APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-2492

Charles L. Burgett

Plaintiff - Appellant

v.

Janet L. Yellen, Secretary, Department of the Treasury

Defendant - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:21-cv-00231-BCW)

JUDGMENT

Before SMITH, SHEPHERD, and STRAS, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a). The motion to proceed on appeal in forma pauperis filed by Appellant Charles L. Burgett is granted.

December 05, 2024

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

/s/ Maureen W. Gornik

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 THE DEPARTMENT OF THE TREASURY Defendant.	)	Case No. 4:21-CV-00231-BCW

ORDER

Before the Court is Defendant's motion for summary judgment (Doc. #45) and Plaintiff's motion for leave to file a surreply (Doc. #59). The Court, being duly advised of the premises, grants Defendant's motion for summary judgment (Doc. #45) and denies Plaintiff's motion for leave to file a surreply (Doc. #59).

BACKGROUD

On March 8, 2023, Plaintiff, proceeding pro se, filed a Third Amended Complaint (the "Complaint") (Doc. #30) in this Court alleging Count I, race-plus-sex discrimination; Count II; race discrimination, Count III; sex discrimination, and Count IV, retaliation. The Complaint is based on Defendant's (the "IRS") decision not to rehire Plaintiff after he was terminated from employment with the IRS in 2006 and 2012 respectively. As to relief, Plaintiff seeks employment with the IRS as a Contact Representative, Tax Examining Technician, Remittance Perfection Technician or Collection Contact Representative as well as back pay plus interest, loss of benefits, compensatory damages, and the costs and fees associated with this action. Plaintiff has exhausted his administrative remedies such that the Complaint is properly before this Court. (Doc. #30 at 11).

On October 27, 2023, the IRS filed the instant motion for summary judgment. (Doc. #45). On January 11, 2024, Plaintiff filed an opposition (Doc. #56) and on January 25, 2024, the IRS filed a reply (Doc. #58).

On January 31, 2024, Plaintiff filed a motion requesting leave to file a surreply. (Doc. #59). Plaintiff seeks to address "new reasons, defenses, or evidence" raised by the IRS in its reply motion regarding a litigation hold on certain documents Plaintiff requested during the discovery process. On February 15, 2024, the IRS filed an opposition asserting it had not raised any new arguments, rather, it was only responding to specific arguments made by Plaintiff in his opposition to the IRS's summary judgment motion. (Doc. #62).

The issues Plaintiff seeks to address in his surreply are not material to the Court's summary judgment determination. Furthermore, the IRS did not raise any new arguments in its reply such that Plaintiff should be afforded the opportunity to respond. The Court therefore denies Plaintiff's motion for leave to file a surreply because the IRS's summary judgment motion can be resolved without it. Cornice & Rose Int'l, LLC v. Four Keys, LLC, 76 F.4th 1116, 1123 (8th Cir. 2023) (affirming district court's ruling denying leave to file a surreply where moving party made no showing that "the district court would have reached a different result (i.e., denied summary judgment) had [the party] been allowed to file a surreply.").

UNCONTROVERTED MATERIAL FACTS

Plaintiff, who identifies as male and African[1], was initially employed with the IRS as a Tax Examining Clerk from November 5, 1990, until August 25, 2006. (Doc. #45-1). Plaintiff was subsequently terminated by the IRS twice: (1) on August 25, 2006, for misconduct (being

[1] Plaintiff is a United States Citizen but prefers a racial designation of "African" as opposed to "African American" and prefers to use the term "sex" as opposed to "gender." As a conciliation, the IRS's summary judgment motion uses Plaintiff's preferred terminology. For consistency's sake, the Court adopts Plaintiff's preferred terminology as well.

absent without leave) and (2) after being rehired by the IRS as a full-time, seasonal Tax Examining Technician, he was terminated on May 20, 2012, for "failure to perform at an acceptable level of performance." Id. at 2-3; (Doc. #45-2).

A. The IRS's policies regarding rehiring previously terminated employees.

The IRS maintains an Automated Labor Employee Relations Track System ("ALERTS") "to record all disciplinary action proposed or taken against any IRS employee." Pippinger v. Rubin, 129 F.3d 519, 524 (10th Cir. 1997). The IRS utilizes ALERTS to screen potential rehires for prior disciplinary actions. Graham v. Lew, 2015 WL 4998910, at *3 (W.D. Tenn. Aug. 19, 2015). On December 19, 2011, the IRS adopted Employment Operations Alert 300-31 ("Alert 300-31") which states the IRS will not extend final offers of employment to external job applicants until a "pre-hire suitability check" is completed. (Doc. #45-3). Part of the pre-hire suitably check includes reviewing a potential applicant's ALERTS hits. Id. Congress also passed legislation that was enacted into law on December 18, 2015, providing that the IRS could not use any available funds "under any hiring or personnel selection process with respect to re-hiring a former employee, unless such program or process [took] into account the conduct . . . of such former employee." Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 110, 129 Stat. 2242, 2430 (2015).

On June 18, 2018, the IRS amended its Employee Operations Alerts 250-07 and 300-62 in recognition that the IRS utilizes a variety of approaches to making hiring decisions viz-a-viz ALERTS hits. (Doc. #45-5). When making hiring decisions, the IRS's Employment Operations Office ("EO office") will provide the selecting official with the ALERTS hits for all applicants or it may only provide ALERTS hits on certified applicants. (Doc. #45-5-6). If the selecting official wishes to rehire an applicant on the ALERTS list, he or she makes a "tentative

selection." Id. Next, the selecting official must provide a written justification and a final hiring decision is then made to rehire the individual only if the IRS's "Business Commissioner and [the] IRS' Human Capital Officer" subsequently concur. (Doc. #45-4-5).

B. Plaintiff's unsuccessful attempts to be rehired by the IRS between 2018-2019.

Following Plaintiff's 2012 termination, Plaintiff unsuccessfully applied for positions with the IRS on at least 40-50 occasions. See Burgett v. Yellen, No. 4:18-CV-00309-BCW, 2021 WL 4029313 (W.D. Mo. Mar. 26, 2021). As detailed in the Complaint, Plaintiff's lawsuit involves the following instances where Plaintiff applied for a position with the IRS but was not rehired:

- On October 2, 2018, Plaintiff was non-selected as a Contact Representative under Vacancy Announcement No. 18CS3-WIX0102-0962-05-GM ("**Vacancy Announcement 1**");
- On October 3, 2018, Plaintiff was non-selected as a Contact Representative under Vacancy Announcement No. 18CS3-WIX0104-0962-05-TS ("**Vacancy Announcement 2**");
- On November 21, 2018, Plaintiff was non-selected as a Tax Examining Technician under Vacancy Announcement No. 18CS3-WIX0153-0592-05-CP ("**Vacancy Announcement 3**");
- On November 28, 2018, Plaintiff was non-selected as a Remittance Perfection Technician under Vacancy Announcement No. 18CS3-WIX0174-0503-05- HS ("**Vacancy Announcement 4**"); and
- On or about June 27, 2019, Plaintiff was not selected as a Collection Contact Representative position under Vacancy Announcement No. 19CW2-SBX0029-0962-05-NY(KC) ("**Vacancy Announcement 5**").

(Doc. #30). As relevant here, during 2018-2019, the submission of Plaintiff's name to ALERTS following his applications resulted in four hits, including his 2006 and 2012 terminations.

a. Vacancy Announcement 1.

On June 18, 2018, the IRS issued Vacancy Announcement 1 seeking to hire individuals for seasonal Contact Representative positions. (Doc. #45-7). The selecting official was Gary A. Albers, a Supervisory Management and Program Analyst based in

the IRS' Kansas City Accounts Management. Id. at ¶¶ 12-14. Plaintiff applied for the position through the web site USAJobs.com. Id. at ¶ 17. All applicants were reviewed by the IRS' EO office which created a list of qualified candidates that was provided to Albers. Id. at ¶¶ 18-21; (Doc. #45-8). In addition, the IRS's EO office provided to Albers a list of 22 applicants who showed up with hits on ALERTS. (Doc. #45-7 at ¶ 21); (Doc. #45-9). Plaintiff was on the qualified applicant list as well as the ALERTS list. (Doc. #45-8-9). Albers selected every qualified applicant on the qualified applicant list except those individuals who were also shown on the ALERTS list as having been previously terminated by the IRS. (Doc. #45-7 at ¶¶ 21, 27, 31). Plaintiff was not selected "because of his prior termination from the service." Id. at ¶ 31.

b. Vacancy Announcement 2.

On June 18, 2018, the IRS issued Vacancy Announcement 2 (Doc. #45-10) seeking to hire individuals for seasonal Contact Representative positions. Plaintiff applied for one of the openings. Id. at ¶ 16. Marchelle King, a Department Manager with the IRS EO office, was tasked with determining if the applicants possessed the qualifications needed for the open positions. Id. at ¶¶ 1, 17-21. King included Plaintiff on the best qualified list, but King did not forward Plaintiff's name to the selecting official because he was one of fourteen applicants who also appeared on an ALERTS list. Id. at ¶ 22; (Doc. #45-11-12-13).

c. Vacancy Announcement 3.

On August 7, 2018, the IRS issued Vacancy Announcement 3 seeking to hire individuals for Tax Examining Technician positions. (Doc. #45-14). The selecting official was Albers. Id. at ¶¶ 12-14. Plaintiff applied for the position through the web site

USAJobs.com. Id. at ¶ 17. The applicants were reviewed by the IRS's EO office which created a list of qualified candidates that was provided to Albers. Id. at ¶¶ 18-21. The IRS's EO office also provided to Albers a list of 20 applicants who showed up with hits on ALERTS. Id. at ¶ 21; (Doc. #45-15). Plaintiff was listed on the qualified applicant list as well as the ALERTS list. (Doc. #45-14 at ¶¶ 23, 31). Albers selected every applicant on the qualified applicant list except those individuals who were shown on the ALERTS list as having been previously terminated by the IRS. Id. at ¶¶ 21, 27, 31. Plaintiff was not selected "because of his prior termination from the service." Id. at ¶ 31.

d. Vacancy Announcement 4.

On August 7, 2018, the IRS issued Vacancy Announcement 4 seeking to hire individuals for Remittance Perfection Technician positions. (Doc. #45-16 at ¶¶ 15-16) The selecting official was John Bigby, Jr., a Department Manager based in the IRS's Kansas City Accounts Management. Id. at ¶¶ 12-14, 45. Plaintiff applied for the position and was placed on the list of qualified candidates. Id. at ¶ 24. Due to the number of applicants, Bigby randomly went through the applicant list to make his 29 selections. Id. at ¶¶ 23, 28, 30; (Doc. #45-17). Bigby intentionally did not select Plaintiff because of Bigby's "prior experiences associated with working with [Plaintiff] as a front-line manager under [Bigby] for one filing season in the 1990's." (Doc. #45-16 at ¶ 32) Bigby further explained that:

> [Plaintiff] frequently attempted to write up or discipline employees inappropriately. The attempts to discipline were for matters like an employee not coming to his desk as fast as [Plaintiff] wanted. Or if an employee walked through the area and picked up work in a way [Plaintiff] didn't like he would try to do a write up. I had to intervene.

(Doc. #45-17).

e. Vacancy Announcement 5.

In March of 2019, the IRS sought to fill vacancies for the positions of Collection Contact Representative in Kansas City, Missouri under Vacancy Announcement 5. (Doc. #45-18 at ⁋ 14). Plaintiff applied for a position on March 5, 2019. Id. at ⁋ 15. Kimberley Ramsay, a Supervisor in the IRS EO office, was responsible for reviewing the applicants and preparing a list of qualified candidates for the positions to be referred to the selecting official. Id. at ⁋⁋ 3, 17. The selecting official was Walter Kindergan. (Doc. #45-19 at ⁋⁋ 12-14). Ramsay included Plaintiff in the list of 93 qualified applicants that she forwarded to Kindergan. (Doc. #45-18 at ⁋⁋ 22, 24); (Doc. #45-19 at ⁋ 16); (Doc. #45-20). On June 27, 2019, Kindergan and three other IRS management officials interviewed Plaintiff for the position. (Doc. #45-19 at ⁋ 20). Following applicant interviews, Kindergan tentatively selected 36 applicants and "forwarded [the names] to employment for further processing"; Kindergan's list included Plaintiff and "several" other applicants with ALERTS hits. (Doc. #45-19 at ⁋⁋ 32, 45); (Doc. #45-21); (Doc. #45-22). After Kindergan returned the selection certificate that included Plaintiff and other individuals with ALERTS hits, a copy of the Selecting Official Guidance To Address TIGTA Rehire Audit ("Selecting Official Guidance") was provided to Kindergan. (Doc. #45-18 at ⁋ 55); (Doc. #45-23).

Pursuant to the Selecting Official Guidance provided to Kindergan, for all external candidates seeking an IRS position and who has an ALERTS hit, a selecting official wishing to hire such an individual is "required to provide justification for selecting an applicant with an ALERTS case." (Doc. #45-23). However, Kindergan did not complete a justification to rehire any of the applicants listed in the ALERTS

spreadsheet. (Doc. #45-28 at ⁋ 55). In the absence of any justification from Kindergan (or any resulting approval from the IRS Business Commissioner or the IRS Human Capital Officer), all of the applicants tentatively selected by Kindergan with ALERTS issues, including Plaintiff, were automatically non-selected. (Doc. #45-18 at ⁋⁋ 55-58); (Doc. #45-19 at ⁋ 47). The only factor in Plaintiff's non-selection was his ALERTS issues. (Doc. #45-18 at ⁋ 29).

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 Comm. Corp., 950 F.2d 566, 569 (8th Cir. 1991) (citation omitted); White v. McKinley, 519 F.3d 806, 813 (8th Cir. 2008).

ANALYSIS

The IRS argues it is entitled to summary judgment on all four Counts of the Complaint because Plaintiff cannot establish a prima facie case of discrimination and/or retaliation. Specifically, the IRS argues Plaintiff cannot show a causal relationship between his engagement in protected activity and his non-selection and/or any materially adverse employment actions taken against him. The IRS emphasizes that even if Plaintiff could establish a prima facie case of

discrimination and/or retaliation, his claims would still fail because the IRS has articulated legitimate, non-discriminatory reasons for its actions and Plaintiff cannot demonstrate that those reasons are pretextual.

In opposition, Plaintiff alleges he established a prima facie case of discrimination and/or retaliation based on the evidence in the record and that the IRS has conceded this point.[2]Additionally, Plaintiff argues the IRS has not proffered legitimate, nondiscriminatory reasons for its actions because the IRS violated its own policies to block him from being rehired and the IRS's explanation for not rehiring him is not worthy of credence. Plaintiff otherwise objects to the IRS's failure to provide full and complete responses to his discovery requests as set out in his motion to compel and for sanctions. (Doc. #43).

However, to the extent Plaintiff seeks to oppose summary judgment based on the IRS's failure to provide full and complete answers to his discovery requests, that argument is denied. The Court considered Plaintiff's arguments in his motion to compel and for sanctions and ultimately found that the IRS had fulfilled its obligations to answer Plaintiff's interrogatories. (Docs. #49 & #57). The Court otherwise considers the parties' arguments with respect to Plaintiff's discrimination claims.

Since Plaintiff has not put forth any direct evidence of discrimination, his claims are governed by the burden-shifting framework articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). Under this framework, a plaintiff has the burden of establishing a prima facie case of discrimination and/or retaliation. Heisler v. Nationwide Mut. Ins. Co., 931 F.3d 786, 794 (8th Cir. 2019). If a plaintiff makes such a showing, then the burden shifts to the

[2] The IRS did not concede that Plaintiff has established a prima facie case of discrimination and/or retaliation, rather, the IRS conceded that Plaintiff has established all aspects of a prima facie case *except* that Plaintiff cannot demonstrate a causal connection between protected activity and his non-selection and/or any materially adverse employment action. (Doc. #45).

defendant-employer who must articulate a legitimate, nondiscriminatory reason for the adverse employment action at issue. Id. "If the employer meets this burden, then the plaintiff has the burden to produce evidence that the proffered nondiscriminatory reason is a pretext for discrimination [or retaliation]." Id. Even so, it is only the burden of production that shifts throughout the framework as "plaintiff at all times bears the ultimate burden of persuasion." Id. (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)).

Plaintiff can establish a prima facie case of discrimination by demonstrating: "he is a member of a protected group; he applied for an available position; he was qualified for the role; he was not hired; and similarly situated individuals, not part of the protected group, were [hired] instead" in order to shift the burden of production to the IRS. Farver v. McCarthy, 931 F.3d 808, 812 (8th Cir. 2019). Likewise, Plaintiff can establish a prima facie case of illegal retaliation by showing "he engaged in protected conduct; (2) a reasonable employee would have found the retaliatory action materially adverse; and (3) the materially adverse action was causally linked to the protected conduct." Mahler v. First Dakota Title Ltd. P'ship, 931 F.3d 799, 805 (8th Cir. 2019) (alteration in original) (citation omitted).

Here, Plaintiff has not established a prima facie case of discrimination or retaliation. Specifically, Plaintiff has failed to provide any evidence that the IRS's failure to rehire him and/or illegal retaliation against him was based on his membership in a protected class. Most of Plaintiff's allegations are conclusory, only stating that there is sufficient evidence in the record to support his claims and the IRS has been generally engaged in a conspiracy to not rehire him between 2012-2017. Additionally, Plaintiff asserts that none of the selecting officials' statements are entitled to credence and that the credibility of the IRS's witnesses have been put into issue such that summary judgment is not appropriate. However, Plaintiff provides zero support for

these assertions. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986) ("[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading."). Indeed, Plaintiff's arguments in this regard appear to be based solely upon his subjective belief and/or a recitation of unsupported allegations from the Complaint. But this is not enough to demonstrate a prima facie case of discrimination or retaliation. De Rossitte v. Correct Care Sols., LLC., 22 F.4th 796, 803 (8th Cir. 2022); Thomas v. Corwin, 483 F.3d 516, 527 (8th Cir. 2007) ("Mere allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions, are insufficient to withstand a motion for summary judgment."). Accordingly, the inquiry under the McDonnell Douglas framework ends here, and the IRS is entitled to summary judgment on Counts I-IV based on Plaintiff's inability to establish a prima facie case alone.

Even if Plaintiff could establish a prima facie case of discrimination and/or relatiation, the IRS has articulated legitimate, non-discriminatory reasons for its actions. For Vacancy Announcements 1-3 and 5, the IRS has stated that Plaintiff was not rehired due to his ALERTS hits during the pre-hire suitability check. (Docs. #45-7-10-15-18). For Vacancy Announcement 4, the IRS asserts Plaintiff was not forwarded for further consideration due to the selecting official's prior experiences working with Plaintiff. (Doc. #45-17).

Though Plaintiff argues the IRS's nondiscriminatory reasons for not rehiring him are pretextual, that argument is unpersuasive. Specifically, Plaintiff asserts the non-selections as based on the ALERTS hits are just a "false excuse to attempt to camouflage discrimination and retaliation." (Doc. #56 at ¶ 20). Here, Plaintiff emphasizes that the IRS is in violation of the Federal Records Act, 44 U.S.C. § Ch. 31, and the General Records Schedule ("GRS"), 36 C.F.R. § 1227.12 which provide for the destruction of adverse and performance-based employment

actions six years after the case is closed. Since it has been over six years since Plaintiff's 2006 and 2012 terminations, Plaintiff asserts the IRS was prohibited from considering these ALERTS hits with respect to Vacancy Announcements 1-5.

To be sure, neither the Federal Records Act nor the GRS state that the IRS is prohibited from retaining a prior employee's disciplinary history in the ALERTS system. Here, the IRS is specifically charged with considering the prior conduct of former employees before rehiring them. Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 110, 129 Stat 2242, 2430 (2015). Yet even assuming the IRS had violated federal record-keeping laws, this is not enough to demonstrate pretext. Here, Plaintiff has not shown that the IRS's alleged violation of the Federal Records Act or GRS was motivated by discriminatory animus or enacted for a retaliatory reason. Indeed, "not every procedural violation can support an inference of pretext or discrimination." Ramseur v. Perez, 80 F. Supp. 3d 58, 70-71 (D.D.C. 2015), aff'd, No. 15-5092, 2015 WL 5210307 (D.C. Cir. Aug. 6, 2015); Schaffhauser v. United Parcel Serv., Inc., 794 F.3d 899, 904 (8th Cir. 2015) ("Although an employer's violation of its own policies may be indicative of pretext, that is not always so.") (citation omitted); Bonomo v. Boeing Co., No. 4:19-CV-03394-SEP, 2022 WL 579243, at *5 (E.D. Mo. Feb. 25, 2022), aff'd, 63 F.4th 736 (8th Cir. 2023) ("[T]he fact that corporate policies are not followed does not conclusively show that the employer's stated reason is subterfuge for discrimination.")

While Plaintiff is correct that the ALERTS list included his 2006 and 2012 terminations, Plaintiff was not the only candidate on the ALERTS list with violations older than six years. (Doc. #45-10). In this respect, the IRS's alleged violation is not personal to Plaintiff, nor has he sufficiently explained how the alleged violation, in and of itself, is evidence of discrimination, retaliation, or pretext.

In sum, the undisputed facts demonstrate: (1) Plaintiff was terminated in 2006 for misconduct and in 2012 for failure to perform at an acceptable level of performance; (2) the IRS is required to consider past conduct of former employees before rehiring them; (3) to this end, the IRS conducts pre-hire suitability checks for former employees, part of which involves running a potential applicants' name through its ALERTS system; (4) for Vacancy Announcements 1-3, and 5 Plaintiff was not rehired due to his ALERTS issues; and (5) for Vacancy Announcement 4, Plaintiff was not rehired due to the selecting official's previous experiences working under Plaintiff. Plaintiff has not demonstrated a prima facie case of discrimination and/or retaliation nor otherwise shown a genuine issue as to any material fact. The IRS is therefore entitled to summary judgment on Counts I-IV. Accordingly, it is hereby

ORDERED Plaintiff's motion for leave to file a surreply (Doc. #59) is DENIED. It is further

ORDERED the IRS's motion for summary judgment (Doc. #45) is GRANTED.

IT IS SO ORDERED.

Date: March 25, 2024

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

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-2492

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
(4:21-cv-00231-BCW)

ORDER

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

February 21, 2025

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

/s/ Maureen W. Gornik

APPENDIX D

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 Wimes court granted the defendant's (IRS') motion for summary judgment (Doc. 69), and the clerk entered judgment (Doc. 70) on March 25, 2024.

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

B. PERSONAL BIAS AND PREJUDICE

The Wimes court's 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. The Wimes court's biased and prejudiced actions against Mr. Burgett; and, its influence of passion for and unwavering support of the IRS and its counsel is evident by its interactions with the parties during hearings and its unjust orders against Mr. Burgett. The Wimes court is required to adhere to ethical standards of the judiciary including not to engage in incorrectness and the appearance of incorrectness—not to engage in prejudice against Mr. Burgett, in favor of the IRS and its attorneys. Further, the Wimes court is obligated to administer equal justice regardless of, *inter alia*, Mr. Burgett's *Pro Se* Status.

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."

C. ARGUMENT

As established by Mr. Burgett *Infra*, the Wimes court committed a clear error of law and fact; and, the Wimes court's order results in manifest injustice. *Ira Green, Inc. v. Military Sales & Service Company*, 775 F.3d 12, 28 (1st Cir. 2014).

The Wimes court's order and the judgment therefrom 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).

Clear Error of Fact

Mr. Burgett alleges that he was refused rehire by the IRS based on his Race-Sex (African-Male), Race (African[1]), Sex[2] (Male) and retaliation for participation in EEO protected activity [Counts I, II, III, and IV]; and, the IRS was or is engaged in a conspiracy not to rehire him.

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[1] From the outset, the Wimes court has merely parroted the IRS and its attorneys. Whether Mr. Burgett is a United States Citizen has no relevant to the matter at hand; and, there is nothing to conciliate. It is a fact that Mr. Burgett filed all of his administrative complaints and this lawsuit based on, *inter alia*, his **Race** (**African**). It is a fact that People of **African** Descent like Mr. Burgett has been labeled by government officials referring to them as "Negro" as early as 1930, and continued to use other labels such as "African-American" as it sees fit to describe People of **African** Descent. It is a fact that the IRS, its attorneys and others are ignorant to the fact that not all People of **African** Descent self identifies as "African-American" nor is such label accepted by all People of **African** Descent including those Descendants from northern **African** countries such as Morocco. It is a fact that as an indigenous person, Mr. Burgett has the right to self-determination of his **Race** (**African**) and has and will continue to exercised such right supported by the Creator, a declaration of the United Nations and President Barack Hussein Obama, Jr. This matter warrants no further discussion.

[2] Mr. Burgett reasserts, **Nowhere** in Title VII does the word, "gender" appear. It is a fact that Mr. Burgett filed all of his administrative complaints and this lawsuit **based on**, *inter alia*, his **Sex**. It is a fact that Mr. Burgett Civil Complaint has nothing to do with gender identity or sex stereotyping. It is a fact that Mr. Burgett was born a male, and remains a male with male reproductive system.

- - Order, PP. 1-2 - -

The Wimes court overlooked that Mr. Burgett, "was**[not]** subsequently terminated by the IRS twice: (1) on August 25, 2006 . . . and (2) . . . on May 20, 2012 . . ." Mr. Burgett was removed on August 25, 2006, and terminated on May 20, 2012. Doc. 56, ¶ 63; Doc. 45-1, Exhibit A. **This fact is undisputed by the IRS. Doc. 58, ¶ 63, at 2.** The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

- - Order, P. 3 - -

The Wimes court misapprehended that the Federal Records Act and corresponding Code of Federal Regulations (CFRs) require all federal agencies to maintain records . . . and dispose of records according to agency schedules. 44 U.S.C. Chapter 31; 36 CFR § 1227.12; Doc. 56, ¶ 75, at 11. **This fact is undisputed by the IRS. Doc. 58, ¶ 75, at 3.** The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court also misapprehended the General Records Schedule (GRS) 1, 30b (Adverse Action Files (5 CFR 752) and Performance-Based Actions (5 CFR 432) mandates that case files and records related to adverse actions and performance based actions are to be, "DESTROY[ED] 6 years after case is closed." Doc. 56-1, Exhibit 2, at 3; Doc. 56, ¶ 76, at 12. **This fact is undisputed by the IRS. Doc. 58, ¶ 76, at 3.** The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court further misapprehended that the Internal Revenue Manual (IRM) 1.15.6.4 obligates the IRS for Scheduling of Electronic Records for disposition—"A Records Control Schedule (RCS) provides mandatory instructions for the disposition of records when they are no longer required by the agency. All IRS records, including records in electronic systems, must be scheduled (44 U.S.C § 3303) with NARA. The records must be covered by an agency schedule or a General Records Schedule (GRS)." https://www.irs.gov/irm/part1/irm_01-015-006#idm140168272161712. Doc. 56, ¶ 77, at 12. **This fact is undisputed by the IRS. Doc. 58, ¶ 77, at 3.** The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

- - Order, P. 4 - -

The Wimes court misstated that, "Following [Mr. Burgett's] 2012 termination, [Mr. Burgett] **unsuccessfully** applied for positions with the IRS on at least 40-50 occasions." Subsequent to the IRS terminating Mr. Burgett in May 2012, he **successfully applied** for and was found **Best Qualified**] but was not rehired for numerous positions over a nearly nine year period by the IRS. Doc. 56, ¶ 17; Doc. 56-1, Exhibit 3; Doc. 45-3, Exhibit C; Doc. 30, at ¶¶ 13, 14; *Burgett v. Yellen*, 4:18-CV-00309-BCW, Doc. 104 (On January 17, 2012, Mr. Burgett passed the pre-hire suitability checks and was rehired by the IRS as a full-time, seasonal Tax Examining Technician at the IRS' Kansas City, Missouri campus). **This fact is undisputed by the IRS. Doc. 58, ¶ 65, at 2.** The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court misapprehended, "As relevant here, during 2018-2019, the submission of Plaintiff's name to ALERTS following his applications resulted in four hits, including his 2006 and 2012 terminations." Mr. Burgett was removed on August 25, 2006, and terminated on May 20, 2012. Doc. 56, ¶ 63; Doc. 45-1, Exhibit A. **This fact is undisputed by the IRS. Doc. 58, ¶ 63, at 2.** The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c). Additionally, For Vacancy Announcement 1 - the search details show no specific hits (***Alert) - Doc. 45-9, Exhibit I; For Vacancy Announcement 2 - the search detail shows one specific hit (Term 7 Years EO Time Elapsed) - Doc. 45-12, Exhibit L; For Vacancy Announcement 3 - the document shows no search details - Doc. 45-15, Exhibit O; For Vacancy Announcement 5 - two Alert hits - Doc. 45-22, Exhibit V.

Notwithstanding, the Wimes Court missed that the Audit dated 08/17/2018 for ALERTS shows, "Time Elapsed [-] More than 5 years" and "Decision [-] CS [Continue Selection] - Employee continued successful employment." Doc. 56-4, Exhibit 8. **This fact is undisputed by the IRS. Doc. 58, ¶ 73, at 3.** The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c). The IRS disregarded the ALERTS and was suppose to continue selection of Mr. Burgett.

a. Vacancy Announcement 1.

- - Order, P. 5 - -

The Wimes court overlooked that the IRS' EO office created a list of **Best** qualified candidates that was provided to Gary Albers. Doc. 45-7, Exhibit G, at ¶¶18-21, 23.

The Wimes court ignored that Gary Albers was aware of Mr. Burgett's Race, Sex, and was named as a responsible management official regarding non-selecting Mr. Burgett for a contact representative position in November 2012, and Tax Examining position in February 2013. Additionally, [in July 2016] Albers testified as an IRS witness in an EEOC administrative hearing concerning non-selecting Mr. Burgett for the two positions. Doc. 45-7, Exhibit G, at ¶¶ 6, 8-9, 11; Doc. 56-2, Exhibit 4, at ¶¶ 6-9. This fact is undisputed by the IRS. Doc. 58, ¶ 80, at 4. The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court improperly accepted as true that allegedly, "Plaintiff was not selected "because of his prior termination from the service."" The material referenced do not establish the absence of **genuine issues as to material fact in dispute and genuine issues as to the credibility of witnesses.** Doc. 30, at ¶¶ 14, 16-17; Doc. 56-2, Exhibit 4, at ¶¶ 24-28; Id., Att. 1, at 19-21; Doc. 45-9, Exhibit I.

The Wimes court missed that Gary Albers selected Non-African Males, Non-Africans, females and those who have not engaged in EEO Protected Activity for the position. Doc. 56-4, Exhibit 10; Doc. 45-8, Exhibit H. This fact is undisputed by the IRS. Doc. 58, ¶ 81, at 5. The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

b. Vacancy Announcement 2.

The Wimes court mistakenly stated, "Marchelle King, a Department Manager with the IRS EO office . . ." Marchelle King was a Department Manager with Accounts Management. Doc. 45-10, Exhibit J ¶ 1.

The Wimes court ignored that Marchelle King was aware of Mr. Burgett's Race, Sex, and was the Recruitment Coordinator regarding non-selection of Mr. Burgett for a contact representative position in November 2013. Doc. 56-2, Exhibit 4, at ¶¶ 6-9; Doc. 56-5, Exhibit 11, at ¶¶ 2, 3-8, 11. **This fact is undisputed by the IRS.** Doc. 58, ¶ 83, at 5. The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court omitted that Robert Jones' and Mr. Burgett's names appeared both on the Applicant Listing and ALERTS list. Doc. 56-5, Exhibit 12, at 2; Doc. 45-12, Exhibit L. **This fact is undisputed by the IRS. Doc. 58, ¶ 86, at 5.** The is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court totally disregarded that Marchelle King considered the ALERTS Hit regarding Robert Jones [caucasian] that indicated, to wit: "Last NOA [-] Separation . . . Selecting Official Decision [-] SELECTED", and she **forwarded** Robert Jones' name for selection. Doc. 45-10, Exhibit J, ¶ 22; Doc. 45-12, Exhibit L. **This fact is undisputed by the IRS. Doc. 58, ¶ 85, at 5.** The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court improperly accepted as true that allegedly, ". . . but King did not forward Plaintiff's name to the selecting official because he was one of fourteen applicants who also appeared on an ALERTS list." The material referenced do not establish the absence of **genuine issues as to material fact in dispute and genuine issues as to the credibility of witnesses.** Doc. 30, at ¶¶ 14, 18-19; Doc. 56-2, Exhibit 4, at ¶¶ 47-51; Id, Att. 2, at 22-24.

The Wimes court missed that Non-African Males, Non-Africans, females and those who have not engaged in EEO Protected Activity were selected for the position by Marchelle King. Doc. 56-5, Exhibit 13; Id., Exhibit 12. This fact is undisputed by the IRS. Doc. 58, ¶ 87, at 5. The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

c. Vacancy Announcement 3.

- - Order, P. 6 - -

The Wimes court ignored that Gary Albers was aware of Mr. Burgett's Race, Sex, and was named as a responsible management official regarding non-selecting Mr. Burgett for a contact representative position in November 2012, and Tax Examining position in February 2013. Additionally, [in July 2016] Albers testified as an IRS witness in an EEOC administrative hearing concerning non-selecting Mr. Burgett for the two positions. Doc. 45-14, Exhibit N, at ¶¶ 6, 8-9, 11; Doc. 56-2, Exhibit 5, at ¶¶ 6-9. **This fact is undisputed by the IRS.** Doc. 58, ¶ 89, at 5. The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court missed that the IRS' EO office created a list of **Best** qualified candidates that was provided to Gary Albers. Doc. 45-14, Exhibit N, at ¶¶18-21, 23.

The Wimes court overlooked that the list Gary Albers relied on does not indicate, "ALERTS list"; and does not show individuals having been previous terminated. Doc. 45-15, Exhibit O.

The Wimes court improperly accepted as true that allegedly, "Plaintiff was not selected "because of his prior termination from the service."" The material referenced do not establish the absence of **genuine issues as to material fact in dispute and genuine issues as to the credibility of witnesses.** Doc. 30, at ¶¶ 14, 20-21; Doc. 56-2, Exhibit 5, at ¶¶ 24-28; Id., Att. 1, at 15-16; Doc. 45-15, Exhibit O.

The Wimes court missed that Gary Albers selected Non-African Males, Non-Africans, females and those who have not engaged in EEO Protected Activity for the position. Doc. 56-5, Exhibit 14; Id., Exhibit 15. This fact is undisputed by the IRS. Doc. 58, ¶ 90 at 5-6. The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

d. Vacancy Announcement 4.

The Wimes court incorrectly stated, "John Bigby, Jr., a Department Manager based in the IRS's Kansas City Accounts Management. . . ." John Bigby, Jr. was a Department Manager with Data Conversion, Department 1. Doc. 45-16, Exhibit P, at 1, Box 6.

The Wimes court ignored that John Bigby, Jr. was aware of Mr. Burgett's Race, Sex, and testified on behalf of the IRS in a discrimination case Mr. Burgett filed against it in 2003. Additionally, [on August 11, 2005], Mr. Burgett provided an affidavit to an EEO Investigator regarding, *inter alia*, a sexual harassment complaint filed by another employee. Derrick Davis and John Bigby, Jr. were named as Responsible Management Officials. Doc. 45-16, Exhibit P, at ¶¶ 6, 8-11; Doc. 56-2, Exhibit 5, at ¶¶ 6-9; Doc. 56-3, Exhibit 7, at ¶ 2.d.-e.; Id., Attachments 4, 5. **This fact is undisputed by the IRS.** Doc. 58, ¶ 92, at 6. The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court missed that Mr. Burgett applied for the position and was placed on the list of **Best** qualified candidates that was provided to John Bigby, Jr. Doc. 45-16, Exhibit P, at ¶ 24.

The Wimes court overlooked that John Bigby, Jr. selected Non-African Males, Non-Africans, females and those who have not engaged in EEO Protected Activity for the position. Doc. 56-6, Exhibit 16; Id., Exhibit 17. This fact is undisputed by the IRS. Doc. 58, ¶ 95, at 6. The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court improperly accepted as true that, "Bigby intentionally did not select Plaintiff [allegedly] because of Bigby's "prior experiences associated with working with [Plaintiff] as a front-line manager under [Bigby] for one filing season in the 1990's."" Doc. 30, at ¶¶ 14, 22-23; Doc. 56-2, Exhibit 5, at ¶¶ 93-97; Id., at 17-18; Doc. 56-3, Exhibit 7, at ¶ 2.a.-b.,d.-e; Id., Attachment 1.

The Wimes court totally disregarded Mr. Burgett's experience as manager and interactions regarding John Bigby, Jr., to wit:

> 2. From the outset, I was not aware of John Bigby, Jr. [in 1993 or 1994] and did not work with him during the same (Exhibit Q). When I did work with John Bigby, Jr. [in 2000], I did not interact with employees in the way he falsely asserts (Exhibit Q). I never attempted to or disciplined employees based on pettiness as described by John Bigby, Jr. (Exhibit Q). I treated all employees in a fair and appropriate manner. I disciplined employee only for cause and observed the applicable collective bargaining agreement, IRS policy, and law.
>
> a. I accepted a detail for Mail and File Supervisor, Kansas City Submission Procession Division, Receipt and Control Branch, Extracting Section for the 2000 tax filing season–effective December 19, 1999. Attachment 1. In January 2000 [after training], Jacqueline Kapeller, Chief Extracting/Batching assigned me to nightshift. John Bigby, Jr. was Section Chief Extracting/Batching and I met and became aware of him then. John Bigby, Jr. evaluated me at the end of the detail—I met the Responsibilities (Leadership, Employee Satisfaction, Customer Satisfaction, Business Results, Equal Employment Opportunity), and I met the Commitments.
>
> c. In 2003, John Bigby, Jr. testified on behalf of the IRS in a discrimination case I filed against it. Exhibit P, at ¶¶ 10-11.
>
> d. On August 11, 2005, I provided an affidavit to an EEO Investigator regarding, *inter alia*, a sexual harassment complaint filed by another employee. Derrick Davis and I understood from the employee that John Bigby, Jr. were named as Responsible Management Officials. Attachment 4, 5; Exhibit P, ¶ 2.

(Doc. 56-3, Declaration of Charles L. Burgett (Exhibit 7), at ¶ 2.,a.,c.-d.)

- - Order, P. 7 - -

e. Vacancy Announcement 5.

The Wimes court overlooked that Ramsay included Mr. Burgett in the list of 93 **Best** qualified applicants that she forwarded to Walter Kindergan. Doc. 45-18, Exhibit R, at ¶ 24.

The Wimes court misapprehended that Walter Kindergan was provided, "a copy of the Selecting Official Guidance To Address TIGTA Rehire Audit ("Selecting Official Guidance")." Walter Kindergan's affidavit (Doc. 45-19, Exhibit S) does not support this purported fact. The material referenced do not establish the absence of **genuine issues as to material fact in dispute and genuine issues as to the credibility of witnesses.**

The Wimes court misapplied the facts as to Doc. #45-22 (Exhibit V).[3] The material referenced do not establish the absence of **genuine issues as to material fact in dispute and genuine issues as to the credibility of witnesses.**

- - Order, PP. 7-8 - -

The Wimes court distorted that Walter Kindergan, "did not complete a justification to rehire any of the applicants listed in the ALERTS spreadsheet. (Doc. #45-28 at ¶55)." The purported fact is not supported by Walter Kindergan (Doc. 45-19–Walter Kindergan's affidavit, Exhibit S). The material referenced do not establish the absence of **genuine issues as to material fact in dispute and genuine issues as to the credibility of witnesses.**

- - Order, P. 8 - -

The Wimes court missed that Non-African Males, Non-Africans, females and those who have not engaged in EEO Protected Activity were selected for the position. Doc. 56-6, Exhibit 18; Doc. 45-20, Exhibit T. This fact is undisputed by the IRS. Doc. 58, ¶ 101, at 6. The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court improperly accepted as true that, "The only factor in [Mr. Burgett's] non-selection was his ALERTS issues." Doc. 30, at ¶ 14; Doc. 56-2, Exhibit 6, at ¶¶ 162-164.

The Wimes court ignored that Employment Operations Alert 300-62, Attachment B – MATRIX states, "This matrix is to be used as a guide. As a general rule, **with the exception of AWOL** . . . applicants who were removed . . . will not be recommended for rehire. Doc. 45-4,

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[3] Mr. Burgett's Discovery Request-**Document Request 3** - Employment Supervisor, Kimberly Ramsay avers, "I have attached a list of **270** applicants that had Alerts . . . Attached list: Alerts SBX0029 - As of 6-13-19 (Doc. 46, Exhibit 10-Affidavit, at 4; AFFIDAVIT OF KIMBERLEY C. RAMSAY, EXHIBIT R, at 6)." The IRS provided information on only **25** individuals who it said had Alerts hits (Doc. 44, at 7; Exhibit E); "ALERT LIST, EXHIBIT V". **The IRS is improperly withholding documents [just like before] that is detrimental to its defense or have destroyed documents in violation of law for the same reason.**

Exhibit D, at 230[4]. This fact is undisputed by the IRS. Doc. 58, ¶ 98, at 6. The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court overlooked that Personnel Security approved issues regarding ALERTS, to wit: "Suitability determinations will continue to be conducted by Personnel Security (PS) for applicants who are tentatively selected. This includes a review of ALERTS and criminal history." Doc. 45-4, Exhibit D, at 222.[5] Doc. 58, ¶ 99, at 6. The fact is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

The Wimes court totally disregarded that Melody Boatright, Kyiesha Hydara, Erica Mincey, Demisha Robinson, Cortney Rowe, and Marcus Smith names appear on the list selected by Walter Kindergan [Doc. 45-21, Exhibit U] also the foregoing individuals appear on the applicants list as, "HIRE" [Doc. 45-20, Exhibit T], further all of the foregoing individuals appear on the ALERTS list [Doc. 45-22, Exhibit V]. **This fact is undisputed by the IRS. Doc. 58, ¶ 100, at 6.** The is deemed admitted for the purpose of summary judgment. Local Rule 56.1(c).

<u>Clear Error of Law</u>

The Wimes 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 Wimes 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).

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[4] Page number bottom center of Exhibit.

Credibility of the witnesses raises a factual dispute, which the Wimes court cannot weigh. The Wimes 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, or attempt to determine the truth of the matter are for the jury not the Wimes court. *Poller v. Columbia Broad. Sys., 368 U.S. 464, 473(1962); Pullman-Standard v. Swint, et al.,* 456 U.S. 273, 288-90 (1982); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Garrett v. Embrey, et al*, Case No. 4:17-cv-02492-PLC (United States District Court, E.D. Missouri, October 25, 2018); *Quick v. Donaldson, 90 F.3d 1372, 1376-77(8th Cir. 1996).*

- - Order, PP. 9-10 - -

The Wimes court's assertion that the IRS did not concede that Mr. Burgett has established a *prima facie* case of discrimination and retaliation is without merit. The IRS conceded that Mr. Burgett established a *prima facie* case but claims that Mr. Burgett cannot establish causation (pretext). Doc. 45, at 4,7. Although, the Wimes court mentioned the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), it misunderstands the same. Regardless, the record indisputably demonstrates that Mr. Burgett established a *prima facie* case of discrimination because (1) he is a member of protected groups [African Male, African, Male] (2) he applied for the available positions, (3) he was best qualified for the positions, (4) he was not hired, and (5) similarly situated individuals, not part of his protected groups [Non African Males, Non Africans, Females], were hired instead. *Farver v. McCarthy*, 931 F.3d 808, 812 (8th Cir. 2019). Mr. Burgett has also established 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., refusal to rehire) to be materially adverse, and (3) the materially adverse action was causally linked to the protected conduct. *Mahler v. First Dakota Title Ltd. Partnership*, 931 F.3d 799, 805 (8th Cir. 2019).

The IRS' agent-attorney, Jason C. Green; and, its attorney, Jeffrey P. Ray engaged in professional misconduct by, *inter alia*, making false statements [regarding its answer to Interrogatory 12] to the court, and to judge Wimes in particular; engaging in conduct involving dishonesty, deceit or misrepresentation; and, engaging in conduct that is prejudicial to the administration of justice.

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[5] See Note 4.

The Wimes court turned a blind eye to the foregoing misconduct of the IRS' agent-attorney, Jason C. Green; and, its attorney, Jeffrey P. Ray; disregarded its duty to sanction the IRS and its attorneys for misconduct; and, refused to compel the IRS to supplement Interrogatory 12, Request for Production 3 to the detriment of Mr. Burgett's case. The Wimes court did not give Mr. Burgett's Motion to Compel Discovery and for Discovery Sanctions (Doc. 43) proper consideration or otherwise. See Id., Docs. 50, 54. The Wimes court engaged in a gross abuse of discretion that resulted in fundamental unfairness in Mr. Burgett's case.

- - Order, PP. 10-11 - -

Mr. Burgett presented specific facts and evidence showing that there is genuine issues of disputed material facts for trial (Doc. 56); however, the Wimes court merely chose to ignore the same. *Tolan v. Cotton,* 572 U.S. 650, 656-57 (2014); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

- - Order, P. 12 - -

The Wimes court asserted, "To be sure, neither the Federal Records Act nor the GRS state that the IRS is prohibited from retaining a prior employee's disciplinary history in the ALERTS system. Here, the IRS is specifically charged with considering the prior conduct of former employees before rehiring them. Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 110, 129 Stat 2242, 2430 (2015)." **The Consolidated Appropriations Act of 2016 cannot supercede the Federal Records Act (44 U.S.C. Chapter 31), enacted in 1950.** Additionally, it is undisputed that Mr. Burgett's alleged disciplinary history in the ALERTS system (2006, 2012) were recorded in said system **before** the 2016 Consolidated Appropriations Act. There is a genuine issue of material fact as to whether the IRS properly retained case files and records related to adverse actions and performance based actions beyond the mandatory time [6 Years] for the disposition of records; and, There is a genuine issue of material fact as to whether the IRS properly maintained adverse actions and performance based actions histories in its electronic tracking system (ALERTS) beyond the mandatory time [6 Years] for the disposition of records. The Wimes court is forbidden by law from weighing evidence and resolving the foregoing matter—This dispute of material fact is for the jury to decide. The 2016 Consolidated Appropriations Act **cannot** mandate the listing of prior IRS alleged disciplinary history of Mr.

Burgett for employment decisions by the IRS in 2018 and 2019 that should not have existed and was unlawfully retained in the first place.

The Wimes court concluded, "[y]et even assuming the IRS had violated federal record-keeping laws, this is not enough to demonstrate pretext. Here, Plaintiff has not shown that the IRS's alleged violation of the Federal Records Act or GRS was motivated by discriminatory animus or enacted for a retaliatory reason." Once again, the Wimes court has failed to follow the law. This disputed issue turns on a question of motive and intent, which is for the jury to decide not the Wimes court. *Woodman v. Haemonetics Corp.,51 F.3d 1087, 1091 (1st Cir. 1995)*; *Poller v. Columbia Broad. Sys., 368 U.S. 464, 473(1962)*; *Pullman-Standard v. Swint, et al., 456 U.S. 273, 288-90 (1982).*

Manifest Injustice

The Wimes court mentioned Mr. Burgett's opposition to motion for summary judgment (Doc. 56) only twice, and credited no material evidence in Mr. Burgett's favor. Adversely, the Wimes court mentioned the IRS' motion for summary judgment (Doc. 45) over sixty (60) times, and credited all evidence it purports to be uncontroverted material facts in favor of the IRS.

The record in this case and the previous case (4:18-CV-00309-BCW), Doc. 104 shows that the Wimes court has a predisposition to support the IRS' discriminatory and retaliatory animus against Mr. Burgett and rule against him.

The Wimes court concluded that, "for Vacancy Announcements 1-3, and 5 [Mr. Burgett] was [allegedly] not rehired due to his ALERTS issues; and . . . for Vacancy Announcement 4, [Mr. Burgett] was not rehired [allegedly] due to the selecting official's previous experiences working under [Mr. Burgett] (Order, P. 13)."

It is indisputable that the IRS Personnel Security adjudicated Mr. Burgett's 2006 removal—Mr. Burgett passed the pre-hire suitability checks—Mr. Burgett was found suitable and considered qualified for rehire (January 2012) and could not have been used to make hiring decisions thereafter.

It is indisputable that the Audit dated 08/17/2018 for ALERTS shows that there was a decision made to continue selection for Mr. Burgett. The decision was not followed.

It is indisputable that the IRS violated the Federal Records Act and corresponding Code of Federal Regulations (CFRs) requiring disposal of case files and records [including electronic-ALERTS] related to adverse actions and performance based actions. This violation of law by the IRS has been used exclusively against Mr. Burgett since 2012 to made unlawful employment decisions in not hiring him.

It is indisputable that similarly situated applicants, who had ALERTS issues were selected/hired and treated more favorably for Vacancy Announcements 1-3, and 5 than Mr. Burgett. *Liles v. C.S. Mccrossan, Inc.*, 851 F.3d 810 (8th Cir. 2017). The Wimes court has a pattern and practice of totally ignoring indisputable disparate treatment by the IRS against Mr. Burgett, who has been denied numerous positions between 2012 and 2017. See *Burgett v. Yellen*, 4:18-CV-00309-BCW, Doc. 104, at 3, 7-10; Doc. 56-3, Exhibit 7, ¶¶ 3, 7-10; Id., at Att. 7-12.

It is indisputable that John Bigby, Jr.'s assertion regarding why he did not select Mr. Burgett for rehire for Vacancy Announcement 4 is supported only by self-serving statements without documentary support. The Wimes court should have rejected John Bigby, Jr.'s self-serving statements without documentary support. John Bigby, Jr.'s assertion could be appropriately rejected by a reasonable jury. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000). The facts asserted in Mr. Burgett's declaration with support (Doc. 56-3, Exhibit 7) are based on his personal knowledge; and, Mr. Burgett is competent to testify on the matters regarding his experience as manager and interactions regarding John Bigby, Jr. (Doc. 56-3, Exhibit 7, at ¶ 2.,a.,c.-d.).

The error made by the Wimes court is apparent to the point of being indisputable; and, the error made by the Wimes court amounts to a complete disregard of the controlling law and the credible evidence in the record. Any honest person who view the record will see that the Wimes court is engaging in extreme unfairness and is contaminated with bias against Mr. Burgett.

The Wimes court reliance on the testimony of interested and biased IRS witnesses contained in the paper record; and, for it to act on the IRS' version of facts that a jury is not required to believe, poses a clear threat to Mr. Burgett's Constitutional right to a jury trial. The Wimes court is infringing on Mr. Burgett's right to a jury trial afforded to him by the Seventh Amendment of the United States Constitution, which provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact

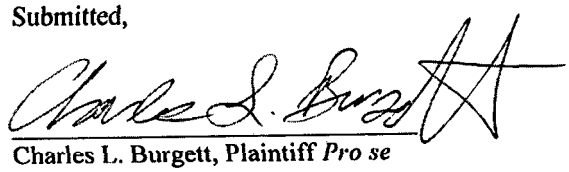
tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The Wimes court consideration of, and reliance on the self-serving testimony and affidavits of IRS' own agents, which a jury would be free to disbelieve in their entirety, deviates so extensively from the common law notion of the right to a jury trial as to demonstrate a Constitutional violation.

C. CONCLUSION

For the above stated reason, Mr. Burgett requests the court **GRANT** his motion for reconsider of summary judgment and moves the court to **VACATE** the order, **REVERSE** judgment, and allow him to continue prosecution of his case.

Dated: April 19, 2024

Submitted,



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