

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

CIVIL NO. 1:07CV336

TIMOTHY KIRK FOXX,)
)
 Plaintiff,)
)
 Vs.)
)
 THE TOWN OF FLETCHER, a)
 municipality organized under the)
 laws of North Carolina; MARK)
 BIBERDORF, in his individual and)
 official capacities; LANGDON B.)
 RAYMOND, in his individual and)
 official capacities; MICHAEL STEVE)
 MORGAN, in his individual and)
 official capacities; WILLIAM B.)
 MOORE, in his official capacity;)
 JIM CLAYTON, in his official)
 capacity; HUGH CLARK, in his)
 official capacity; BOB DAVY, in his)
 official capacity; and EDDIE)
 HENDERSON, in his official capacity,)
)
 Defendants.)
)
 _____)

MEMORANDUM AND
ORDER

THIS MATTER is before the Court on Plaintiff's motion to dismiss, or
in the alternative, for summary judgment filed September 2, 2008, and

Defendants' motion for summary judgment filed September 2, 2008.¹ For the reasons stated herein, Plaintiff's motion is denied and Defendants' motion is granted in part.

I. BACKGROUND

This case arises out of Plaintiff's termination of employment as a police officer with Defendant Town of Fletcher Police Department. Plaintiff filed an initial complaint against Defendants alleging claims of discrimination and/or retaliation under Title VII, claims under the United States and North Carolina Constitutions, and state law claims for wrongful termination, negligence, assault, battery, false imprisonment, civil conspiracy and punitive damages. **See Complaint filed October 18, 2007, at 25-33.** Plaintiff was allowed to file an amended complaint alleging one or more Defendants waived sovereign immunity under North Carolina law through the purchase of liability insurance. **See Order, filed January**

¹Evidence has been presented in the form of depositions, affidavits and other documents that are outside of the pleadings in this matter. Therefore, the Court will treat the 12(b)(6) motion as a motion for summary judgment and apply the applicable standard of review. **See Fed. R. Civ. P. 12(d); *Jakubiak v. Perry*, 101 F.3d 23, 25 n.1 (4th Cir. 1996).**

25, 2008; Amended Complaint, filed February 4, 2008. Defendants answered the amended complaint, filed a counterclaim along with a motion to dismiss some of Plaintiff's claims. An order was entered granting in part and denying in part Defendants' motion to dismiss. **See Memorandum and Order, filed April 3, 2008.** The following claims against one or more Defendants remained after entry of that order and a subsequent order allowing in part a motion for reconsideration: Plaintiff's claims of discrimination and/or retaliation under Title VII pursuant to 42 U.S.C. § 2000e-3 against Defendant Town of Fletcher and all individual Defendants in their official capacities; Plaintiff's pendent state claims of wrongful termination and negligence in the hiring, retention and supervision against Defendant Town of Fletcher; Plaintiff's pendent state claims of assault, battery, and false imprisonment against Defendants Town of Fletcher and Raymond in his official and individual capacities; Plaintiff's pendant state law claim for false imprisonment against Defendants Mark Biberdorf and Michael Morgan in their official and individual capacities; and Plaintiff's claims for punitive damages against Defendants Raymond and Michael

Morgan in their individual capacities. ***Id.* at 37-38;**² **see Order, filed May 15, 2008.** After completion of discovery, Defendants filed a motion seeking summary judgment on all of Plaintiff's remaining claims and an order dismissing the claims with prejudice. **See Defendants' Memorandum of Law in Support of Motion for Summary Judgment ("Defendants' Memorandum"), filed September 2, 2008.** Plaintiff responded in opposition on September 25, 2008, and Defendants replied on October 3, 2008. On September 2, 2008, Plaintiff filed a motion to dismiss or, in the alternative, for summary judgment on Defendant Raymond's state law counterclaims against him for defamation, malicious prosecution, and intentional infliction of emotional distress. **Plaintiff's Motion to Dismiss and/or Motion for Summary Judgment, filed September 2, 2008.** Defendant Raymond responded in opposition on September 19, 2008, and Plaintiff replied on October 3, 2008. These pending motions are now ready for resolution.

²Defendant Mark Biberdorf was employed as Town Manager for the Town of Fletcher. Defendant Michael Morgan was employed as a sergeant with the Town of Fletcher Police Department. **See Amended Complaint, *supra*, at 6-7.**

II. FACTUAL HISTORY

Plaintiff submitted an employment application in August 2005 to the Fletcher Police Department and was later scheduled for an interview by Defendant Chief of Police Langdon Raymond. **See Amended Complaint, at 7-8.** Following the interview and required background check, both completed by Raymond, Plaintiff was hired by the Town of Fletcher Police Department as a patrol officer in October 2005, initially excelling in his new position. **Id. at 7-9.** In January 2006, Raymond promoted Plaintiff to shift leader. **Id. at 9.** Raymond then conducted a performance evaluation of Plaintiff in April 2006, concluded Plaintiff's performance had been outstanding, and promoted him to the rank of Master Police Officer. **Id. at 9-11.**

As part of his new position, Plaintiff began working as a training coordinator where he was responsible for scheduling officers for various training programs. **See Exhibit D, Deposition of Timothy Foxx, attached to Defendants' Memorandum, at 80.** Officers with the Fletcher Police Department were asked to e-mail Raymond with their requests for training. **Id. at 82.** Once the requests were received, they were placed in the individual officer's training file. **Id.** As training coordinator, Plaintiff was

then responsible for retrieving these requests beginning in alphabetical order. ***Id.* at 83.** Plaintiff's first and only assignment led him to the file of Officer Sharon Archer of the Fletcher Police Department. Officer Archer had e-mailed requests for several training programs. Plaintiff attempted to enroll her in two of training programs, a death investigation class and child sex abuse investigator class. ***Id.* at 81.** Plaintiff testified he prepared the appropriate forms and forwarded them to Defendant Sergeant Michael Morgan for approval. ***Id.* at 84.** Plaintiff testified that Morgan discussed Archer's training requests with Raymond and Raymond told Plaintiff that he was "to never ever sign that fucking bitch up for training again." ***Id.* at 85.** Plaintiff testified that Morgan told him to put Archer's "file up and never fool with it again" and that day or the day after Plaintiff was relieved of his duties as training coordinator but remained a Master Patrol Officer. ***Id.*** When asked who became the next training coordinator, Plaintiff responded, "I have no idea." ***Id.***

Plaintiff testified that he complained to Raymond and Morgan about their refusal to permit Archer to attend requested training programs. ***Id.* at 88.** Plaintiff told Morgan he did not think "it was right" to deny Archer these training opportunities. ***Id.* at 89.** According to Plaintiff, Morgan told him

that if he wanted “to go anywheres” within the police department, he should not “be concerned” or “associated” with Archer. *Id.* According to Plaintiff, during his April 2006 performance evaluation, Raymond told him that Archer “was a bad officer[,] that it was only a matter of time before he got rid of her and that if [Plaintiff] wanted to advance in [his] career[,] that [he] would not stand up for her or be friends with her.” **Exhibit 4, Affidavit of Timothy Foxx, attached to Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment, filed October 8, 2008, at 5.**

Plaintiff also testified that in June 2006, at the conclusion of a departmental meeting that included Plaintiff, Raymond, Morgan, Archer and other officers, Raymond referred to Archer as a “bitch.” *Id. at 94-95.* Plaintiff stated that although this term was made by Raymond after the meeting had concluded and “people were moving around,” he had “no idea what [Raymond] was talking about . . . but [Raymond] made the comment loud enough to where people” overheard it. *Id. at 95.* When asked how many times he had complained to Morgan or Raymond about their alleged disparate treatment of Archer, Plaintiff replied “more than once.” *Id. at 92.* When pressed for additional details, Plaintiff replied that he had discussed

Archer's treatment with Morgan on two occasions and Raymond on at least one occasion. ***Id.* at 93-98.** Plaintiff testified that he never complained to anyone else about any alleged maltreatment of Archer by Raymond or Morgan. ***Id.* at 99.** Plaintiff further testified that Raymond and Morgan took no disciplinary action against him following his complaints to them concerning Archer at that time, and Plaintiff did not complain or protest when he was relieved of his training duties. ***Id.* at 102.** In fact, Plaintiff remained a Master Patrol Officer until October 2006. **Amended**

Complaint, at 19. Plaintiff was also asked:

Q: Is there anything else with regard to Archer that you haven't told me that you feel constitutes unethical or corrupt conduct on the part of Chief Raymond or any of the defendants?

A: Today that I can think of, no.

Foxx Deposition, at 102.

Plaintiff testified that Archer told him she had filed a grievance concerning her working conditions but admitted he has never been contacted in connection with her case. ***Id.* at 100-01.** In her affidavit, Archer states that Plaintiff tried to enroll her for training classes, but was ultimately unsuccessful. **Exhibit 3, Affidavit of Sharon Archer, attached to Plaintiff's Memorandum in Opposition, at 4.** When Archer asked him

if her training requests had been granted, Plaintiff replied that “he wasn’t sure what was going on.” *Id.* Shortly after Plaintiff was relieved of his training duties, a memorandum was sent to the officers of the Fletcher Police Department identifying Officer Jeff Eaton as the new training coordinator. *Id.* Archer stated that although she was not allowed to attend her requested training programs, other officers were allowed to attend training, including Aaron Lisenbee, Defendant Morgan, Matt Reid, and Kay Kimler. *Id.* Archer knew Raymond referred to her as a “bitch” on at least one occasion. *Id.* at 5-6 (“I also know that Raymond referred to me as a ‘bitch’. Raymond cussed in front of me and at me and humiliated me, and I believe he singled me out to do so.”). Archer filed a complaint with the Equal Employment Opportunity Commission (EEOC) on October 30, 2006, alleging discrimination based on her sex and age against Defendant Town of Fletcher. **Exhibit D, Archer Charge of Discrimination, attached to Declaration of Mark Biberdorf, included in Exhibits to Defendant’s Memorandum.** Archer’s EEOC complaint does not make any mention of the Plaintiff or that she was denied training opportunities. *Id.*

On or about October 20, 2006, Plaintiff executed a grievance form pursuant to the requirements set forth in the Town of Fletcher Personnel Handbook and Fletcher Police Department Handbook. **Exhibit A, Foxx Grievance Form, attached to Biberdorf Declaration.** In the grievance, Plaintiff alleges that on October 7 and 8, 2006, he informed Defendant Morgan that Plaintiff's wife had received sexually explicit telephone calls from Fletcher Police Officer John Munro. *Id.* According to Plaintiff, Morgan advised him to wait until October 9, 2006, in order to personally inform Raymond of these allegations. *Id.* At the outset of the meeting with Raymond, Plaintiff alleges Raymond became very angry and insinuated Plaintiff was failing in his duties as Master Patrol Officer. *Id.; see also, Amended Complaint, at 15.* When Plaintiff explained the nature of Munro's sexually explicit calls to Plaintiff's wife, Raymond inquired whether Plaintiff had reported this to anyone else. Plaintiff advised Raymond that he had called the Yancey County Clerk of Court's office in an effort to find out how to obtain a restraining order against Munro. *Id. at 15-16.* Plaintiff stated that as he "was explaining the sexual harassment complaint, Chief Raymond began shouting and screaming, he got up out of his chair, leaned over his desk, became red in the face, was shaking in anger, and

slammed his fist down on the desk to the point that [Plaintiff] believed that Chief Raymond was about to hit” Plaintiff. **Foxx Grievance Form, supra.** Raymond then informed Plaintiff that he was under internal investigation. Although Plaintiff requested to have legal counsel present in accordance with Town of Fletcher Policy, he alleges that Raymond told him he had no such right to counsel. *Id.* This meeting, where Morgan was also present, continued for over two hours. *Id.*; **see also Amended Complaint, at 16-17.** Plaintiff drafted a statement detailing his complaint against Munro at the conclusion of the meeting as requested by Raymond. Thereafter, Morgan informed Plaintiff that he had been instructed to give Plaintiff a less desirable work schedule. *Id. at 17; Foxx Grievance Form.*

Subsequently, Plaintiff attended another meeting with Raymond on October 12, 2006. Plaintiff was advised he was being reprimanded and demoted because he had failed to notify Raymond or Morgan of Munro’s alleged conduct in a timely fashion. **Foxx Grievance Form.** When Plaintiff asked for copies of the notices, Plaintiff alleges Raymond became angry and assaulted him by grabbing his genitals and hitting him in the chest with the copies. *Id.* Plaintiff alleges in the Amended Complaint and in his grievance form that the Town of Fletcher had no intention to demote,

fire, or otherwise reprimand him until such time as he complained to Defendants Morgan and Raymond about the inappropriate conduct by Officer John Munro. **Amended Complaint, at 19; Foxx Grievance Form.** Plaintiff does not allege that, during this series of meetings, Defendants Morgan and/or Raymond made any comment regarding his previous duties as training coordinator or his support of Archer.

Plaintiff alleges that on October 23, 2006, he met with Defendants Biberdorf and Raymond for what he believed would be a discussion of Plaintiff's October 20, 2006, grievance. **Amended Complaint, at 19-20.** Instead, Plaintiff's requests for an outside investigation were rebuffed. ***Id.* at 20.** The next day, Raymond informed Plaintiff that his grievance would be denied. ***Id.*** Plaintiff alleges none of the Defendants "ever seriously considered [his] appeals, grievances, or complaints about Officer Munro or Raymond." ***Id.* at 20.**

On October 24, 2006, Defendant Morgan advised Plaintiff that he was being placed on a five-day suspension with pay for alleged "violations of policy." ***Id.* at 21.** According to Plaintiff, he filed his charge of discrimination with the EEOC and sent copies to Defendant Biberdorf and the Fletcher Police Department on October 31, 2006, *via facsimile.* ***Id.*;**

see also, Exhibit H, Plaintiff's Charge of Discrimination, dated October 27, 2008, attached to Defendant's Memorandum. Plaintiff alleges that immediately after faxing the EEOC charge, he received a telephone call from Morgan advising him that he had been placed on indefinite suspension. **Amended Complaint, at 22.** On March 9, 2007, Plaintiff was notified by Biberdorf that he was being fired. **Id. at 22.**

In addition to the above complaint filed with the EEOC, Plaintiff filed two other charges of discrimination, one on November 2, 2006, and another on January 17, 2007, in response to the alleged retaliation by Defendants. **See Foxx Affidavit, at 3; Exhibit H, supra, at 2, 3.** Following investigation of the three charges, the EEOC was unable to conclude that Defendants had violated Plaintiff's civil rights, but nevertheless issued Plaintiff three right to sue letters. **See Exhibits A, B, & C, attached to Complaint.** In the first charge filed October 27, 2006, Plaintiff alleges he was demoted and reprimanded after he complained to Defendants Raymond and Morgan about sexually explicit phone calls placed by Officer Munro to Plaintiff's wife. **Exhibit H, supra, at 1.** He also reported being assaulted by Raymond when he asked for copies of the paperwork. **Id. ("Raymond grabbed me by the groin.")**. Plaintiff also

alleged in this charge that after his grievance was denied by Biberdorf and Defendant Town of Fletcher, he was notified that he was under internal investigation by Defendant Morgan and then placed on suspension by Raymond. *Id.* Plaintiff charges that he was discriminated against because of his male gender and retaliated against for “having complained of illegal activities” in violation of Title VII. *Id.* There is no mention of any discriminatory motive in regard to his removal as training coordinator. *Id.*; **Foxx Grievance Form (“I believe that any failure or refusal of the Fletcher Police Department and the Town of Fletcher to investigate and take appropriate remedial action, and the Fletcher Police Department’s acts of retaliation against both me and my wife, to be in direct violation of Title VII of the Civil Rights Act.”)**. During his deposition, Plaintiff explained that the “illegal activities” he complained of were the phone calls Munro allegedly made to his wife, and the information contained in his grievance form which also pertains to the alleged phone calls. **Foxx Deposition, at 204.** Plaintiff’s second charge of discrimination dated November 2, 2006, alleges he was retaliated against after filing the October 27, 2006, charge by being placed on indefinite suspension on October 31, 2006, by Defendants Raymond and Morgan. **Exhibit H,**

supra, at 2. Plaintiff's third charge of discrimination dated January 17, 2007, alleges he was retaliated against because he had filed two previous charges with the EEOC and for his opposition to Defendants' unlawful employment practices in violation of Title VII. **Id. at 3.**

II. STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact, and judgment for the moving party is warranted as a matter of law. **Fed. R. Civ. P. 56(c).** "A genuine issue [of fact] exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" **Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)), cert. denied, 513 U.S. 813, 814 (1994).** In considering a motion for summary judgment, the Court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. **Id.**

By reviewing substantive law, the Court may determine what matters constitute material facts. **Anderson, 477 U.S. at 248.** "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." **Id.** "The party seeking

summary judgment has the initial burden to show a lack of evidence to support the nonmoving party's case." ***Shaw, 13 F.3d at 798.*** If that showing is made, the burden then shifts to the nonmoving party who must convince the Court that a triable issue does exist. ***Id.*** A "mere scintilla of evidence" is not sufficient to defeat a motion for summary judgment. ***Id.***

Accordingly, in considering the facts of the instant case for purposes of this motion, the Court will view the record in the light most favorable to Plaintiff, the nonmoving party.

III. DISCUSSION

Plaintiff's amended complaint alleges two Title VII claims. First, Plaintiff alleges Defendants retaliated against him by suspending his employment indefinitely after he filed a charge with the EEOC. **See Amended Complaint, *supra*, at 22-23.** Second, Plaintiff alleges he was subjected to retaliatory action in violation of Title VII for his "continued and open support for [Officer Archer] , for Plaintiff's willingness to be a witness for [Archer] in her EEOC proceeding, and, further, for Plaintiff's clear opposition to Defendants' discriminatory acts and practices against this lone female officer [Archer]." ***Id. at 25-26.***

Section 704(a) of Title VII provides in relevant part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

To establish a *prima facie* case under Title VII for retaliation, Plaintiff must offer evidence that shows: (1) he engaged in activity protected under Title VII; (2) that his employer took adverse employment action against him; and (3) that there was a causal connection between the protected activity Plaintiff engaged in and the adverse action taken by Defendants.

See *Price v. Thompson*, 380 F.3d 209, 212 (4th Cir. 2004). If Plaintiff establishes his *prima facie* case, the burden shifts to Defendant “to rebut the presumption of retaliation by articulating a legitimate nonretaliatory reason for its actions.” ***Holland v. Washington Homes, Inc.*, 487 F.3d 208, 218 (4th Cir. 2007) (quoting *Beall v. Abbott Labs.*, 130 F.3d 614, 619 (4th Cir. 1997)).** If a legitimate reason is offered for the adverse action, the burden shifts back to Plaintiff to show that the “reason was mere pretext for retaliation by proving ‘both that the reason was false, and that discrimination was the real reason’ for the challenged conduct.” ***Beall*, at**

619 (quoting *Jiminez v. Mary Washington College*, 57 F.3d 369, 377-78 (4th Cir. 1995)) (other citations omitted).

A. First Title VII Retaliation Claim

Plaintiff's amended complaint alleges Defendants extended his suspension from the Town of Fletcher Police Department indefinitely in retaliation for filing charges of discrimination with the EEOC relating to his support of Archer. **Amended Complaint, *supra*, at 22.** Plaintiff's first claim for relief states:

Defendants unlawfully discriminated and retaliated against Plaintiff for Plaintiff's open opposition of Defendant's unlawful employment practices, including but not limited to Plaintiff's open support for the lone female officer employed by the Town of Fletcher against whom Defendant's were blatantly and openly discriminating in Plaintiff's presence.

***Id.* at 26.** Plaintiff further sets forth under this claim for relief allegations concerning Defendant's discriminatory conduct towards Archer based on her female sex and the alleged subsequent retaliation against Plaintiff for his support of Archer's effort to obtain training. In fact, Plaintiff devotes this entire claim for relief to illegal retaliation under Title VII based on his support of Archer. Plaintiff does not discuss alleged retaliation for filing the October, November, and January EEOC claims as a claim distinct from his

claim for support of Archer. Defendant moved for summary judgment and dismissal with prejudice of all of Plaintiff's Title VII claims for discrimination and retaliation. Perhaps recognizing that Plaintiff did not intend to argue that the EEOC filings support a claim for retaliation for any reason other than his support of Archer, Defendants focus their argument on Plaintiff's Title VII claim relating to Archer. Indeed, Plaintiff, in his response to Defendant's motion for summary judgment, devotes five paragraphs to rebuttal of Defendant's arguments pertaining to Archer and makes no mention about any Title VII retaliation claim relating to the EEOC filings that is distinct from his claim for support of Archer.³ Based on an examination of the evidence submitted in this matter, the Court concludes that Plaintiff is only offering argument and evidence on a Title VII claim as it relates to retaliation for his support of Sharon Archer. Plaintiff's affidavit

³ Plaintiff contends that "Defendants maliciously extended Plaintiff's suspension, ' . . . for taking a stand against Defendants' long-standing policies and practices that . . . violated individual rights.'" **Plaintiff's Response in Opposition to Defendant's Motion to Dismiss, filed December 31, 2007, at 6 (quoting Complaint, ¶ 102)**. Plaintiff also contends that "[p]ursuant to the clear and unambiguous language of 42 U.S.C. § 2000e-3, Plaintiff respectfully submits that he should be entitled to protection from retaliation from Defendants that has occurred as a result of Plaintiff's open and continued support for this lone female officer against whom Raymond and Morgan, and consequently the Town of Fletcher, discriminated." *Id.*

states that he filed three charges with the EEOC. Plaintiff states that the second charge was filed with the EEOC because Defendant retaliated against him for filing the first EEOC charge. Plaintiff explains his position as follows:

Although I understand that Defendants have taken the position that I did not initially complain about retaliation directed at me for opposing unlawful employment practices against Officer Sharon Archer, that is simply not the case, I certain did so complain and have done so consistently.

Foxx Affidavit, *supra*, at 3-4. The Court concludes that although Plaintiff offers an allegation that Defendant retaliated against him for filing an EEOC complaint, Plaintiff has offered no evidence to support this allegation.

However, even assuming *arguendo* that Plaintiff has offered evidence that supports retaliation under Title VII for reasons unrelated to support for Archer, the Court concludes as a matter of law that Plaintiff was not engaged in a protected activity. Plaintiff must first show that he was engaged in a protected activity under Title VII to satisfy the first element of his *prima facie* case. ***See Price v. Thompson*, 380 F.3d 209, 212 (4th Cir. 2004).** In both his grievance form and under oath in his deposition, Plaintiff admits that he filed the first EEOC claim on October 27, 2006, because

Defendant retaliated against him after he complained of illegal activities, that is, he complained that Munro was placing sexually explicit calls to his wife. **See Grievance, *supra*; Foxx Deposition, at 203-04.** Plaintiff has offered no case law to support a claim that his complaints to his employer about sexually explicit phone calls to his wife, who was not employed by Defendant Town of Fletcher, is protected activity under Title VII. Therefore, because Plaintiff has failed to demonstrate a general issue of material fact, summary judgment will be granted on this issue.

B. Sharon Archer Title VII Claim

Defendants contend Plaintiff's Title VII claim regarding Archer should be dismissed because Plaintiff has failed to establish a *prima facie* case of discrimination or retaliation, and further that the Town of Fletcher had legitimate nondiscriminatory reasons for all actions taken against Plaintiff. **Defendant's Memorandum, at 9.** In reviewing the facts contained in the record and as set out above in the light most favorable to Plaintiff, the Court concludes that Plaintiff has not established his *prima facie* case of discrimination or retaliation with respect to his support of Archer.

Plaintiff asserts in his amended complaint that his support of Officer Archer, a female, in June 2006 led Defendants to retaliate against him by removing him as training coordinator. **Amended Complaint, at 25-26.**

Plaintiff testified during his deposition that he expressed concern to Raymond on at least one occasion and Morgan on two occasions that it was unfair to deny Archer her requested training classes, but he testified he never complained to anyone else about Archer's alleged treatment.

Foxx Deposition, at 93-98, 99. Plaintiff stated that Raymond explained to Plaintiff that Archer was a bad officer and it was likely she would be fired sometime in the near future. **See Foxx Affidavit, at 5.** In examining the first prong of the *prima facie* showing, the Court finds that Plaintiff's statements to Raymond and Morgan qualify under Title VII as opposing an unlawful employment practice, namely, Defendants' alleged discrimination against Archer in denying her the opportunity to take training classes because of her sex.

The second consideration is whether Defendants took adverse employment action against Plaintiff because he spoke out in support of Archer. Plaintiff testified that neither Raymond nor Morgan took any disciplinary action against him after he was removed as training

coordinator and prior to October 2006 when he was demoted from Master Patrol Officer for reasons wholly unrelated to Archer. Plaintiff's statements regarding this incident do not show that he complained about being removed as training officer nor does the record show that he ever asked to be reinstated in that position. **Foxx Deposition, at 102.** Additionally, Plaintiff remained a Master Patrol Officer after his removal as training coordinator for some four more months until October 2006. **Amended Complaint, at 19.** Even though Plaintiff stated he did not know who was selected as his replacement, Archer stated that a memorandum was sent to all officers that contained the name of the new training coordinator. **Foxx Deposition, at 85; Archer Affidavit, at 4.** Further, there is no evidence to indicate that removing Plaintiff as training coordinator resulted in any reduction in his pay, work hours, benefits, or any other condition of his employment.

The Title VII retaliation "provision 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, 67-68 (2006).** Plaintiff "must show that a reasonable employee would have found the challenged action materially adverse." ***Id.* at 68.** This burden

presupposes that Plaintiff himself finds the conduct “materially adverse” and that Plaintiff will offer competent evidence of the same. “We speak of *material adversity* because we believe it is important to separate significant from trivial harms.” *Id.*

After considering the evidence of record in the light most favorable to Plaintiff, the Court concludes that no rational trier of fact could conclude that Plaintiff suffered an adverse employment action. Plaintiff’s three EEOC claims make no mention whatsoever of the training coordinator position. Plaintiff’s deposition shows that he did not have any great attachment to the training coordinator position, if any at all. The record reflects that the Plaintiff, who remained Master Patrol Officer in the Fletcher Police Department, did not even know who had been installed as the new training coordinator. Plaintiff has not met his burden to produce sufficient evidence to show that there is genuine issue of material fact on this issue. **See Fed. R. Civ. P. 56(c)**. Having concluded there was no adverse employment action, it is unnecessary to consider whether there was a causal connection. Accordingly, Plaintiff’s Title VII claim must fail as a matter of law.

Plaintiff's remaining claims arise exclusively under North Carolina law and are before this Court under 28 U.S.C. § 1367. Having granted Defendant's motion for summary judgment on the Title VII claims, the Court hereby declines to exercise supplemental jurisdiction over these remaining state law claims and such claims are dismissed without prejudice. **See 28 U.S.C. § 1367(c)(3)**. Defendant's counterclaims likewise arise exclusively under North Carolina law and they, too, are dismissed without prejudice.

IV. ORDER

IT IS, THEREFORE, ORDERED that Defendant's motion for summary judgment as to Plaintiff's Title VII retaliation claim is **GRANTED** and the motion is **DENIED** as to Plaintiff's remaining state law claims. Plaintiff's Title VII claims are **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiff's motion to dismiss and/or for summary judgment is **DENIED**.

A Judgment incorporating the findings herein is filed herewith.

Signed: December 3, 2008

A handwritten signature in black ink, appearing to read "L. H. Thornburg", written over a horizontal line.

Lacy H. Thornburg
United States District Judge

