APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 21-2938

Charles L. Burgett

Plaintiff - Appellant

v.

Janet L. Yellen, Secretary, Department of the Treasury

Defendant - Appellee

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: May 12, 2022
Filed: May 17, 2022
[Unpublished]

Before KELLY, ERICKSON, and GRASZ, Circuit Judges.

PER CURIAM.

Charles Burgett appeals following the district court's[1] adverse grant of summary judgment in his employment discrimination action. After careful review of

[1]The Honorable Brian C. Wimes, United States District Judge for the Western District of Missouri.

the record and the parties' arguments on appeal, we conclude that the grant of summary judgment was proper. See Banks v. John Deere & Co., 829 F.3d 661, 665 (8th Cir. 2016) (reviewing grant of summary judgment de novo). Additionally, we conclude that the district court did not abuse its discretion in denying Burgett's motion for reconsideration. See Ryan v. Ryan, 889 F.3d 499, 507-08 (8th Cir. 2018) (abuse of discretion review). We grant Burgett's pending motion seeking leave to file a document, and we affirm. See 8th Cir. R. 47B.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

CHARLES L. BURGETT, Plaintiff, v. JANET YELLEN, Secretary of United States Department of Treasury,[1] Defendant.	)	Case No. 4:18-CV-00309-BCW

ORDER

Before the Court is Defendant's Motion for Summary Judgment (Doc. #65). The Court, being duly advised of the premises, grants said motion.

BACKGROUND

Plaintiff Charles Burgett ("Burgett") alleges claims against Defendant the Secretary of the United States Department of Treasury under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. Burgett was hired as a full-time, probationary seasonal Tax Examining Technician at the Internal Revenue Service ("IRS") where he worked from January 2012 until May 20, 2012. During this time, Burgett alleges he suffered race and gender-based discrimination, was subjected to a hostile work environment because of his race and gender, and was retaliated against for participating in a protected activity.

On April 5, 2012, Burgett filed an informal discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") alleging he was the victim of discriminatory evaluations by IRS management and other employees. Burgett claims he tried to meet with his

[1] Janet Yellen is substituted as the Defendant Secretary of the U.S. Department of Treasury due to her appointment on January 26, 2021. Fed. R. Civ. P. 25(d).

manager, Bonnie Green, to discuss concerns outlined in his evaluations, but was refused. On May 7, 2012, Burgett mediated his informal complaint filed on April 5, 2012, and a Resolution Agreement was executed and signed by Burgett and operations manager Ronald Manville. The next day, Manville's subordinate managers, who Burgett alleges were aware that he was in settlement discussions, recommended Burgett be terminated. Thereafter, on May 10, 2012, Burgett filed another informal discrimination complaint alleging continued harassment. Over the next few days, Burgett alleges his work was heavily scrutinized in retaliation for filing EEOC complaints. Four days after signing the settlement agreement, Burgett's IRS employment was terminated for unacceptable performance.

After his termination, Burgett applied to other positions within the IRS. Burgett alleges Defendant continued to discriminate and retaliate against him by failing to select him for numerous positions over a period of approximately seven years despite his qualifications.

On April 24, 2018, Burgett filed a petition in this Court for leave to proceed in forma pauperis, alleging discrimination in the workplace. (Doc. #1). On May 7, 2018, the Court ordered Burgett to amend his complaint and attach his right-to-sue letter regarding his Title VII claim. (Doc. #3). On May 17, 2018, Burgett filed an amended complaint against the Secretary of the United States Department of Treasury. (Doc. #4). On May 25, 2018, the Court granted Burgett's motion for leave to proceed in forma pauperis. (Doc. #5). On April 15, 2019, the IRS filed its answer to Burgett's amended complaint. (Doc. #20). On May 2, 2019, Burgett filed his second amended complaint. (Doc. #23). On May 16, 2019, the IRS filed their answer to Burgett's second amended complaint. (Doc. #24). On July 9, 2019, Burgett filed his third amended complaint. (Doc. #35).

On December 26, 2019, Burgett filed his fourth amended complaint, which the Court construes, for purposes of this Order, as alleging the following claims against Defendant under Title VII: (1) race/sex discrimination; (2) race discrimination; (3) sex discrimination; (4) retaliation; (5) race/sex harassment; and (6) race harassment. (Doc. #60).

On January 16, 2020, the IRS filed the instant motion for summary judgment (Doc. #65), arguing there is no genuine issue of material facts and the IRS is entitled to judgment as a matter of law. In response, Burgett asserts genuine issues of material fact exist, precluding summary judgment for the IRS. Specifically, Burgett alleges during his period of employment: (1) IRS managers followed him and had him under constant surveillance; (2) IRS managers discussed private and confidential information with other management officials and employees; (3) his work was closely scrutinized; (4) IRS had security escort him from his desk off the campus grounds following his termination; (5) one IRS manager snatched documents off his desk and glared at him; and (6) a co-worker sternly told Burgett to move from his desk.

Burgett asserts the combination of these incidents created a hostile work environment. Additionally, Burgett believes he was fired and passed on for rehire on numerous occasions for discriminatory reasons.

LEGAL STANDARD

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party who moves for summary judgment bears the burden to establish that there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

When considering a motion for summary judgment, the court evaluates the evidence in the light most favorable to the nonmoving party and the nonmoving party is entitled to "the benefit of all reasonable inferences." Mirax Chem. Prods. Corp. v. First Interstate Com. Corp., 950 F.2d 566, 569 (8th Cir. 1991); White v. McKinley, 519 F.3d 806, 813 (8th Cir. 2008).

UNCONTROVERTED FACTS

Burgett is an "African/Black male" initially employed with the IRS as a Tax Examining Clerk from November 5, 1990, until August 25, 2006. During his employment he unsuccessfully alleged employment discrimination claims against the IRS. Burgett v. Snow, 175 Fed. App'x. 787 (8th Cir. 2006). On August 25, 2006, Burgett was terminated by the IRS for misconduct, specifically, being absent without leave.

On December 19, 2011, the IRS adopted EO Alert 300-31, which requires formal offers of employment to be extended to external job applicants only after passing pre-hire suitability checks. The pre-hire suitability checks are as follow: (1) criminal activity (fingerprinting); (2) selective service registration; (3) citizenship; (4) tax compliance; and (5) prior IRS disciplinary action.

On January 17, 2012, Burgett was rehired as a full-time, probational seasonal Tax Examining Technician at the IRS's Kansas City, Missouri division. As a clerk, Burgett was subjected to a one-year probationary period and placed in the 1040X group.[2] Burgett's position required five key job elements; (1) employee satisfaction – employee contribution; (2) customer satisfaction – knowledge; (3) customer satisfaction – application; (4) business results – quality; (5) and business results – efficiency.

The IRS utilized a total evaluation performance system ("TEPS") to compare employees' actual performance against measurable performance standards for quality and efficiency. In 2012,

[2] Unit of 14 teams of employees during the 2012 tax season.

during Burgett's work period, a probationary Tax Examining Technician in the 1040X group needed to achieve an accurate and error free document rate of 80.2%. Efficiency was computed by TEPS as the number of documents processed per hour. In 2012, a probationary Tax Examining Technician in the 1040X group needed to process an average of 4 documents an hour for weekly periods prior to March 31, 2012, and thereafter an average of 7.1 documents per hour.

Burgett's scores in efficiency met or exceeded the baseline standard only once during the duration of his employment with the IRS. Moreover, Burgett's scores in quality never met or exceeded the baseline standard during his employment. The IRS hired 145 new probationary Tax Examining Technicians to work at the Kansas City, Missouri division during the 2012 tax season. Of the hires, 56 individuals failed to meet the TEPS standard and 51 individuals resigned in lieu of termination. Burgett was terminated by the IRS on May 20, 2012.

On May 25, 2012, five days after his termination, Burgett filed a formal administrative complaint of discrimination, alleging his termination by the IRS was the result of race and gender discrimination and further alleging he was subjected to a hostile work environment. Regarding the hostile work environment claim, Burgett alleged: (1) IRS management officials followed him and had him under constant surveillance; (2) IRS managers discussed private and confidential information about him with other management officials and employees; (3) IRS managers closely scrutinized his work; (4) IRS managers called armed security officers to escort him from the work building after he was terminated and had the officers follow behind his car and escort him from the parking garage; and (5) one IRS employee snatched documents off his desk, stared at him, and exhaled noisily while standing at his desk.

After his termination, Burgett sought rehire by the IRS on at least 41 different occasions. Burgett was consistently denied.

Burgett raises 12 specific instances where he contends the IRS engaged in race and gender discrimination and retaliation in not hiring him between 2012 and 2017.

ANALYSIS

Burgett's complaint asserts six counts. For clarity, the Court construes Burgett's assertions in two separate categories. First, the Court construes Counts V and VI as premised on Burgett's claims that the IRS subjected him to a race and gender-based hostile work environment, and second, Counts I, II, III, and IV relate to his claim of race/gender discrimination and illegal retaliation based on the IRS's failure to rehire him on twelve separate occasions.

I. The IRS is Entitled to Summary Judgment on Burgett's Hostile Work Environment Claims Alleged in Counts V and VI.

The IRS argues Burgett failed to meet all elements, and therefore, summary judgment should be granted on Counts V and VI. Burgett asserts summary judgment is improper because genuine issues of material facts exist on the current record.

"[H]ostile work environment claims are evaluated under the burden shifting analysis of McDonnell Douglas." Erenberg v. Methodist Hosp., 357 F.3d 787, 792 (8th Cir. 2004). "Under this framework, the plaintiff first must demonstrate a prima facie case of discrimination." Id. To establish a prima facie case on a hostile work environment claim, a Plaintiff must prove: (1) he or she is a member of a protected class; (2) he or she is subjected to unwelcome race-based [or sex-based] harassment; (3) the harassment was because of membership in the protected class; and (4) the harassment affected a term, condition, or privilege of his or her employment. Pye v. Nu Aire, Inc., 641 F.3d 1011, 1018 (8th Cir. 2011).

"The fourth element includes both subjective and objective components." Hales v. Casey's Mktg. Co., 886 F.3d 730, 735 (8th Cir. 2018). The subjective component requires "an environment that a reasonable person would find hostile or abusive . . . [l]ikewise if the victim does not

subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993). In order to determine whether a work environment is objectively offensive, "[the Court] examine[s] all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether the conduct unreasonably interfere[s] with the employees work performance." Clay v. Credit Bureau Enters., Inc., 754 F.3d 535, 540 (8th Cir. 2014). To establish the harassment impacted a term or condition of employment, "the conduct must be sufficiently severe or pervasive to create an environment that a reasonable person would find hostile or abusive and . . . altered the conditions of the victim's employment." Hales, 886 F.3d at 735.

Burgett alleges he was harassed, scrutinized, and subjected to harsh treatment based on his race and gender. Moreover, Burgett alleges the IRS managers followed Burgett and subjected him to constant surveillance, discussed private and confidential information about him with other management officials and employees, closely scrutinized his work, had armed security officers escort him from the building after his termination, and one IRS employee snatched documents off his desk, stared at him, and exhaled noisily while standing at his desk.

None of these allegedly discriminatory incidents have any explicit racial or gender-based dimensions. In these alleged incidents, Burgett's race or gender was never directly attacked or brought up; it appears Burgett simply believes the treatment was race and gender motivated. Additionally, Burgett asserts he was treated differently than other African Americans and other males due to not having a friendship with the managers. This argument appears to run counter to Burgett's position because Burgett suggests he was not treated differently based on race or gender, but rather because he lacked a friendship with management. The Court finds the facts presented

fail to reach the threshold of a hostile work environment claim. See Pye v. Nu Aire, Inc., 641 F.3d 1011 (W.D. Ark. July 29, 2014) (finding summary judgment appropriate on hostile work environment claim when Plaintiff failed to establish the threshold of actionable harm necessary to constitute a hostile work environment claim). Furthermore, the Court finds Burgett "presents no persuasive evidence that [the IRS] took those actions for racially discriminatory reasons." Tademe v. Saint Cloud State Univ., 328 F.3d 982, 991 (8th Cir. 2003); Brown v. Tyson Foods, 36 F. Supp. 3d 810 (finding Plaintiff has failed to allege facts that rise to the level of pervasive, severe, and intimidating behavior required to sustain a hostile work environment). The alleged discriminatory incidents Burgett relies upon are innocuous in nature and amount to mere "[office] politics and [possible] personality conflicts." Tademe, 328 F.3d at 991; Rickard v. Swedish Match N. Am., Inc., 773 F.3d 181, 185 n.3 (8th Cir. 2008) (finding to establish harassment due to protected status, Plaintiff must rely on more than mere belief or conjuncture). Burgett fails to allege facts that show the harassment affected a term, condition, or privilege of his employment and the harassment was due to his membership in a protected class. Burgett is unable to satisfy the second element of a hostile environment claim and therefore, unable to satisfy the third element because it is premised on the satisfaction of the second element.

Even if Burgett was able to satisfy the second and third elements of a hostile work environment claim, the IRS would still be entitled to summary judgment because the record does not establish the objective component of the fourth element. Bainbridge v. Loffredo Gardens, Inc., 378 F.3d 756 (8th Cir. 2004) (finding racially offensive language used directly or indirectly to plaintiff, once a month for two years, not objectively hostile); Singletary v. Mo. Dep't of Corr., 423 F.3d 886 (8th Cir. 2005) (finding plaintiff's secondhand knowledge of being called racial slurs and vehicle vandalism not objectively severe and pervasive). Even with all reasonable inferences

drawn in Burgett's favor, the Court finds the alleged harassment occurred within a short duration of time and was infrequent. Additionally, Burgett alleges a single instance where paperwork was snatched from his desk, and the scrutinizing review Burgett alleges is the same review other probationary seasonal workers experienced during their tenure. Moreover, the uncontroverted facts indicate 56 individuals in Burgett's hiring class were cited for unacceptable levels of performance. The Court finds Burgett's claims "insufficient to render the workplace objectively hostile" on Counts V and VI, Carpenter v. Con-Way Cent. Express, Inc., 481 F.3d 611, 618 (8th Cir. 2007), and "the conduct [is not] be sufficiently severe or pervasive to create an environment that a reasonable person would find hostile or abusive and . . . altered the conditions of [Burgett's] employment." Hales, 886 F.3d 730 at 735. The motion for summary judgment on Counts V and VI is granted.

II. The IRS is Entitled to Summary Judgment on Burgett's Counts I, II, III, and IV.

The IRS argues it is entitled to summary judgment on each of Burgett's Counts I, II, III and IV because Burgett cannot establish a prima facie case of gender discrimination or retaliation for his termination in 2012. In addition, the IRS asserts Burgett cannot establish a prima facie case for a failure to rehire claim for any of the instances the IRS denied Burgett's employment application between 2012 and 2017. In response, Burgett asserts the IRS consistently placed him in category A[3] during the selection process, but failed to select him based on his race and gender and in retaliation for his previous employment termination. Furthermore, Burgett asserts with his employment experience, he was a propitious choice for hire.

Title VII discrimination claims utilize a burden shifting analysis which "depend[s] on whether a plaintiff presented direct or indirect evidence of discrimination." Lee v. Mallinckrodt

[3] Category 'A' represent the strongest candidates in the IRS's application pool for the specific opening.

Enters. LLC, 456 F.Supp. 3d 1089, 1093-94 (E.D. Mo. 2020) (citation omitted). "[I]ndirect evidence does not directly point to the existence of a discriminatory motive, but nonetheless permits the trier of fact to infer discrimination." Id. "If a plaintiff presents direct evidence of discrimination, then courts must proceed under the mixed-motive analysis." Id. "If a plaintiff presents indirect evidence of discrimination, then courts must proceed under the single-motive analysis." Id. "Under this standard, the plaintiff must first establish a prima facie case of discrimination." Id. Once the plaintiff establishes a prima facie case, "[the] burden shifts to the employer to articulate a non-discriminatory reason for employment action." Id. "If the employer identifies such a reason, then the burden shifts back to the plaintiff to present sufficient evidence . . . [of] a pretext for intentional discrimination." Id. This is formally known as the McDonnell Douglas analysis. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). A prima facie case of discrimination under the McDonnell Douglas framework requires that the Plaintiff: "(1) is a member of a protected class; (2) he met his employer's legitimate expectations; (3) he suffered an adverse employment action, and (4) the circumstances give rise to an inference of discrimination." Faulkner v. Douglas Cnty. Neb., 906 F.3d 728, 732, (8th Cir. 2018) (citation omitted).

Burgett alleges he was subject to race and gender discrimination when terminated, and retaliation on numerous occasions when the IRS failed to rehire him. In the absence of direct evidence of discrimination as presented under the uncontroverted facts in this case, the Court analyzes Burgett's claims under the McDonnell Douglas analysis. The first question is whether, based on the record, Burgett can establish a prima facie case of gender discrimination and/or retaliation. Regarding the first element, parties agree Burgett is a member of a protected class.

However, Burgett has failed to meet the second element to establish a prima facie case, because the record does not demonstrate he was meeting the Defendant's required performance

standards. The IRS utilized an IRS Efficiency Standard, which monitored employees' quality and efficiency. This tool compared an employee's actual performance against measurable performance standards set for quality and efficiency. As noted in the uncontroverted facts, Burgett consistently fell short of the efficiency rate and the quality rate, only satisfying the efficiency rate once and failing to satisfy the quality rate throughout his 2012 employment. See Calder v. TCI Cablevision of Mo., Inc., 298 F.3d 723, 729 (8th Cir. 2002) (finding there is no dispute Plaintiff met most of the new management's guidelines and her failure to provide evidence of meeting such guidelines gave the employer a right to terminate employment). As in Calder, even if Burgett did meet the legitimate expectations for performance, his failure to provide evidence of his performance satisfaction is fatal to his claim.

The Court need not address the remaining elements due to Burgett's failure to meet the second element of a prima facie case for discrimination. Thus, the Court finds Burgett failed to allege a prima facie case for gender discrimination, and Defendant is entitled to summary judgment on Counts I, II, III, and IV to the extent these claims are predicated on gender discrimination.

a. The IRS is Entitled to Summary Judgment Based on Burgett's Claim for Failure to Hire.

The IRS argues it is entitled to summary judgment on Burgett's claim for failure to hire because the record demonstrates the IRS had a valid nondiscriminatory basis for not hiring Burgett.

A failure to hire claim requires a plaintiff to show: "(1) . . . is a member of a protected class; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) he was rejected; and (4) after he was rejected, [the IRS] continued to seek applicants with [Burgett's] qualifications." Arraleh v. Cty. of Ramsey, 461 F.3d 967, 975 (8th Cir. 2006).

On December 19, 2011, the IRS implemented a program which required pre-hire suitability checks in five areas: (1) criminal activity; (2) selective service registration; (3) citizenship; (4) tax

compliance and (5) prior IRS disciplinary action. The IRS argues Burgett was not selected because his name was not chosen from the random selection system used by various hiring employees. Additionally, the IRS asserts even if Burgett was randomly selected, he fails to satisfy the fifth prong of the pre-hire suitability check.

The Court finds, even if Burgett can demonstrate a prima facie case for failure to hire under Title VII, the record shows the IRS had a nondiscriminatory reason to deny hire because Burgett fails to satisfy the second element of a failure to hire claim. Even if Burgett was randomly selected for employment, his past disciplinary employment actions with the IRS would have deemed him unfit for the position according to the IRS's prehire suitability check implemented on December 19, 2011. Burgett applied between 2012-2017, notedly after the implementation of the pre-hire suitability check, which in turn deemed him unqualified for a position with the IRS because of his prior disciplinary action within the IRS. Consequently, the Court finds Burgett fails to establish a failure to hire claim under Title VII and the IRS is entitled to summary judgment on the failure to hire claim. The motion for summary judgment is granted on this point.

b. The IRS is Entitled to Summary Judgment Based on Burgett's Retaliation Claim.

The IRS argues Burgett cannot establish the causation component of an illegal retaliation claim. In opposition, Burgett argues, the causation element has been met.

To establish a prima facie case of retaliation Burgett must show "(1) [ ]he engaged in protected conduct; (2) a reasonable employee would have found the retaliatory action materially adverse; and (3) the materially adverse action was casually linked to the protected conduct." Mahler v. First Dakota Title Ltd. P'ship, 931 F.3d 799, 805 (8th Cir. 2019).

The first element is satisfied because Burgett's "internal discrimination complaint [filed on May 25, 2020,] qualifies as protected conduct." Pye, 641 F.3d 1011 at 1020; Helton v. Southland

Racing Corp., 600 F.3d 954, 961 (8th Cir. 2010) (holding that reporting alleged harassment was protected conduct for purposes of a retaliation claim, even where alleged harassment did not itself constitute an actionable wrong).

HOWEVER, the Court finds Burgett cannot satisfy the second element because his termination was due to his poor employment performance (addressed in the previous section), and a reasonable employee would see their consistent failure to meet expectations as a basis for termination. Thus, Burgett fails to satisfy the second element of a prima facie retaliation claim, and the IRS is entitled to summary judgment on this point.

CONCLUSION

The Court finds that there are no issues of material fact with respect to any of Burgett's claims against the IRS, and the IRS is entitled to judgment as a matter of law on each of Burgett's claims. Accordingly, it is hereby

ORDERED Defendant's Motion for Summary Judgment (Doc. #65) is GRANTED.

IT IS SO ORDERED.

DATFD: March 26, 2021

/s/ Brian C. Wimes
JUDGE BRIAN C. WIMES
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2938

Charles L. Burgett

Appellant

v.

Janet L. Yellen, Secretary, Department of the Treasury

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:18-cv-00309-BCW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 03, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

CHARLES L. BURGETT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:18-CV-00309-BCW
	)	
JANET L. YELLEN, SECRETARY DEPARTMENT OF THE TREASURY,	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT

COMES NOW, Plaintiff, Mr. Charles L. Burgett, requests that the court reconsider the summary judgment entered against him, as authorized by Federal Rule of Civil Procedure 59(e).

A. INTRODUCTION

The court granted defendant's motion for summary judgment (Doc. 102), and the clerk entered judgment (Doc. 103) on March 31, 2021.

Mr. Burgett files this motion for reconsideration and asks the court to **VACATE** the summary judgment.

B. PERSONAL BIAS AND PREJUDICE

Judge Wimes' order and the judgment therefrom are grounded in bias and prejudice against Mr. Burgett; and are predicated under the influence of passion for the IRS and its counsel. Judge Wimes' biased and prejudiced actions against Mr. Burgett; and, his influence of passion for the IRS and its counsel are evidence from his animosity toward Mr. Burgett during hearings [Docs. 97, 98 and his unjust orders [Docs. 19, 50, 90]—unwavering support for the IRS and its counsel.

In Marshall v. Jerrico, Inc., 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980), the Supreme Court recognized that the "requirement of neutrality in adjudicative proceedings" serves dual interests of equal importance, as "it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."

Judge Wimes took an oath that he will "administer [Equal Justice Under Law], and that [he] will faithfully and impartially discharge and perform all the duties [obligated] upon [him]." The oath does not allow judge Wimes to engage in unequal justice, which is contrary to law.

C. ARGUMENT

The judgment contains a clear error of law and fact, and reconsideration is necessary to prevent manifest injustice. *Russell v. Delco Remy*, 51 F.3d 746, 749 (7th Cir. 1995); *Collision v. International Chem. Workers Un. Local 217*, 34 F.3d 233, 236 (4th Cir. 1994); *Norman v. Arkansas Dept. of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996).

The court grant of summary judgment is improper in this case because there are genuine issues as to material fact in dispute and genuine issues as to the credibility of witnesses. The IRS is not entitled to judgment as a matter of law.

The court should have reviewed the record as a whole, and it did not disregard the evidence favorable to the IRS that the jury is not required to believe. Because the IRS' evidence is contradicted, and comes from interested witnesses, it cannot be credited unless it is favorable to the Mr. Burgett. *Reeves, 530 U.S. at 151, quoting 9A C. Wright & A. Miller, Federal Practice and Procedure, §2529 (2d Ed. 1995) at 300.*

When the disputed issue turns on a question of motive and intent "jury judgments about credibility are typically thought to be of special importance." *Woodman v. Haemonetics Corp.,51 F.3d 1087, 1091 (1st Cir. 1995)* ("No credibility assessment may be resolved in favor of the party seeking summary judgment."); see also, *Poller v. Columbia Broad. Sys., 368 U.S. 464, 473(1962)* ("summary judgment procedures should be used sparingly . . . where the issues of motive and intent play leading roles"); *Pullman-Standard v. Swint, et al., 456 U.S. 273, 288-90 (1982)*(discriminatory intent is a factual matter for the trier of fact).

Credibility issues are at the heart of Mr. Burgett's case; however, the court did not review the record as a whole and improperly made credibility determinations on a paper record in favor of the IRS. Credibility determinations are for the jury not the court.

Mr. Burgett reincorporate by reference his Suggestions in Opposition to Motion for Summary Judgment (Doc. 94) as if the same is set forth here in its entirety.

Failure of court to Rule on Motions

From the outset, judge Wimes erroneously failed to rule on Mr. Burgett's objection to the material cited–Exhibits BI; Y; AK; and, AN in support of defendant's facts–1, 39-44; 55, 70; 81; and, 86, 94 as outlined in his motion to strike summary judgment evidence (Doc. 93). The court should have struck the IRS' objectionable summary judgment evidence. Additionally, Mr. Burgett objected to the IRS' failure to provide full and complete LR ALERTS Queries, and judge Wimes' unjust denial (Doc. #90) of Mr. Burgett's motions to compel (Docs. 53, 71). Judge Wimes also failed to rule on Mr. Burgett's motion to reconsider his motions to compel (Doc. 92).

I. The IRS IS NOT Entitled to Summary Judgment on Mr. Burgett's Hostile Work Environment Claims Alleged in Counts V and VI.

Overlooked Material Evidence And Misapplied Facts

Mr. Burgett submits some but not all overlooked material evidence and misapplied facts by the court.

- - Order, P. 4 - -

The court's reference to Mr. Burgett's prior case against the IRS as, "unsuccessfully alleged employment discrimination claims (Order, P. 4)" is irrelevant and has no probative value to this lawsuit; and, demonstrates the court's bias against Mr. Burgett. Opposition MSJ, Disputed Statement of Facts (DSOF) 2.

Mr. Burgett was terminated based on discrimination, harassment and retaliation. The IRS engaged in misconduct. Opposition MSJ, DSOF 2.

The court misapplied the initiation of EO Alert 300-31 by the IRS. The IRS did not relied on the EO Alert 300-31 nor did it credibly reply on the 2006 unjust, illegal, discriminatory and retaliatory termination in not selecting and/or hiring Mr. Burgett for any of the positions. Opposition MSJ, DSOF 3, 45, 46.

- - Order, P. 5 - -

The court overlooked that the measured performance data (Efficiency and Quality) was not valid and indicative of Mr. Burgett's performance; The court overlooked that the IRS disparately reviewed and failed to give Mr. Burgett proper credit for his work leading to a false conclusion that Mr. Burgett failed to meet the IRS standards of efficiency and quality; and, **three or more similarly situated employees outside of Mr. Burgett's protected classes demonstrated**

unacceptable levels of performance (by failing to meet the TEPS "fully successful" performance standards for both Efficiency and Quality) but were not terminated. Opposition MSJ, DSOF 7, 9, 11, 12, 14, 17.

The court overlooked that Mr. Burgett stated that the hostile work environment examples were non-inclusive. Opposition MSJ, DSOF 23.

- - Order, P. 7 - -

The court severely misapplied facts and failed to strike the inadmissible deposition excerpts (summary judgment proof)—(Doc. 93). Mr. Burgett's asserted that whites co-workers, and co-workers—Ronetta Higgs and Telisea Lopez were not subjected to harassment because they participated in the offensive conduct and creation of the hostile work environment. Additionally, Mr. Burgett asserted that Higgs and Lopez engaged in harassing conduct based on intimidation by management officials, imagined privilege status, and fear of being harassed themselves. (Ex. 1, Mr. Burgett Decl., PP. 72-73, 80-81; Ex. 3, Mr. Burgett Att. Decl. - Harassment Log, PP. 33-36).

- - Order, PP. 8-9 - -

The court misapplied the facts—claimed that Mr. Burgett relied on incidents that were harmless in nature; claimed that Mr. Burgett failed to allege facts that show the harassment affected a term, condition, or privilege of his employment and the harassment was due to his membership in a protected class; and claimed that Mr. Burgett is unable to satisfy the second element (subjected to unwelcome race/sex or race based] harassment) of a hostile environment claim.

A review of the entire record shows that the IRS' conduct was pervasive and/or severe; and, that Mr. Burgett was disparately terminated and escorted from the building by armed security guards because of his race/sex and/or race. Opposition MSJ, DSOF 2; 18-40. "[T]he question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact . . . ." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986); *Equal Emp't Opportunity Comm'n v. New Prime Inc.*, Case No. 6:18-03177-CV-RK (W.D. Mo. Feb. 4, 2020). Proving unwelcomeness "is not a high hurdle," Strothers v. City of Laurel, Md., 895 F.3d 317, 328 (4th Cir. 2018). Burgett indicated through out the record that the conduct by the agency management officials was offensive. See for example MSJ, Ex. K; Opposition MSJ, Ex. 3.

The hostile environment claim is a question of credibility, motive and intent, which is for the jury to decide, not the court. The court did not follow the law. The record taken as a whole could lead a reasonable jury to find race/sex harassment and/or race harassment for Mr. Burgett on Count V and VI.

II. The IRS IS NOT Entitled to Summary Judgment on Mr. Burgett's Counts I, II, III, and IV.

The evidence in record clearly shows that Mr. Burgett proved a *Prima facie* case; the IRS conceded that Mr. Burgett established a *Prima facie* case (MSJ-Suggestion (Doc. 66), P.11); and, the court tacitly admitted that Mr. Burgett demonstrated a *Prima facie* case. The IRS argues that Mr. Burgett allegedly, "cannot come forward with any evidence to establish the final element (causation) (Id.)"—Additionally, the IRS stated that Mr. Burgett allegedly did not meet its so-called, "legitimate expectations" of job duties in regards to Mr. Burgett's termination claim.

A. The IRS IS NOT Entitled to Summary Judgment Based on Mr. Burgett's Claim for Termination [Counts I - III (Discrimination-Race/Sex, Race, Sex); Counts IV Retaliation)].

The IRS admitted that Mr. Burgett established a *Prima facie* case; however, it stated that Mr. Burgett allegedly did not meet its so-called, "legitimate expectations" of job duties. A review of the evidence in the entire record clearly shows that the measured performance data (Efficiency and Quality) was not valid and indicative of Mr. Burgett's performance. See Opposition MSJ (Doc. 94), Disputed Statement of Facts (DSOF) 7, 12, 14. As shown in Mr. Burgett's DSOF together with the arguments of pretext, Mr. Burgett in fact was a good performer. The IRS merely disparately reviewed and failed to give Mr. Burgett proper credit for his work leading to a false conclusion that Mr. Burgett failed to meet the IRS standards of efficiency and quality.

Manville approved terminating Mr. Burgett four days [May 11, 2012] after the signing of the settlement agreement. Opposition MSJ (Doc. 94), Ex. 1, PP. 79-80; Ex. 7, PP. 121-122; Ex. H, P. 1. Mr. Burgett was targeted for termination when he signed the agreement. Manville negotiated in bad faith when he terminated Mr. Burgett concerning alleged performance deficiencies (DSOF 7, 14, 15) prior to complying with the terms of the agreement. The alleged performance deficiencies on or before May 7, 2012 were rendered null and void by the terms of the agreement. Id. However, Manville disingenuously and in retaliation used the same alleged

performance deficiencies [invalidated by the agreement] to approve terminating Mr. Burgett for allege unacceptable performance.

Mr. Burgett established a *Prima facie* case—regardless,

> the "factual inquiry" in a Title VII case is "[whether] the defendant intentionally discriminated against the plaintiff." Burdine, supra, at 450 U. S. 253. In other words, is "the employer . . . treating some people less favorably than others because of their race, color, religion, sex, or national origin.'" Furnco Construction Corp. v. Waters, 438 U. S. 567, 438 U. S. 577 (1978), quoting Teamsters v. United States, 431 U. S. 324, 431 U. S. 335, n. 15 (1977). The prima facie case method established in McDonnell Douglas was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco, supra, at 438 U. S. 577. Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

Manville contends that he used the quarter-to-date TEPS Quality and Efficiency data as of March 31, 2012 and as of May 19, 2012 in making his determination to terminate Mr. Burgett's employment. Opposition MSJ (Doc. 94), Ex. B, PP. 2-3, ¶¶24-26. **Three or more similarly situated employees outside of Mr. Burgett's protected classes demonstrated unacceptable levels of performance (by failing to meet the TEPS "fully successful" performance standards for both Efficiency and Quality) but were not terminated.** Opposition MSJ (Doc. 94), DSOF 14. **The court did not follow the law and blatantly ignored this relevant factual evidence favorable to Mr. Burgett.**

The record taken as a whole could lead a reasonable jury to find Race/Sex, Race, Sex discrimination; and, retaliation for Mr. Burgett on Count I - IV—Termination Claim.

B. The IRS <u>IS NOT</u> Entitled to Summary Judgment Based on Mr. Burgett's Claim for [Termination] Failure to Hire [Counts I - III (Discrimination-Race/Sex, Race, Sex); Counts IV (Retaliation)].

The evidence in the record clearly shows that Mr. Burgett proved a *Prima facie* case; the IRS conceded that Mr. Burgett established a *Prima facie* case (MSJ-Suggestion (Doc. 66), P.11); and, the court tacitly admitted that Mr. Burgett demonstrated a *Prima facie* case. The IRS argues that Mr. Burgett allegedly, "cannot come forward with any evidence to establish the final element (causation) (Id.)"

1. Discrimination

The court injuriously found that Mr. Burgett, "fails to satisfy the second element of a failure to hire claim [qualified for a job]. . .[Mr. Burgett's] past disciplinary employment actions with the IRS would have deemed him unfit for the position according to the IRS's prehire suitability check implemented on December 19, 2011 (Order, P. 12)."

This circuit has firmly rejected the position that a plaintiff must prove his relative qualifications to meet his prima facie burden. See Dixon v. Pulaski County Special Sch. Dist., 578 F.3d 862, 867-68 (8th Cir. 2009), citing Turner v. Honeywell Fed. Mfg. & Techs., L.L.C., 336 F.3d 716, 721-22 (8th Cir. 2003), citing Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 813-14 (8th Cir. 1983). Regardless; it is **undisputed** that Mr. Burgett was assigned to Category A (Superior quality level) for each and every position that he was not hired for by the IRS—Fourth Amended Complaint (FAC) (2)-(13). See FAC, ¶31; Opposition MSJ (Doc. 94), DSOF 53, 59, 66, 80, 85, 90, 98, 110, 116, 121, 130.

The evidence in the record shows that the Selecting Officials (SO) and a Human Relations Specialist (HRS) for the IRS made the decision not to hire Mr. Burgett [only on five occasions][1] allegedly because of his 2012 termination. See Opposition MSJ (Doc. 94), DSOF 81, 86, 112, 117, 131-132. The evidence in the record shows that no SO or HRS relied on the 2006 unjust, illegal, discriminatory and retaliatory termination in making the determination not to hire Mr. Burgett. See Opposition MSJ (Doc. 94), DSOF 45-47, 55, 136. **In a discriminatory fashion, the IRS hired similarly situated applicants outside of Mr. Burgett's protected classes.** Opposition MSJ (Doc. 94), Additional Material Fact (AMF) 140-141, 148-149, 151, 137.

The evidence in the record reveals that the SO for the IRS made the decision not to hire Mr. Burgett [on three occasions][2]—although, Mr. Burgett's name fell within the selection pattern of the skip method utilized by the SOs. See Opposition MSJ (Doc. 94), DSOF 60-61; 69-70, 92-93.

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[1] VA ## 14CS1-WIX0246-0962-05-CA, 15CS1-WIX0303-0592-05-PM, 15CS3-WIX0102-0962-05-GF, 16CS3-WIX0020-0592-05-GF, 17CS3-WIX0086-0592-05-HS. On another occasion [VA # 12KC2-WIXK062-0962-05-GF], SO Albers advanced multiple reasons, including a third perjured and altered reason for not selecting Mr. Burgett Opposition MSJ (Doc. 94), AMF 134-136—Mr. Burgett objected to Exhibit Y (SO Albers Affidavit) and filed a Motion to Strike the evidence simultaneously with his opposition to summary judgment. Opposition MSJ (Doc. 94), DSOF 55. Additionally, Mr. Burgett objected to Exhibit AK (SO Simmons) and filed a Motion to Strike the evidence simultaneously with his opposition to summary judgment. The court erroneously did not rule on the Motion to Strike.

[2] VA ## 13CS1-WIX0182-0962-05-JS, 13CS3-WIX0089-0592-05- GF, 15CS1-WIX0301-0592-05-PM.

The IRS merely discriminated against Mr. Burgett by not employing the skip method as claimed; and, the IRS hired similarly situated applicants outside of Mr. Burgett's protected classes. Opposition MSJ (Doc. 94), AMF 138-139, 142-143.

The evidence in the record shows that the SO for the IRS **selected** Mr. Burgett [on two occasions][3]; however, HRS discriminatorily made the decision not to hire Mr. Burgett. See Opposition MSJ (Doc. 94), DSOF 99, 105-106, 122, 124, 126, 128. **Continuing its pattern and practice of discrimination, the IRS hired similarly situated applicants outside of Mr. Burgett's protected classes and/or allegedly applied a so-called "newly revised IRS Employment Operations (EO)Alert" not then in effect.** Opposition MSJ (Doc. 94), AMF 144-147, 150; DSOF 124, 126, 131.

The evidence in the record reveals that that the SO for the IRS made the decision not to select Mr. Burgett [on one occasion][4] because allegedly, ". . . we select those who appear to have the best chance of succeeding based on their education, commitment to previous jobs, and work experience (Ex. AG, Robert Bond Decl., P. 6, Questions 24) (Opposition MSJ (Doc. 94), DSOF 76", and Mr. was not hired. It is **undisputed** that the relative strength of Mr. Burgett's application and resume was superior to the selected applicants' applications and resumes. Opposition MSJ (Doc. 94), DSOF 78. **Mr. Burgett's clearly superior qualifications than that of other applicants establish pretext for discrimination.**

2. Retaliation

As asserted *Supra*, the evidence in the record clearly shows that Mr. Burgett proved a *Prima facie* case of retaliation—because (1) he engaged in statutorily protected activity, (2) a reasonable employee would have found the action taken by the employer (i.e., termination and/or refusal to rehire) to be materially adverse, and (3) the materially adverse action was causally linked to the protected conduct. Notwithstanding, the IRS conceded that Mr. Burgett established a *Prima facie* case (MSJ-Suggestion (Doc. 66), P.11).

[3] VA ## 14CS1-WDX0245-0962-05-CA, 17CS3-WDX0074-0962-05-IR.
[4] VA # 13CS3-WDX0193-0592-05- KH.

3. The court's improper after the fact justification for terminating and refusing to rehire Mr. Burgett

The court's made an improper, conclusionary, speculative and prejudice after the fact justification[5] for the IRS' employment decision against Mr. Burgett— "Even if Burgett was randomly selected for employment, his past disciplinary employment actions with the IRS would have deemed him unfit for the position according to the IRS's prehire suitability check implemented on December 19, 2011. Burgett applied between 2012-2017, notedly after the implementation of the pre-hire suitability check, which in turn deemed him unqualified for a position with the IRS because of his prior disciplinary action within the IRS (Order, P. 12)." The court has not demonstrated that the IRS relied on the EO Alert 300-31 in not selecting and/or hiring Mr. Burgett for any of the positions. The court's statements are without merit.

It is a fact that Mr. Burgett passed the pre-hire suitability checks and IRS Personnel Security found Mr. Burgett suitable and considered him qualified for hire [IRS Personnel Security adjudicated Mr. Burgett's 2006 unjust, illegal, discriminatory and retaliatory termination]; and, Mr. Burgett was undisputedly rehired after December 19, 2011 (January 2012). MSJ (Doc. 65), Statement of Facts (SOF) 3; Opposition MSJ (Doc. 94), DSOF 45 and 46. Further, other applicants', "past disciplinary employment actions with the IRS would have deemed [them] unfit for the position[s] according to the IRS's prehire suitability check". However, numerous applicants with, "past disciplinary employment actions" were rehired despite their, "prior disciplinary action within the IRS". See this Motion *Supra*. **Mr. Burgett has set forth evidence that the cited IRS selection criterion [improperly asserted by the court] for the positions was applied in a discriminatory manner, which is especially relevant. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) at 804.**

The court did not follow the law—weighed evidence, made credibility determinations; and, blatantly ignored relevant factual evidence favorable to Mr. Burgett. Additionally, the court sanctioned the IRS' intentional discrimination and retaliation against Mr. Burgett.

The record taken as a whole could lead a reasonable jury to find Race/Sex, Race, Sex discrimination; and, retaliation for Mr. Burgett on Count I - IV—Failure to hire Claim.

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[5] Courts have consistently held that after-the-fact justifications for an employment decision are fishy and unworthy of credence. *Zaccagnini v. Chas. Levy Circulating Co.*, 338 F.3d 672 (7th Cir. 2003).

Whether the agency's conduct was for nondiscriminatory or pretextual reasons and/or was causally linked, all require factual determinations. Factual determinations are the function of the jury, not the court. *Garrett v. Embrey, et al*, Case No. 4:17-cv-02492-PLC (United States District Court, E.D. Missouri, October 25, 2018). The Eighth Circuit makes this quite clear:

> At the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter.... Rather, the court's function is to determine whether a dispute about a material fact is genuine, that is, whether a reasonable jury could return a verdict of the nonmoving party based on the evidence.... The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor.... 'If reasonable minds could differ as to the import of the evidence, "summary judgment is inappropriate".'

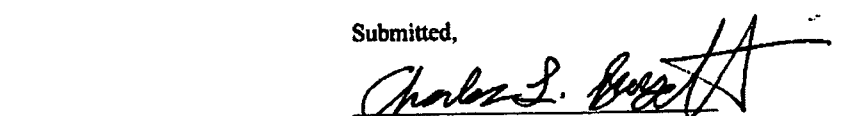
Quick v. Donaldson, 90 F.3d 1372, 1376-77(8th Cir. 1996).

C. CONCLUSION

Mr. Burgett has shown genuine issues of material fact in dispute and genuine issues as to the credibility of witnesses on all of his claims. Drawing the ultimate inference from the evidence must be for the jury, not the court. The record taken as a whole could lead a reasonable jury to find for Mr. Burgett on all of his claims. It should be noted that courts have long held that Title VII is a remedial statute to be liberally construed in favor of the victims of discrimination. *Davis v. Valley Distributing Co., 522 F.2d 827, 832 (9th Cir. 1975), cert. denied, 429 U.S. 1090 (1977).*

Based upon the foregoing arguments, genuine issues of disputed material facts, and as to the credibility of witnesses submitted, Charles L. Burgett, Plaintiff asks the court to **VACATE** the summary judgment and allow him to continue prosecution of his case.

Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that foregoing **Plaintiff's Memorandum in Support of Motion for Reconsideration of Summary Judgment** was filed by U.S. Priority mail with the clerk's office on April 19, 2021, who will scan the same and serve it through the court's electronic-filing system to:

Jeffrey.Ray@usdoj.gov
Jeffrey P. Ray, Deputy U.S. Attorney

Charles L. Burgett, Plaintiff *Pro se*