLC. MOTION TO DISMISS, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Plaintiff Equal Employment Opportunity Commission ("EEOC") respectfully submits this Memorandum in Support of Its Opposition to Fox News, LLC's Motion to Dismiss, or, In the Alternative, for Partial Summary Judgment.

Date:

Respectfully submitted,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

P. DAVID LOPEZ
General Counsel

JAMES L. LEE
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

LYNETTE A. BARNES
Regional Attorney
Charlotte District Office

129 W. Trade Street, Suite 400
Charlotte, N.C. 28202

/s/ Tracy Hudson Spicer
TRACY HUDSON SPICER
Supervisory Trial Attorney
Washington Field Office
131 M Street, N.E.
Washington, D.C. 20507

ATTORNEYS FOR PLAINTIFF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

I. PROCEDURAL BACKGROUND

The EEOC filed this action against Fox News, LLC ("Defendant") on September 30, 2010, alleging that Defendant retaliated against Catherine Herridge ("Herridge") by placing retaliatory language in Herridge's employment contract and refusing to remove it over Herridge's objections during contract negotiations. Complaint at ¶ 9 (hereinafter, Compl. at ¶ __). Defendant argues that the EEOC's Complaint should be dismissed because it fails to state facts sufficient to support a claim upon which relief can be granted and that the EEOC cannot establish a prima facie case. Defendant's Brief at p. 9 (hereinafter, Def's brief at p.__). For the reasons set forth herein, Defendant's motion should be denied.

II. STATEMENT OF FACTS

Catherine Herridge began her employment with Defendant on or around October 21, 1996, as an on-air general assignment news reporter with Defendant's London Bureau. Declaration of Catherine Herridge at ¶1 (hereinafter Herridge Decl. at ¶__) Herridge also worked as an on-air reporter in Defendant's New York City Headquarters. Herridge Decl. at ¶1. Since 2001, Herridge has worked as an on-air reporter in Defendant's Washington, D.C., Bureau. Herridge Decl. at ¶1. Around November 20, 2006, Herridge began complaining to Defendant about its employment practices that she reasonably believed to be discriminatory. Herridge Decl. at ¶3 . Specifically, Herridge observed that less desirable shifts were routinely given to female and black correspondents and she voiced concerns to Defendant's D.C. Acting Bureau Chief, Bruce Becker that the shift assignments appeared to be based on sex and race. Herridge Decl. at ¶3. Around January 8, 2007, Herridge contacted Defendant's CEO Roger Ailes, and implored him to select a new Bureau Chief who would not discriminate against women. Herridge Decl. at ¶4.

Herridge had a trial run as Anchor from approximately the Fall of 2006 until the Fall of 2007. Herridge Decl. at ¶5. At the end of the trial run she was reassigned from Anchor back to her position as on-air reporter. Shortly after Herridge was reassigned back to her on-air position Defendant placed a male in the Anchor position that Herridge had temporarily held. Herridge Decl. at ¶5. On December 4, 2007, Herridge complained to D.C. Bureau Chief Bryan Wilson, that she believed she was demoted from Anchor to on-air reporter, and that assignments were being taken away from her because of her age, sex, and because of her prior opposition to Defendant's employment practices that she believed to be discriminatory. Herridge Decl. at ¶6. Herridge also complained to Defendant's Senior Vice-President for Legal and Business Affairs, Dianne Brandi on December 10, 2007, that her removal from the Anchor position was discriminatory based on her age and sex. Herridge was informed that Senior VP Brandi would conduct an internal investigation into her allegations. Herridge Decl. at ¶7.

Around January 15, 2008, Herridge restated her age and sex-based complaint to Brandi. Herridge Decl. at ¶8. Brandi told Herridge that Brandi had promised CEO Ailes that she would keep him fully apprized of her investigation of Herridge's internal complaint of discrimination. Herridge Decl. at ¶8. Later, around February 7, 2008, Herridge e-mailed Brandi about her investigation and expressed concerns that Brandi's investigation was neither thorough nor impartial. Herridge Decl. at ¶8. The next day, February 8, 2008, Defendant's CEO Ailes – whom Brandi had indicated that she [Brandi] was keeping informed of the status of Brandi's investigation of Herridge's discrimination complaints - sent a company-wide email that appears to be in response to Herridge's complaints.[1] In pertinent part, the e-mail states:

[1] Defendant points out that Herridge did not complain about the email in her charge of discrimination. The EEOC uncovered information regarding the email during the course of its investigation. When an investigation uncovers facts supporting additional discrimination the EEOC is not required either to "cast a blind eye over such discrimination nor to sever those facts" from the original investigation. *EEOC v. General Electric*, 532 F.2d 359,

> "...The best things about those days [the early days of Fox] were the...lack of complaints...But today I hear too much selfish complaining, petty whining, and a desire to have what someone else has. As I have always said, negative people make positive people sick...you should note that there are no locks on the outside of the doors keeping us here. I would never want to hold anyone back. I decided many years ago that I did not ever want to work with unhappy people because life is too short and the first 100 years in the ground is just the beginning...If you are happy, your work experience will be fulfilling and your colleagues will like you. If you are not happy, your fellow employees will avoid you.... Some people actually find it easier to achieve success than to handle it well once they have it.

Herridge Decl. at ¶8.

The following month, on March 17, 2008, Brandi notified Herridge that she had completed her investigation into Herridge's internal complaints of discrimination. Herridge Decl. at ¶9. Brandi informed Herridge that she had concluded that there was no evidence of discrimination. Herridge Decl. at ¶9. Herridge disputed Brandi's findings and renewed her discrimination complaints by telling Brandi that she felt the outcome of the investigation was predetermined. Herridge Decl. at ¶9.

Herridge's employment is governed by a contract that has a three year term. Herridge Decl. at ¶1. Herridge's employment contract with Respondent was set to expire in October 2008. Prior to the expiration of her 2005 contract in October 2008, Herridge, through her agent, engaged in negotiations with Defendant for the upcoming 2008 contract term. Herridge Decl. at ¶10. On behalf of Defendant, Senior VP Brandi was responsible for drafting and negotiating Herridge's contract. Brandi was the lead negotiator on Herridge's contract. Declaration of Yofi Weinberg at ¶5. (hereinafter Weinberg Decl. at ¶ __)

Around August 2008, Brandi forwarded a draft proposal to Herridge that was very similar to Herridge's previous contract but contained several new paragraphs that troubled Herridge.

---

365 (4th Cir. 1976)

Compare Docket No. 4 at Document 4-3 with Document 4-4. First, Brandi inserted language that Herridge would never serve as an Anchor/Co-Anchor or an occasional Anchor/Co-Anchor during the contract term unless Defendant at its sole discretion decided otherwise. Herridge had complained to Brandi and Defendant's CEO that her removal from the Anchor position was discriminatory. Second, the proposed contract stated that both Herridge and Defendant acknowledged that Herridge "has raised allegations of discrimination in the past concerning her non-assignment to anchor positions and concerning other matters, and that Fox has investigated" Herridge's allegations. Herridge and "Fox also acknowledge that Fox has determined that discrimination did not occur and that [Herridge] did not agree with Fox's determination." Docket No. 4 at Document 4–4. Herridge also had concerns about the salary proposed by Defendant, but was more concerned with the language referencing her EEO complaints. Herridge Decl. at ¶10. Herridge viewed the disputed language as offensive and as Defendant's attempt to cover-up its inadequate investigation of her discrimination complaints. Herridge Decl. at ¶10. Herridge also viewed this language as an attempt to intimidate her. Herridge Decl. at ¶10.

On August 15, 2008, Herridge, through her agent, informed Fox that Herridge would not accept the proposal and pointed out that Herridge's EEO complaint and her contract renewal were separate issues and should be treated as such. Herridge Decl. at ¶11. Defendant was also presented with a counter demand to its proposed salary offer. Herridge Decl. at ¶14; Docket No. 4 at Document 4–5.

Herridge continued to reiterate her belief that the language was retaliatory and a cover-up attempt. Herridge's objection was dismissed by Brandi who responded that the reference to her EEO complaint was "simply a recitation of the facts." Herridge Decl. at ¶11. Defendant did not

address Herridge's salary demand other than to say it might consider raising its offer. Herridge Decl. at ¶12. Herridge informed Defendant that she believed that she deserved to be equitably compensated for her work. Herridge supported her salary demand with facts concerning the important stories she covered, her 21 years of journalistic experience and the estimated cost that Defendant would have incurred to find a journalist with her skill set. Herridge Decl. at ¶12. Herridge invited Fox to present its own facts and figures to refute her salary demand. Defendant presented nothing to Herridge to refute the salary demand but rather accused Herridge of extortion. Herridge Decl. at ¶12. Additionally, Defendant repeated its claim that the disputed language must be kept in the contract. Herridge Decl. at ¶12.

In September 2008, Herridge filed a charge of discrimination with the EEOC.[2] Herridge Decl. at ¶12. As part of its investigation of Herridge's charge, the EEOC conducted an on-site investigation in which an EEOC Investigator met with Defendant's officials and conducted interviews. Weinberg Decl. at ¶4. Brandi specifically stated during her EEOC interview that she included the disputed language in Herridge's new contract because she wanted it to be "crystal clear" to Herridge that Herridge would only be an Anchor at Defendant's discretion and that

[2] The EEOC's Letter of Determination indicated that there was insufficient evidence to establish Herridge'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 denied promotions." The letter of determination went on to say that the determination "... does not, however, certify that Respondent is in compliance with Title VII, the EPA, and the ADEA as to these allegations." Docket No. 4 at Document 4-13. Defendant attempts to argue in its brief that EEOC's finding was equivalent to the EEOC finding in favor of Defendant on Herridge's underlying claims, i.e., that the evidence in fact proved that Defendant was in compliance with the law as to the underlying allegations. However, the language of the letter of determination set forth above, specifically states the contrary. Moreover, whether the EEOC made a reasonable cause finding on Herridge's underlying allegations of discrimination is irrelevant to the allegations made in this matter. The EEOC's investigation of Herridge's charge is not at issue in this litigation. The EEOC's determination is not "an adjudication of rights and liabilities;" rather, "it is a non-adversarial proceeding designed to notify an employer of the EEOC's findings." *EEOC v. Keco Indus.*, 748 F.2d 1097, 1100-01 (6th Cir. 1984). Indeed, the United States Supreme Court has expressly foreclosed evaluation of the nature and extent of the EEOC's investigation as the retaliation standard "does *not* require a reviewing court or jury to consider the nature of the discrimination that led to the filing of the charge." *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 69 (2006).

Defendant did not want Herridge to continue filing discrimination charges[3] that Respondent did not think had merit. Weinberg Decl. at ¶6. EEOC Investigator Weinberg informed Defendant that the language could be considered retaliatory. Weinberg Decl. at ¶6.

On May 6, 2009, after the EEOC investigator's onsite visit, Herridge's agent received an e-mail from Senior VP Brandi which Herridge describes as coming "out of the blue" because Brandi had not responded to a March 5, 2009 e-mail sent by Herridge's agent. Herridge Decl. at ¶14. In the March 5, 2009 e-mail Herridge's agent informed Brandi again that the disputed language needed to be removed and that Herridge was not negotiating, waiving or releasing her pending EEOC matter. The e-mail also provided further justification for Herridge's salary demand. Docket No. 4 at Document 4-11. Brandi stated that Fox would get Herridge a counter-offer by the end of that week. On May 8, 2009, Herridge received Fox's counter-offer, which did not contain the disputed language. Herridge was out of the country at the time and her agent was on vacation, so she was not able to immediately provide a response. Herridge Decl. at ¶14. On May 29 2009, Herridge, through her agent, told Fox that she would accept the salary terms and contract conditions. On June 4, 2009, Fox and Herridge agreed to the final provisions of the contract and Herridge signed the contract on June 18, 2009. Docket No. 4 at Document 4–12. The final terms of the contract include the original monetary offer made by Defendant but does not include the disputed language regarding Herridge working as an Anchor at the "sole discretion" of Defendant and does not mention Herridge's allegations of discrimination.

During the time Herridge worked without a contract, she was compensated at the 2005 contract salary rate. Herridge Decl. at ¶16. For Herridge, working without a contract meant that she could be fired at any time and lose health benefits, salary, etc., 30 days after notice of her

[3]Brandi was referring to the internal complaints of discrimination filed by Herridge as "charges" as no formal EEOC charge had been filed at the time.

termination. Herridge Decl. at ¶16. In January 2009, while she was still without an employment contract, Herridge was given a final written warning and told that she could be terminated at anytime. Herridge received the warning for questioning D.C. Bureau Chief Bryan Boughton about why her news report had been given to a male colleague to broadcast as his own work. Herridge feared termination and feared losing her health insurance for herself and her two young children. Herridge Decl. at ¶15. Herridge has a child who suffers from a rare liver disease that required a transplant and a tremendous amount of medical care, and thus she feared being unable to properly care for her child. Herridge Decl. at ¶16. Defendant was aware of Herridge's child's medical condition since it was the subject of a segment which aired on Defendant's television network. Herridge Decl. at ¶16. After the contract was signed, Defendant paid Herridge her nine months of lost salary, but did not pay her interest. Herridge Decl. at ¶14. Herridge therefore was not made whole for her lost wages, and likewise suffered the lost opportunity cost by not having the money to which she was entitled during the nine-month negotiation period.

In sum, Herridge received the proposed contract which contained the retaliatory language intended to deter her from exercising her rights in August 2008 and was forced to endure the emotional distress associated with the uncertainty of continued employment through May 8, 2009 when Fox agreed to withdraw the retaliatory language from the proposed contract. For nine months Herridge's career was held hostage in retaliation for having previously complained of age and sex discrimination.

III. STANDARD OF REVIEW

Pursuant to the Federal Rules of Civil Procedure, to state a claim for relief a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). It is well settled by the United States Supreme Court that such

statement "need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 544, 555 (2007). The Supreme Court has held that in an employment discrimination lawsuit, there is not a heightened pleading standard. *Twombly*, 550 U.S. at 570; *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002).

A claim is facially plausible when plaintiff pleads factual content that allows the court to draw the reasonable inference that defendant is liable for the alleged misconduct. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). Defendant's motion to dismiss EEOC's complaint "should not be granted unless it appears certain that the plaintiff can prove no set of facts that would support its claims and entitle it to relief." *Totten v. Norton*, 421 F.Supp.2d 115, 119 (D.D.C. 2006). The court must give every favorable inference that may be drawn from the allegations of fact to the EEOC. *See Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000).[4] Here the EEOC has pled sufficient facts that gave Defendant fair notice of the EEOC's claim and the grounds upon which it rests. *Conley v. Gibson*, 355 U.S. 41, 47 (1957), and that allows the court to draw the reasonable inference that defendant is liable for the alleged misconduct. *Iqbal*, 129 S.Ct. at 1949. Therefore, Defendant's motion to dismiss must be denied.

In the alternative, Defendant has founded its motion to dismiss on matters outside the pleadings and as such the District Court may "treat the motion to dismiss as one for summary judgment and dispose of it as provided in Rule 56." However, summary judgment is not appropriate when the EEOC has not been given a reasonable opportunity to discover each and

[4] Furthermore, "a Rule 12(b)(6) motion is not an appropriate device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 585 (2007) (internal citations and quotations omitted). *See also Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)(where a 12(b)(6) motion is "testing the sufficiency of a civil rights complaint, we must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief *under any legal theory that might plausibly be suggested by the facts allege*")(emphasis in original).

every claim and defense in this matter. *See Baker v. Henderson*, 150 F.Supp.2d 13, 16 (D.D.C. 2001) (parties to be provided a reasonable opportunity to pursue reasonable discovery); *Celotex v. Catrett,* 477 U.S. 317, 322 (1986)(noting that summary judgment is appropriate "only after adequate time for discovery."). FED. R. CIV. P. 12(d). The EEOC requests that this Court deny Defendant's motion for summary judgment pending the opportunity for EEOC to conduct discovery in this case.

IV. ARGUMENT

A. The EEOC's Complaint Pleads Sufficient Facts to Establish a Prima Facie Case of Retaliation.

In this case, the EEOC has pled a claim for relief under Title VII that is plausible, specifically that Defendant added the disputed language regarding Herridge's discrimination complaints to her employment contract in retaliation for her engaging in protected activity. In order to state a prima facie case of retaliation, EEOC must show: (1) Herridge engaged in a protected activity; (2) Defendant took a materially adverse employment action against Herridge; and (3) the protected activity was causally connected to the materially adverse action. *Zelaya v. UNICCO Service Co.*, --- F.Supp.2d ----, 2010 WL 3292364 at *3 (D.D.C. August 20, 2010).

As to the first element, there is no dispute that Herridge engaged in protected activity known to Defendant when she complained of age and sex discrimination. Compl. at ¶10 and Def. brief at p. 2. As Defendant admits, Defendant conducted an internal investigation into those complaints. Compl. at ¶11; Def. Brief at 2. As to the third element, it is undisputed that Defendant placed the subject language in Herridge's contract and refused to remove it over her repeated objections. Compl. at ¶12; Def. Brief at 3. The language Defendant added to Herridge's contract did not appear in contracts for other Fox employees and was clearly a result of Herridge's protected activity as it specifically referenced Herridge's protected activity.

Consequently, a causal link between exists between Herridge's protected activity and Defendant's insertion of the subject language into Herridge's contract.

The second element of the prima facie case, that Defendant took a materially adverse action against Herridge is the only element of the prima facie case that is in dispute. Defendant argues in its brief that as a matter of law, the disputed language does not rise to the level of a materially adverse action for two reasons: first, it did not produce any employment injury or threaten any such injury, and it would not dissuade a reasonable employee from complaining about discrimination; and second Herridge's alleged emotional distress during the negotiations is insufficient to constitute a materially adverse action. Def. Brief at p.11. However, the disputed language in fact constitutes a materially adverse action that supports EEOC's retaliation claim.

In order to constitute materially adverse action in the retaliation context, the action complained of must be one that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Railway. Co. v. White*, 548 U.S. 53, 57, (2006); *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C.Cir.2006). *See also Steele v. Schafer*, 535 F.3d 689, 696 (D.C.Cir.2008) (noting that "the court does not focus on actual harm but on the potential for deterrence"). In order to determine whether Defendant's inserted language could dissuade a reasonable employee engaging in protected activity, this Court must consider the totality of the circumstances in context. *Burlington*, 548 U.S. at 57; *Howard v. Gutierrez*, 237 F.R.D. 310, 313 (D.D.C.2006). Moreover, the question of whether Defendant took a materially adverse employment action against Herridge is a question of fact for the jury. *See Bergeron v. Cabral*, 560 F.3d 1, 6 (1st Cir.2009)("the existence of an adverse employment action may be a question of fact for the jury when there is a dispute concerning the manner in which the action taken affected the plaintiff-employee.").

Here, Herridge states that the language was intended to intimidate her, that she in fact felt intimidated, and that the language precluded her from signing the contract. She explicitly refused to sign a new contract – for any amount of money – while the retaliatory language was included in that contract. More telling is Brandi's admission to the EEOC Investigator that Defendant included the language in Herridge's employment contract to deter future discrimination complaints from Herridge. In other words, Defendant inserted the language into the contract precisely for the reason that the Supreme Court highlighted, to dissuade Herridge from making future complaints of discrimination. *See Burlington,* 548 U.S. at 57. The tangible consequence was that Herridge did not immediately obtain her raise; the contract negotiations stalled; and the contract negotiations restarted on Defendant's initiative when Defendant removed the retaliatory language from the 2008 contract. After the retaliatory language was removed from the proposed 2008 contract, Herridge accepted the terms of the contract and agreed to the original monetary offer made by Defendant.

Defendant mistakenly argues that *Baloch v. Kempthorne*, 550 F.3d 1191, 1198-99 (D.C. Cir. 2008), *Taylor v. Solis*, 571 F.3d 1313, 1320-21 (D.C. Cir. 2009), *Porter v. Shah*, 606 F.3d 809, 817-18 (D.C. Cir. 2010), *Booth v. District of Columbia*, 701 F.Supp.2d 73, 79-81 (D.D.C. 2010), *Potter v. Cole* and *Benjamin v. Duncan*, 694 F.Supp.2d 1, 9 (D.D.C. 2010) are comparable to the facts of this case. Unlike the plaintiffs in said cases who could not point to a materially adverse employment action that created economical harm, Ms. Herridge was denied a salary increase, albeit temporarily, because of the proposed language. Moreover, when Herridge received her lost wages retroactively, she did not receive interest and there is a lost opportunity cost associated with the nine month delay of payment of Herridge's wages to her. Therefore, Herridge was not made whole for the wages that were withheld from her due to her refusal to

sign a contract that contained retaliatory language. Notably, *Baloch, Taylor, Booth, Porter*, and *Benjamin* were all in a different procedural posture than this case in that discovery had been completed and summary judgment was entered after the record had been fully developed on the claims and defenses. Likewise, at a minimum this court should allow EEOC to fully engage in discovery before considering Defendant's motion for summary judgment.

Defendant's reliance on *Geleta v. Fenty*, 685 F.Supp.2d 99, 102-03 (D.D.C. 2010) is also misplaced. The plaintiff in *Geleta* complained that he was subjected to an adverse employment action when he was reassigned to other positions on several occasions. The plaintiff did not allege that the reassignments affected his pay or benefits, but rather that the reassignments resulted in a significant change in his job responsibilities because he lost his supervisory duties. The Court dismissed this claim because the plaintiff, unlike Herridge in this matter, failed to present sufficient evidence that he actually lost his supervisory responsibilities in light of each of the job descriptions in the record which outlined supervisory duties.

Schmidt v. Shah, 696 F.Supp.2d 44, 66-67 (D.D.C. 2010) is likewise factually distinguishable from the instant case. In *Schmidt*, the plaintiff claimed that he was being intimidated by the United States Agency for International Development after submitting supplemental information in connection with a former subordinates' EEO complaint. Plaintiff sought reimbursement for expenses he had incurred in sending the documents to the EEO investigator via overnight mail. The EEO investigator informed Defendant that the supplemental information submitted via overnight mail went beyond the scope of the inquiry. Plaintiff was sent a letter asking him not to send any further unsolicited supplemental information. This Court emphasized that the claim failed because the plaintiff, unlike Herridge in this matter, was not an employee who could be intimidated and no reasonable employee would have been dissuaded

from testifying based on the language of the letter. In *Totten v. Norton*, 421 F.Supp.2d 115, 121 (D.D.C. 2006) also cited by Defendant, the plaintiff was denied admission when he went to that defendant's facility to visit his former co-workers during the period between that plaintiff's removal and ultimate reinstatement. The plaintiff was not an employee at that time he was denied admittance to the building. This Court maintained that the non-employee plaintiff's inconvenience which he did not associate with any particular emotional distress did not rise to the level of an adverse employment action. To the contrary in this case Herridge was an employee, was still under contract when the disputed language was inserted into her renewal contract, and Herridge will testify to significant emotional distress. Herridge Decl. at ¶16. The case of *Johnson v. Bolden*, 699 F.Supp.2d 295, 301-02, (D.D.C. 2010) is also factually distinguishable. The plaintiff in *Johnson* asserted that he suffered materially adverse actions when he was not promoted to GS-14 and received a negative performance appraisal which resulted in a lower amount of his bonus. This Court held that plaintiff's retaliation claim failed not because the actions were not in effect materially adverse, but rather because there was no evidence of a causal connection between the alleged protected activity and the materially adverse actions. The issue of causality is not before this Court.

Defendant's argument that the proposed language was not materially adverse to Herridge is premised on the fact that the disputed language is not contained in the final version of Herridge's employment contract. Defendant attempts to characterize the inclusion of the disputed language in the contract as minor, trivial and inconsequential because Defendant ultimately removed the disputed language and paid Herridge back pay; however this argument is unpersuasive. Def. Brief at p.14. Defendant makes the same "no harm, no foul" argument that was rejected by the Supreme Court in *Burlington*. *Burlington,* 548 U.S. at 68. In *Burlington*,

the plaintiff filed an internal complaint that her supervisor subjected her to sex based harassment. After she complained, her immediate supervisor was disciplined for sexual harassment, but the plaintiff was removed from forklift duty to standard track laborer tasks. The plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission claiming that the reassignment was unlawful gender discrimination and was in retaliation for her complaint. Subsequently, the plaintiff was suspended without pay for insubordination. The suspension led to a second EEOC retaliation charge. Burlington later found in its internal investigation into the plaintiff's suspension that the plaintiff had not been insubordinate, reinstated her, and awarded her backpay for the 37 days she was suspended. The Supreme Court rejected Burlington's position that the reassignment and suspension were not materially adverse employment actions simply because the plaintiff had been reinstated and awarded backpay. The Supreme Court noted materially adverse action, "in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington,* 548 U.S. at 68. The Court's focus was whether Defendant's action might have been a deterrent to a reasonable employee engaging in protected activity. In *Burlington* the deterrent effect was created by the temporary suspension without pay; and here it is the hardship, emotional distress, and lost opportunity caused by Herridge's temporary loss of income. During the time Herridge worked without a contract, she could have been fired at any time with limited notice. For nine months Herridge worked with the real fear of termination and loss of health benefits for herself and her two young children. In fact, Defendant threatened Herridge's employment during the months when contract negotiations were stalled due to the retaliatory language.

Finally, Defendant's argument that no financial harm resulted from its actions and thus Herridge did not suffer a materially adverse employment action is factually and legally flawed.

First, Defendant points out that Herridge received a $35,000 raise. While the relevance of this information is questionable given the issue before this court, EEOC notes that Defendant failed to provide this court with salary information to compare Herridge's salary with that of her counterparts. Defendant states that Herridge was being paid $460,000 in the final year of her 2008 contract without disclosing what it was paying to other on-air reporters and Anchors. Defendant's objective is clearly to try to somehow negatively influence this Court toward Herridge by discussing the amount of money that Herridge was being paid. Yet, the issue in this case is unrelated to Herridge's earnings. The issue is whether Defendant retaliated against Herridge by inserting the disputed language into her 2008 contract.[5] Moreover, Herridge properly sought a salary which she believed was commensurate with the value of the services she provided to Defendant. While Herridge ultimately received a salary increase, the increase was delayed due to Defendant's insertion of the retaliatory language into Herridge's contract. As a result, Herridge was temporarily deprived of her legitimate wages and permanently deprived of interest and other opportunities to utilize the withheld funds, which is clearly a materially adverse action. *See Greer v. Paulson*, 505 F.3d 1306, 1317 (D.C.Cir. 2007)("dimunition in pay or benefits can [be adverse] even when the employer later provides back pay").

The instant case is similar to *Norden v. Samper*, 503 F.Supp.2d 130, 157 (D.D.C. 2007). In *Norden*, the plaintiff, a federal employee, survived summary judgment of his claim alleged under the Rehabilitation Act of 1973, in connection with the return to work plan (RTWP) presented by his employer, the Smithsonian. In the RTWP the agency advanced, *inter alia*, a requirement that Norden waive her right to challenge future adverse employment actions.

[5] To the extent that Defendant discusses Herridge's salary demands as the alleged reason for the delayed contract negotiations, Defendant presents an issue of fact that must be decided by a jury. Herridge plainly states that she was not willing to relinquish her position that the retaliatory language be removed. Herridge Decl. at ¶ 11. Consequently regardless of the amount of money in the contract, she was not going to sign a contract that contained the retaliatory language.

Norden perceived this language to be oppressive and illegal; and refused to sign the RTWP. The defendant advanced a argument similar to the argument offered by Defendant herein, namely that the language was not adverse because a revised proposal was prepared in which the language was removed after Norden objected to the language. This Court found Defendant's argument unpersuasive. This Court explained that even assuming *arguendo* that Defendant "took no action" against Norden based on the language in the RTWP, Norden did not need to show that the defendant took an action against her in order to sustain her retaliation claim. This Court concluded that Norden need only show that her employer, the Smithsonian, acted in a way that a reasonable employee would find "materially adverse." *Norden,* 803 F.Supp 2d at 157-58 *(citing Burlington,* 548 U.S. at 68).

The fact that the subject contract language did not ultimately affect Herridge's pay or benefits does not end the inquiry into whether Defendant's actions were materially adverse, i.e. whether such would dissuade a reasonable employee from engaging in protected activity. Whether an action is "materially adverse" is determined by whether it holds a deterrent prospect of harm, not by whether the harm comes to pass or whether any effects are felt in the present. *Rattigan v. Holder,* 604 F.Supp.2d 33, 52 (D.D.C. 2009) *citing, inter alia, Slater v. Town of Exeter,* No. 07-CV-407, 2009 WL 737112, at *9-*10 (D.N.H. Mar. 20, 2009) (noting that "a threat, depending on its severity, could constitute retaliation" through its "deterrent effect").

Defendant argues that the fact that the disputed language was inserted into Herridge's contract before she filed her EEOC charge means that Herridge could not have been dissuaded by the disputed language. That Herridge felt the need to stop making internal complaints – just as Brandi states Defendant intended – and take her complaints outside to the EEOC, should not be held against Herridge. Moreover, Herridge's action in filing an EEOC discrimination charge

after insertion of the language into her contract does not mean that the language was not a materially adverse action. The inquiry is whether based on Defendant's inclusion of the disputed language a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" The standard is objective - whether the challenged action might likely deter a reasonable employee from exercising her right to complain about discrimination – not subjective – whether the challenged action actually deterred an employee from exercising her rights. In this case, retaliatory animus is found in Defendant's motivation not in Herridge's response. And here, Brandi admitted that Defendant's motivation was to deter Herridge from making further complaints of discrimination.

B. The EEOC's Lawsuit is Not Frivolous, Unreasonable, Or Without Merit.

Defendant concludes its brief with a general statement that EEOC's lawsuit is frivolous and thus, Defendant is entitled to attorneys' fees and costs. Section 706(k) of Title VII authorizes an award of attorneys' fees to a "prevailing party." 42 U.S.C. §2000e-5(k) (2008). The district court has the discretion to award attorneys' fees. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the Supreme Court articulated the rigorous standard by which courts are to evaluate a defendant's claim for attorney's fees. Under the *Christiansburg* standard a prevailing defendant should recover attorneys' fees only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg*, 434 U.S. at 412. "[F]rivolous, unreasonable, or without foundation," implies "groundless . . . rather than simply that the plaintiff has ultimately lost his [or her] case." *Christiansburg*, 434 U.S. at 421.

As a preliminary matter, Defendant has not met its burden of showing that EEOC's

lawsuit is frivolous. In order to meet the *Christiansburg* standard, an action must be one upon which no reasonable person could hope to succeed. *Warren v. Gould*, 808 F.2d 493, 505 (6th Cir. 1987)(emphasis added). The "plaintiff's action must be meritless in the sense that it is groundless or without foundation." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980). In the present case there is ample evidence to show that the Commission's litigation is not "frivolous," "groundless," or "without foundation." As discussed previously, Plaintiff has pled a prima facie case of retaliation. Because there are facts in dispute regarding Defendant's motivation for its actions does not render the EEOC's suit frivolous.

V. CONCLUSION

Based on the foregoing reasons, EEOC respectfully requests this Court deny Defendant's Motion to Dismiss, or in the Alternative, For Summary Judgment. This Court has articulated that the a materially adverse action that supports a retaliation claim is an action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. Here, Defendant's actions were not only reasonably calculated to deter Herridge from engaging in further protected activity, but were in fact designed by Defendant to do so.