UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

S.V.

Plaintiff,

vs. Case No.: 10-919

KENNETH KRATZ

Defendant.

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

The Defendant, Kenneth Kratz, by his attorneys, Hammett, Bellin, & Oswald, L.L.C., respectfully submits this reply brief in support of his Motion for Summary Judgment.

ARGUMENT

I. Defendant's actions do not constitute sex discrimination, even when all facts are read in the light most favorable to Plaintiff, and this Court must grant Defendant's Motion to Dismiss.

Plaintiff states in her Brief that Defendant discriminated against her by engaging in sexual harassment as it is defined in the context of Title VII hostile work environment analysis ("environmental harassment," in Plaintiff's brief). (Pl.'s Br. in Resp. to Def.'s Mot. to Dismiss & for Summ. J. 4.) Defendant acknowledges that federal courts use roughly the same standards in evaluating hostile work environment sexual harassment under Title VII and in evaluating sexual harassment for purposes of § 1983 claims under the Equal Protection Clause of the 14th Amendment. *See e.g.*, *King v. Bd. of Regents of Univ. of Wis. System*, 898 F.2d 533, 537 (stating, "In general, the claim [under the Equal Protection Clause] follows the contours of Title VII claims."). Courts do, however, delineate a set of guidelines in Equal Protection cases that differs from the general standard:

"the defendant must intend to harass under equal protection, . . . but not under Title VII, where the inquiry is solely from the plaintiff's perspective." *Id*. at 537-38. The test is more clearly stated in *Volk v. Coler*, 845 F.2d 1422, 1430-31, ¶ 40 (7th Cir. 1988): "Liability under § 1983 requires proof that '(1) defendants acted under color of state law, (2) defendants' actions deprived plaintiff of her rights, privileges or immunities guaranteed by the Constitution, and (3) defendants' conduct proximately caused plaintiff's deprivation.' . . . In addition, [plaintiff] must prove that the defendants' discrimination was intentional." (quoting *Webb v. City Center of Illinois*, 813 F.2d 824, 827 (7th Cir. 1987)). In *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1186-87, ¶¶ 27-28 (7th Cir. 1986), the court states, "The core of any equal protection case is, of course, a showing of intentional discrimination. . . . [T]he ultimate inquiry is whether the sexual harassment constitutes intentional discrimination. This differs from the inquiry under Title VII as to whether or not the sexual harassment altered the conditions of the victim's employment." Based upon the above guidelines, Plaintiff's complaint fails to state any plausible claim upon which relief can be granted by this Court, and this case must therefore be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6).

In *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428 (7th Cir. 1995), the Seventh Circuit Court of Appeals, whose precedent Defendant rightly points out is particularly relevant in this case, draws a firm distinction in sexual harassment cases between those cases that constitute legitimate complaints of "hostile environment" harassment and those that do not: "On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. . . . On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers." *Id*. at 430, ¶ 12 (internal citations omitted) (citing *Meritor Savings Bank v.*

V*inson*, 477 U.S. 57, 67, 106 s. Ct. 2399, 2405-06, 91 L. Ed. 2d 49 (1986); *Harris Forklift Systems, Inc.*, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993); *Carr v. Allison Gas Turbine Division*, 32 F.3d 1007, 1009-10 (7th Cir. 1994); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620-21 (6th Cir. 1986); *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983)). In that case, the court determined that a supervisor who made flirtatious and suggestive remarks to an employee over the course of seven months was not a harasser for purposes of finding sex discrimination.

Other circuits and districts similarly hold plaintiffs to a high standard in assessing the presence or absence of sex discrimination in harassment cases. "The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women. . . . It is not designed to purge the workplace of vulgarity." *Baskerville*, 50 F.3d at 430, ¶ 12. In *Faragher v. Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), defendants repeatedly inappropriately touched their subordinates without the subordinates' consent. For example, one supervisor "put his arm around [Plaintiff], with his hand on her buttocks, . . . and once made contact with another female [employee] in a motion of sexual simulation . . . ." *Id*. at 782. The defendants in that case regularly made offensive comments about women in general and regularly told the plaintiffs they wanted to have sex with them. *Id*. The court in that case noted, "'simple teasing,' . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory . . ." behavior. *Id*. at 788.

The federal district court for the Southern District of Illinois echoes this language in *Chambliss v. Illinois Department of Corrections*, No. 05-CV-4175-JPG (S.D. Ill. Feb. 15, 2007), stating, "For example, a court has found that 'teasing about waving at squad cars [like a prostitute might], ambiguous comments about bananas, rubber bands, and low-neck tops, staring and attempts to make

eye contact, and four isolated incidents in which a co-worker briefly touched her arm, finger, or buttocks' did not amount to an impermissibly hostile environment as a matter of law." *Id*. at 19 (citing *Adusumilli v. City of Chicago*, 164 F.3d 353, 361-62 (7th Cir. 1998)). In *Chambliss*, the court concluded that the following catalogue of behaviors was not sufficiently severe or pervasive to constitute sex discrimination: "25 comments about [a female co-worker], his describing pornographic movies once to [Plaintiff] alone and as many as five times to the office in general, his note on her leave request, the one time he interrogated her about her sexual experiences on her vacation, his hugging her for five to ten seconds, his bringing in a birthday cake in the shape of a woman's breasts, his telling her about his [sexual] dream about [another female co-worker], his asking her out on a date, and numerous other comments to the office in general." *Chambliss*, at 20. The court stated, "While [Defendant's] behavior was certainly boorish, it did not create an objectively hostile work environment for [Plaintiff]." *Id*.

On the other hand, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986), the Supreme Court concluded that sexual harassment took place where a supervisor pressured a female employee into a sexual relationship that continued for four years before the employee was finally terminated, even going so far as to rape her several times. *Meritor Savings Bank*, 477 U.S. at 60. In *King v. Bd. of Regents of Univ. of Wis. System*, 898 F.2d 533 (7th Cir. 1990), the 7th Circuit Court of Appeals found a plausible claim of harassment where an employee's supervisor "repeatedly verbally assaulted [her], fondled her, and at one point, physically attacked her." *Id*. at 538, ¶ 20. The court goes on, stating, "It is clear . . . that the advances were unwelcome and that [the defendant] knew they were unwelcome. *This is not the case of a single, innocent, sexual query*. Instead, we have repeated, unwelcome advances, fondling and a physical attack." *Id*. at 539-40, ¶ 27 (emphasis added). In *Bohen*,

799 F.2d at 1186, the court stated, "several fact situations have been found to constitute sufficient sexual harassment to amount to sex discrimination for equal protection purposes. For example, liability was found where there were 'repeated crude sexual advances and suggestive comments' by the plaintiff's Assistant Supervisor . . . , where the same Assistant Supervisor sexually assaulted the plaintiff at work." The court in *Bohen* also stated, "'[E]very passing overture made by a male public official to a female public employee because of her gender' is not a denial of equal protection. . . . Likewise, 'a single, innocent, romantic solicitation which inadvertently causes offense to its recipient' is not a denial of equal protection." *Id*. at 1186, ¶ 26.

The above cases serve as a foil to the present case in that, in contrast to Defendant's text messages, they demonstrate the seriousness and severity of true sexual harassment. The Defendant in this case texted the Plaintiff, a young woman he met through his employment with the District Attorney's office (a woman who did not work for him and who was not an intern or student), asking for a date and, possibly, a relationship. (*See* Compl.; Def.'s Statement of Proposed Material Facts; Pl.'s Resp. to Def.'s Statement of Proposed Material Facts & Statement of Additional Material Facts; Decl. of Def. Kenneth Kratz.) He may not have done so in the most charming way, or in a way that Plaintiff found attractive (indeed, Plaintiff's Brief suggests she was "revolted" at Defendant's proposals) (*see* Pl.'s Br. in Resp. to Def.'s Mot. to Dismiss & for Summ. J. 1), but nothing about Defendant's interaction with Plaintiff rises to the level of sexual harassment as it is described in the cases above. Plaintiff's Brief exaggerates the intensity and duration of the text messages she received, as is obvious to anyone who has conversed through text message. A text message constitutes barely a single sentence in most cases, sometimes one or two full sentences. In the context of an ongoing conversation, thirty sentences in three days is hardly pervasive, and on two of the days in question,

October 20 and October 22, Plaintiff received fewer than ten texts per day. (Decl. of Pl. S.V., Ex. A.) In fact, Plaintiff asserts in her supporting materials that she sent Defendant at least *twenty-three* text messages herself during the same three-day time period. (*Id.*) The "transcript" she provides of her responses is notably less detailed than the "transcript" of Defendant's messages, and Plaintiff states in her declaration that both "transcripts" were created by her "to the best of [her] recollection," so it is very possible that some text messages were forgotten or were recalled inaccurately. (Decl. of Pl. S.V.; Decl. of Def. Kenneth Kratz.)

Nevertheless, even if Plaintiff's depiction of the three-day text "conversation" is entirely accurate, there is nothing about it that is threatening, demeaning, or offensive to the extent that it constitutes sexual harassment. Defendant makes two references to the ongoing case against Plaintiff's ex-boyfriend: "It would go slow enough for Shannon's case to get done," and "When the case is over, if you change your mind . . . ." (Decl. of Pl. S.V., Ex. A; Decl. of Def. Kenneth Kratz ¶ 16.) Never did Defendant threaten or even suggest that he would stop prosecuting Shannon's case if Plaintiff rejected or turned down his request for a relationship, and it appears that he tried to make it clear throughout the three-day conversation that whether any relationship occurred would be "ALL up to [Plaintiff]." (*Id.*) Defendant actually asked Plaintiff twice on October 21 whether she wanted him to stop texting her, and, according to Plaintiff's account of the conversation, she responded, "I have to think about that," and, "Lol." (*Id.*) The very last text message is one from Defendant, and it reads, "When the case is over, if you change your mind and want to meet for a drink, please tell me. *Otherwise I will respect your desire to be left alone*." (*Id.*)

In each of the cases cited by Plaintiff in her Brief, and in the cases cited above, the Court takes note of whether the plaintiffs in those cases made any attempt to put a stop to the behavior before

resorting to legal action. In *Meritor Savings Bank*, the Court states, "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" *Meritor*, 477 U.S. at 68. *See also Chambliss* (noting that "she was able to rebuff it simply by refusing [Defendant's] invitation for a date . . . ."). Likewise, in *Bohen*, 799 F.2d at 1186, ¶ 26 (7th Cir. 1986), the court notes that in other cases liability has been found where "'repeated crude sexual advances and suggestive comments' by the plaintiff's Assistant Supervisor . . . 'persisted despite plaintiff's explicit and consistent rejection of his advances' . . . ." Based on Plaintiff's responses to Defendant's text messages, it is totally unclear as to whether Plaintiff wanted him to stop, not only because her responses are so ambiguous, but also because she continued to respond to Defendant's texts for the next three days.

Plaintiff suggests in her Brief that this Court should view Defendant's text messages differently because she was a domestic abuse victim, implying that her subjective point of view is inherently different from that of an objective reasonable person in the same circumstances. (Pl.'s Br. in Resp. to Def.'s Mot. to Dismiss & for Summ. J. 6, 12-13.) But just because Plaintiff's perspective is not a reasonable one, or differs from an objectively reasonable perspective, that does not mean this Court can adopt an unreasonable perspective. In fact, case law explicitly requires this Court to view the alleged conduct from both subjective *and* reasonably objective points of view in order to determine whether the allegations rise to the level of severe and pervasive conduct. In *Faragher*, the Court states, "in order to be actionable under the statute, a sexually objectionable environment must be *both* objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, *and* one that the victim in fact did perceive to be so." *Faragher*, 524 U.S. at 787 (emphasis added) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993)). Similarly, in *King*, the Court states, "in order to find discrimination, the court must conclude that 'the conduct would adversely

affect both a reasonable person and the particular plaintiff bringing the action.'" *King*, 898 F.2d at 537, ¶ 14.

Plaintiff in this case has stated multiple times that she perceives Defendant's text messages as harassment, but the Court cannot ignore the requirement of considering what a *reasonable* person would perceive when reading Defendant's text messages. Seeing the text conversation in its entirety only serves to accentuate the lack of harassing conduct on Defendant's part. Nothing in Plaintiff's responses indicated that she was uncomfortable with the conversation or that she believed it to be inappropriate. (*See* Decl. of Pl. S.V., Ex. A.; Decl. of Def. Kenneth Kratz, ¶¶ 9-14) She never asked Defendant to stop texting her or to text her only regarding Shannon's case. (*Id.*) Plaintiff and Defendant never met face-to-face after the texting started, Defendant never physically touched Plaintiff, never swore at her, called her names, or made lewd gestures or comments as Plaintiffs did in the cases above. (*See* Compl.; Decl. of Pl. S.V.; Decl. of Def. K.K. ¶¶ 4, 13, 15.. In fact, he never made any attempt to contact Plaintiff other than these text messages. Under these circumstances, it would actually be *un*reasonable for the Court to find that sex discrimination or sexual harassment had taken place.

On the facts presented, even when giving all inferences in favor of Plaintiff, the Court cannot find that there was intentional discrimination on Defendant's part, as is required for a finding of sex discrimination under the Equal Protection Clause. The Court also cannot find, based upon the facts presented by Plaintiff, that Defendant's text messages or other conduct deprived Plaintiff of any rights, privileges, or immunities. Her ex-boyfriend's case was concluded successfully, and, when she finally made clear to Defendant that she did not want to pursue a relationship, he respectfully left her alone. While the text messages may have been a clumsy, perhaps pathetic (Plaintiff even goes so far

in her Brief as to call them "revolting") attempt to ask Plaintiff for a date, they do not rise to a level that constitutes sexual harassment under the Equal Protection Clause of the 14th Amendment, even if this Court reads all of the facts provided thus far in the light most favorable to the Plaintiff. The Court must therefore grant Defendant's Rule 12(b)(6) Motion to Dismiss, alternatively, Motion for Summary Judgment.

II. Defendant is entitled to absolute or qualified immunity because he could not have reasonably known or expected his conduct in this case to constitute a violation of Plaintiff's constitutional rights and because he was performing duties intimately associated with the prosecution of S.K.'s criminal matter when the alleged conduct occurred.

In *Houston v. Partee*, 978 F.2d 362, 367 (7th Cir. 1992), the court states, "Federal courts, including this one, have been willing to grant prosecutors absolute immunity for gathering information and evidence in furtherance of a decision to initiate a prosecution." The court has also noted that "[t]he absolute immunity of an advocate is not confined strictly to actions taken in the courtroom." *Auriemma v. Montgomery*, 860 F.2d 273, 278, ¶ 18 (7th Cir. 1988).

Defendant's actions in this case began when he conducted an office meeting with Plaintiff, the victim in a criminal prosecution and also the only witness to the criminal actions of her ex-boyfriend. In his capacity as District Attorney, Defendant was required to conduct this meeting in order to fully prepare his case against S.K. and to perform his duties as prosecutor. Additional contact with witnesses similarly constitutes one of the duties of District Attorney, and such contact is therefore of the type that is preotected by absolute immunity.

Nonetheless, if this Court were to conclude that absolute immunity is inappropriate in this case, then qualified immunity applies. "On a qualified immunity claim the court confronts two questions: (1) whether the plaintiff's allegations make out a deprivation of a constitutional right; and (2) whether that right was clearly established at the time of the defendant's alleged misconduct." *Ault*

v. Speicher, No. 09-2104, slip op. at 8 (7th Cir. Mar. 3, 2011). Furthermore, "[i]n order to carry her burden of proving that the constitutional right she claims Defendant violated was clearly established, Plaintiff must either (1) present case law that has articulated both the right at issue and applied it to a factual circumstance similar to the one at hand or (2) demonstrate that the 'contours of the right are so established as to make the unconstitutionality obvious.'" *Id.* at 9 (quoting *Boyd v. Owen*, 481 F.3d 520, 526-27 (7th Cir. 2007)).

As demonstrated in Section I. above, Plaintiff in this case has failed to meet her burden, and this Court must therefore grant Defendant's request for dismissal. First, Plaintiff's accusations do not imply the deprivation of any constitutional right. The Constitution does not protect Plaintiff from feeling repulsed by a man's interest in her. The Constitution does require that public officials not engage in sexual harassment and that they not deprive any person of due process of the law. Plaintiff has stated in her Brief that she does not intend to pursue any Due Process claims, as her due process rights were never violated. Plaintiff's ex-boyfriend was prosecuted and sentenced appropriately, and Plaintiff was apprised of the status of the case throughout those criminal proceedings. (Compl. 3, 6.) With respect to sexual harassment, Plaintiff has failed to demonstrate, even when her additional submissions are considered along with the Complaint, that sexual harassment or intentional sex discrimination took place.

Second, based upon the status of the law at the time Defendant texted Plaintiff, Defendant would have had no way of knowing that such actions might constitute sex discrimination or a violation of equal protection, and the unconstitutionality of his actions (if they were in fact unconstitutional) is therefore anything but obvious.

The cases cited by Plaintiff in her Brief, including *Markham v. White*, 172 F.2d 486 (7th Cir. 1999), take place in either an educational setting or in a workplace environment, and every single one

of them involves more than "'a single, innocent, romantic solicitation which inadvertently causes offense to its recipient.'" *Bohen*, 799 F.2d at 1186, ¶ 26. Plaintiff in this case was in no way under the authority or control of Defendant in the way that a student or employee would be, and Defendant had no reason to believe Plaintiff would feel herself to be beholden to him in any way. (Decl. of Def. K.K. ¶16.) Plaintiff claims to have been concerned that Defendant might stop prosecuting her ex-boyfriend's case if she rejected him, but Defendant never gave her any indication that he would stop pursuing the case against S.K. in the event his proposals were turned down. (Decl. of Pl. S.V., Ex. A; Decl. of Def. K.K. ¶13.) Instead, he twice asked, point blank, whether Plaintiff wanted him to stop texting her and told her that any relationship would move slowly to allow for S.K.'s case to be completed. (*Id.* at ¶¶ 13 and 14) The fact that Plaintiff had unreasonable fears about Defendant does not heighten Defendant's conduct to the level of sex discrimination, especially where the case law existent at the time the text messages occurred used a reasonable person standard in evaluating alleged harassment and did not even hint at the possibility that asking another adult for a date and a relationship via text message, even if done in a way that is unattractive to the recipient, might constitute sex discrimination. *See* Section I., supra. At no time did Defendant know his text conversation could rise to the level of a constitutional violation. (Decl. of K.K. ¶ 19).

Because Defendant was acting well within the scope of his duties as District Attorney, and because there was no way for him to know that his text messages to Plaintiff could be discriminatory, qualified immunity must attach if absolute immunity does not, resulting in a summary judgment dismissal of Plaintiff's claims.

III. Defendant's Motion for Summary Judgment and, in the alternative, Motion to Dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6) has been properly pled and must be granted.

The local rules of civil procedure do not preclude the simultaneous filing of motions for dismissal and summary judgment. In fact, Seventh Circuit case law recognizes this type of pleading as valid. For example, in *Line Const. Ben. Fund v. Allied Elec. Contrac.*, 591 F.3d 576 (7th Cir. 2010), the court states in passing that "Allied moved to dismiss Lineco's action for lack of standing or, in the alternative, for partial summary judgment . . ." without commenting further or noting any procedural error. *Id.* at 576. Similarly, in *Wisconsin v. Ho-Chunk*, 512 F.3d 921 (7th Cir. 2008), the court acknowledges that "The Nation . . . brought a motion to dismiss or, alternatively, for summary judgment regarding the State's amended complaint." *Id.* at 921. The district court addressed the motions as pled, and the court of appeals addressed the motions de novo, with no mention of a procedural error. In *Porco v. Trustees of Indiana University*, 453 F.3d 390, 390 (7th Cir. 2006), "[t]he defendants moved to dismiss [the] suit for lack of standing, and moved in the alternative for summary judgment. The district court dismissed the suit in part and granted the defendants' motion for summary judgment as to the remainder." The Plaintiff appealed the district court's decision on other grounds, and the court of appeals dismissed the appeal. *Id.* In *Tri-Gen v. Intern. Union Operating Engineers*, 433 F.3d 1024, 1024 (7th Cir. 2006), the defendant "moved for dismissal and summary judgment on all counts." The circuit court in that case ruled in favor of the defendant, and the court of appeals affirmed.

Finally, in the Second Circuit case *Ying Jing Gan v. City of New York*, 996 F.2d 522 (2d Cir. 1993), a case very similar to this one, a district attorney was sued for violation of a victim's constitutional rights. The district attorney subsequently filed a motion "for dismissal of the complaint pursuant to . . . Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief could be granted or,

in the alternative, for summary judgment in their favor pursuant to Fed. R. Civ. P. 56(b) on grounds of absolute, qualified, or Eleventh Amendment immunity." *Id.* at 526, ¶ 13. The Second Circuit ruled in favor of the defendant, making no mention of procedural issues in its ruling.

Defendant's motions in this case are consistent with the Federal Rules of Civil Procedure, the Local Rules, and the above case law. Not only are they pled properly, but also this Court must grant them under the circumstances present in this case. The motion to dismiss for failure to state a claim for relief must be granted because the facts as stated in the Complaint fail to rise to the level of a constitutional violation, and Defendant's motion for summary judgment must be granted because, even in light of the additional submissions filed by the parties, Defendant is entitled to absolute or qualified immunity and has not violated Plaintiff's constitutional rights.

IV. The Declaration of Michael R. Fox and attached letter of the Wisconsin District Attorneys Association (WDAA) must be stricken from the record because it is inadmissible hearsay and is irrelevant to the accusations contained in the Complaint.

According to the Federal Rules of Evidence, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). "Hearsay is not admissible" pursuant to Rule 802, except as provided for in the limited exceptions listed in the Rules. Fed. R. Evid. 802. In addition, the Rules provide that only relevant evidence, that is, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," is admissible. Fed. R. Evid. 401-02.

The letter of the Wisconsin District Attorneys Association fails to satisfy either of the above rules and must therefore be stricken from the record. With respect to relevancy, the letter has no bearing on the probability of any of the specific facts asserted by Plaintiff in her complaint or on the alternative facts asserted. It makes several conclusory statements about Defendant's intentions but

offers no factual evidence in support of those statements. Furthermore, the letter constitutes hearsay because it has been offered for purposes of proving the truth of the conclusory statements contained therein and for purposes of proving the truth of the matters asserted in Plaintiff's Brief. Either way, the letter is a statement made by someone other than the declarant, Attorney Fox, and it does not fall within the scope of any hearsay exceptions enumerated in the Rules of Evidence. (*See* Decl. of Michael R. Fox.)

Specifically, the letter is not a "prior statement by a witness" or an "admission by a party opponent" as provided for in Rule 801(d). In order to be considered an admission by the Defendant, the letter would have to be one of the following: "A) the party's own statement, . . . or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant . . . , or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Other exceptions to the hearsay rule where the declarant is unavailable to testify include former testimony of a witness, a statement under belief of impending death, a statement against interest, a statement of personal family history, or a forfeiture by wrongdoing. Fed. R. Evid. 804(b). None of the above apply in this case, and the only remaining exception occurs when "the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." Fed. R. Evid. 807.

If this letter is meant to be proof of Defendant's intentions, then it must fail to meet any of the above exceptions. It would in fact, defeat the purposes of these rules and the interests of justice if

an accusatory letter containing conclusory statements regarding a defendant's subjective intentions is admitted as evidence, especially when the record contains not only direct statements from the Defendant but also evidence in the form of a conversation between the parties and other declarations. The letter must be stricken from the record in this case for failure to satisfy the Rules of Evidence.

CONCLUSION

Based upon the above, Defendant respectfully submits that this Court must dismiss Plaintiff's complaint for failure to state a claim on which relief can be granted or, in the alternative must grant Defendant's request for summary judgment based upon the fact that he is entitled to absolute or qualified immunity. In addition, this Court must strike the Declaration of Michael R. Fox and accompanying letter from the record.

Dated this 29th day of June, 2011.

HAMMETT, BELLIN & OSWALD L.L.C.

/s/ Robert E. Bellin, Jr.

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