UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1286

Jingyuan Feng

Appellant

v.

Sheena Komenda

Rockwell Collins, Inc.

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:15-cv-00139-LRR)

ORDER

The petition for rehearing by the panel is denied.

November 27, 2017

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

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 17-1286

Jingyuan Feng

Plaintiff - Appellant

v.

Sheena Komenda

Defendant

Rockwell Collins, Inc.

Defendant - Appellee

Appeal from United States District Court
for the Northern District of Iowa - Cedar Rapids

Submitted: October 3, 2017
Filed: October 25, 2017
[Unpublished]

Before LOKEN, MURPHY, and SHEPHERD, Circuit Judges.

PER CURIAM.

Appendix A

Jingyuan Feng appeals the district court's[1] adverse grant of summary judgment in her action claiming employment discrimination and retaliation. Having carefully reviewed the record and the parties' arguments on appeal, we conclude that summary judgment was properly granted for the reasons stated in the district court's order. See Peterson v. Kopp, 754 F.3d 594, 598 (8th Cir. 2014) (de novo review). Accordingly, we affirm. See 8th Cir. R. 47B.

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[1]The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa.

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

JINGYUAN FENG, Plaintiff, vs. ROCKWELL COLLINS, INC., Defendant	No. 15-CV-139-LRR **ORDER**

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I. INTRODUCTION

The matters before the court are Defendant Rockwell Collins, Inc.'s ("Rockwell") "Motion for Summary Judgment" ("Motion") (docket no. 15) and "Motion to Strike Plaintiff's Response to Defendant's Reply and Response" ("Motion to Strike) (docket no. 19).

II. RELEVANT PROCEDURAL HISTORY

On November 12, 2015, Plaintiff Jingyuan Feng filed a pro se Petition (docket no. 2) in the Iowa District Court for Linn County. In the Petition, Feng asserts the following five claims against Defendants Sheena Komenda and Rockwell: Count I asserts that Defendants committed fraud by falsifying certain statements made in Feng's performance reviews; Count II asserts that Komenda discriminated against Feng based on her race, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2, and the Iowa Civil Rights Act ("ICRA"), Iowa Code § 216.6; Count III asserts that Komenda retaliated against Feng after Feng complained of unfair treatment, in violation of Title VII and the ICRA; Count IV asserts that Rockwell "factually supported" Komenda's retaliation "by knowingly and intentionally using . . . false statements"; and Count V asserts that Defendants wrongfully terminated Feng. Feng requests compensatory damages.

On April 14, 2016, the court dismissed all of Feng's claims against Komenda and dismissed several claims against Rockwell. *See* April 14, 2016 Order (docket no. 12) at 12. The court found that Feng was foreclosed from pursuing her claims under the ICRA because she failed to exhaust her administrative remedies and obtain a right to sue letter. *See id.* at 7-8. The court further noted that Title VII does not provide an avenue for relief

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against an individual supervisor, and thus dismissed the Title VII claims against Komenda. *Id.* at 9-10. Finally, the court found that Feng could not pursue her state common law claims of fraud and wrongful discharge because they were preempted by her state law claims under the ICRA. *Id.* at 10-11. Therefore, the court dismissed Komenda from the instant action. The only claims remaining for adjudication are the Title VII discrimination claim, the Title VII retaliation claim and the entirety of Count IV against Rockwell.

On November 1, 2016, Rockwell filed the Motion. On November 17, 2016, Feng filed a Resistance (docket no. 16). On November 28, 2016, Rockwell filed a Reply (docket no. 17). On December 19, 2016, Feng filed a Sur Reply (docket no. 18). On December 21, 2016, Rockwell filed the Motion to Strike. On January 5, 2017, Feng filed a "Response and Objections to Defendant['s] Motion to Strike" (docket no. 20), in which she asserts, without authority, that she should be permitted to file the Sur Reply. The court did not authorize Feng to file a Sur Reply and, in any event, the Sur Reply was untimely. Feng has not provided justification as to why the Sur Reply is necessary. Accordingly, the court shall grant the Motion to Strike and will not rely on the Sur Reply when ruling on the Motion.[1] No party requests oral argument. The matter is fully submitted and ready for decision.

III. SUBJECT MATTER JURISDICTION

The court has original jurisdiction over the Title VII claims because they arise under the Civil Rights Act of 1964. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

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[1] However, the court has reviewed the substance of the Sur Reply, which largely reiterates the arguments made in the Resistance. *Compare* Resistance, *with* Sur Reply. Having reviewed the Sur Reply, the court notes that its conclusions in this Order would remain the same even if it considered the Sur Reply.

To the extent that the claim alleged in Count IV is a state law claim, the court has supplemental jurisdiction over it because it is so related to the claims within the court's original jurisdiction that it forms part of the same case or controversy. *See* 28 U.S.C. § 1367(a) ("[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . ."). In other words, "the federal-law claims and state-law claim[] in the case 'derive from a common nucleus of operative fact' and are 'such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.'" *Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063, 1067 (8th Cir. 1996) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988)) (second alteration in original) (quotation marks omitted).

IV. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment is proper 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show'" an absence of a genuine dispute as to a material fact. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (quoting Fed. R. Civ. P. 56(c)(2)). "A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party; a fact is material if its resolution affects the outcome of the case." *Amini v. City of Minneapolis*, 643 F.3d 1068, 1074 (8th Cir. 2011) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986)). "The movant 'bears the initial responsibility of informing the district court of the basis for its motion,' and must identify 'those portions of [the record] . . . which it believes demonstrate the absence of a genuine issue of material fact.'" *Torgerson*, 643 F.3d at 1042 (alterations in original) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the movant has done so, "the nonmovant must respond by submitting

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evidentiary materials that set out 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Celotex Corp.*, 477 U.S. at 324).

On a motion for summary judgment, the court must view the facts "in the light most favorable to the nonmoving party . . . ." *Id.* (quoting *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009)). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial," and summary judgment is appropriate. *Ricci*, 557 U.S. at 586 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "The nonmovant 'must do more than simply show that there is some metaphysical doubt as to the material facts' . . . ." *Torgerson*, 643 F.3d at 1042 (quoting *Matsushita*, 475 U.S. at 586). Instead, "[t]o survive a motion for summary judgment, the nonmoving party must substantiate his allegations with sufficient probative evidence [that] would permit a finding in [his] favor based on more than mere speculation, conjecture, or fantasy." *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 801 (8th Cir. 2011) (second and third alterations in original) (internal quotation marks omitted) (quoting *Putman v. Unity Health Sys.*, 348 F.3d 732, 733-34 (8th Cir. 2003)). Mere "self-serving allegations and denials are insufficient to create a genuine issue of material fact." *Anuforo v. Comm'r of Internal Revenue*, 614 F.3d 799, 807 (8th Cir. 2010).

V. RELEVANT FACTUAL BACKGROUND

Viewing the evidence in the light most favorable to the nonmoving party and affording her all reasonable inferences, the uncontested material facts are as follows.

A. Parties

Feng is a Chinese foreign national living in Cedar Rapids, Iowa. *See* Petition ¶ 3; Rockwell Statement of Facts (docket no. 15-2) ¶ 5. Rockwell is a "publicly owned corporation that produces communication and aviation electronic solutions for both commercial and government applications." Rockwell Statement of Facts ¶ 1.

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Rockwell maintains policies "prohibiting workplace discrimination and harassment against all individuals on the basis of national origin, race and other protected classes." *Id.* ¶ 2. "The policies also prohibit retaliation against an employee for exercising rights under any state or federal employment law." *See id.*; *see also* Rockwell Appendix (docket no. 15-3) at 19-30. Rockwell also maintains a corporate Ombudsman to whom employees may bring concerns of suspected violations of Rockwell's policies. *See* Rockwell Appendix at 28.

B. Feng's Employment With Rockwell

On July 23, 2008, Feng began working for Rockwell as a "C2 Tax Accountant." Rockwell Statement of Facts ¶ 4. During Feng's employment with Rockwell, Rockwell sponsored Feng's work visa and sponsored her for permanent residence less than two years after she began her employment with the company. *Id.* ¶ 6. Her job responsibilities included "the maintenance of tax records, preparing routine tax reports and preparing specifically assigned tax returns." Rockwell Appendix at 31. A C2 Tax Accountant

> [n]ormally receives general instructions on routine work and detailed instructions on new projects or assignments. Work is reviewed for soundness of judgment and overall adequacy and accuracy. . . . Solves routine problems of limited scope and complexity. Follows established policies and procedures in analyzing situations or data from which answers can be readily obtained.

Id. Rockwell also stresses that a function of the position is "[b]uild[ing] stable working relationships internally." *Id.* Part of such a requirement depends on the employee's "ability to follow through with work assignments and support management's policies and procedures" as well as "provide the status of work assignments at any time and . . . quickly produce any documentation or information that is needed." *Id.*

In Fiscal Year 2008, Feng's supervisor, Cheryl M. Woods, performed Feng's first Performance Review & Development Plan ("PR&DP"). Woods stated that Feng was

meeting expectations for the year and that she had "been overall impressed with [Feng's] willingness to learn, her attention to detail, and her timely completion of assigned tasks." Feng Appendix I (docket no. 16-1) at 29. However, Woods also noted several areas needing improvement. In particular, Woods expressed some concern that Feng was not communicating effectively and encouraged Feng "to ask questions . . . until she is confident that she will have a reliable output" and to "openly communicate[] to other staff members . . . on the status of assignments . . . ." *Id.* at 30.

In Fiscal Year 2009, Woods again stated that Feng was meeting expectations in her PR&DP. *See* Feng Appendix II (docket no. 16-2) at 7. Woods stated that she was "overall impressed with [Feng's] willingness to learn, her attention to detail, and her timely completion of assigned tasks . . . ." *Id.* However, Woods again expressed some concerns about Feng's ability to community effectively. *Id.* ("I would still encourage [Feng] to openly communicate on the status of assignments, questions she may have, issues that she sees, etc."). Woods also noted that Feng had the tendency to make some mistakes, though she also noted that Feng's work product was generally good. *Id.* ("[Feng] continues to have a tendency to rush through things and makes mistakes. . . . I want [Feng] to take time to review her own work, so that errors in references (company name, fiscal year, etc.) are correct[ed] and consistent.").

In Fiscal Year 2010, Thomas C. Peifer III became Feng's supervisor and conducted her PR&DP. Like Woods, Peifer stated that Feng was meeting expectations. *See id.* at 15. Peifer reiterated that Feng was doing "an overall good job" on her assigned projects and noted that she worked "really well with others and [was] always eager to help out . . . ." *Id.* at 13. He acknowledged that "there is definitely a pattern of growth of knowledge in state tax as well as professionalism in how she addresses projects." *Id.* Peifer identified several areas in which Feng could improve, including the need to "eliminate 'silly' mistakes—errors caused by rushing to complete a task" because such

errors require others to review her work or have the work sent back to Feng to be redone. *Id.* Peifer, like Woods, expressed concerns regarding Feng's ability to communicate and noted that it sometimes appeared that Feng did not "quite fully understand certain tasks" that were assigned to her. *Id.* at 15.

In Fiscal Year 2011, Peifer rated Feng as a "[s]uccessful contributor." *Id.* at 21. A "successful contributor," under Rockwell's performance review scheme, is a team member who "consistently meets performance expectations and at times exceeds expectations" of the position. Feng Appendix I at 26. A successful contributor also "[c]onsistently meets established goals, with some tasks performed beyond expectations." *Id.* This rating was reflected in Feng's PR&DP when Peifer stated that Feng "did a great job . . . completing her assigned returns accurately and ahead of schedule." Feng Appendix II at 21. However, Peifer still noted some areas in which he felt that Feng could improve her performance. In particular he stated:

> I would like to see [Feng] focus on completing assigned tasks ahead of the internal/external due dates and not wait to complete assignments until close to the deadline. I would also encourage [Feng] to take more initiative to "own" projects by setting up her own meetings with other individuals instead of relying on others to do this. I would also like to see [Feng] become much more proactive instead of waiting on others to take action.

Id.

In Fiscal Year 2012, Sheena R. Komenda became Feng's supervisor and conducted her PR&DP. Komenda rated Feng as a "[b]asic" contributor. *See* Rockwell Appendix at 53. Under Rockwell's performance scheme, a "basic contributor" is a team member who "generally meets performance expectations. However, improvement in performance is desired." Feng Appendix I at 26. Komenda noted that assessing Feng's performance was "difficult" because Feng had successfully achieved all of her individual goals for the year, but also noted that Feng had extensive education and work experience, and that the

company should be expecting more from Feng at this point. Rockwell Appendix at 55. Komenda noted a "lack of growth/development" since Feng was hired and noted that communication issues could be preventing her from moving up to C3 status. *Id.* Komenda noted that Feng did have some "difficulties with English" that may have contributed to such issues. *Id.* Komenda also expressed concerns about Feng's "reliance on others to help her bridge some of these gaps . . . ." *Id.* Komenda stated:

> As [Feng] enters her [sixth] year, it is imperative that we better understand both her capabilities and limitations. With her education and work experience, more should be expected from her than we are currently receiving. As such, the coming year's goals and development plan will be crafted with this in mind.

Id.

C. Fiscal Year 2013

On or about April 30, 2013, Komenda met with Feng to discuss her mid-year performance review. *See* Rockwell Statement of Facts ¶ 14. The mid-year performance review revealed that Feng was "minimally meeting expectations" and provided several examples of projects that Feng had worked on that required more extensive review than Komenda believed was appropriate for Feng's position and demonstrated Komenda's belief that Feng was not consistently able to provide the sort of analysis of problems that is expected from a person in Feng's position. *See* Rockwell Appendix at 118-19. Komenda summed up the mid-year performance review as follows:

> [Feng] is a dedicated employee who puts forth great effort on her projects. She is minimally meeting expectations and is therefore limited in the types of work that can be delegated to her. Some general themes are as follows: [Feng] needs to provide more frequent and meaningful communication and make sure to cc: the reviewer on all emails that are sent to internal or external contacts. Although we have tracking schedules, an IM or 'drop by' helps keep visibility and ensures that projects keep moving. In addition, [Feng] should clearly

> document and communicate open items and provide reviewers with a complete, referenced, and easy to follow workpaper package. When reviewers provide comments or challenge something, [Feng] should be more willing to accept feedback.

Id. at 121. At the meeting, Feng expressed her opposition to Komenda's characterization of her shortcomings as outlined in the mid-year review. *See* Resistance at 11.

On May 8, 2013, Feng sent Komenda an email following up with the mid-year review discussion. *See* Feng Appendix III (docket no. 16-3) at 18-19. In the email, Feng thanked Komenda for her feedback and stated that she did not intend, nor was she aware, that sometimes her work and efforts deviated from what was expected of her by her superiors. *Id.* at 18. Feng expressed that she would "like to work more closely and effectively with all team members through better communication and coordination." *Id.* Feng also indicated that she intended to communicate more effectively through multiple channels and apologized that others perceived her as unwilling to accept criticism or feedback. *Id.* at 18-19.

On May 10, 2013, Komenda presented Feng with a "Performance Recovery Plan" ("PRP"), which indicated that Feng was not currently meeting the expectations of her position and that the sixty-day PRP was designed to bring Feng's performance up to the expected levels. *See* Rockwell Appendix at 61. Komenda had worked with Human Resources to develop the PRP. Rockwell Statement of Facts ¶ 16. Rockwell's policies indicate that a PRP is a "[d]ocument used to clarify expectations when performance expectations are not being met. A PRP containing target objectives and timeframes is mandatory when a PR&DP rating of ['Unsatisfactory Contributor'] is received." Rockwell Appendix at 57. "Leaders and Human Resources will consult and determine the best disciplinary course of action. . . . Individual circumstances will determine the actions to be taken or tools of discipline to be used." *Id.* at 58. The PRP outlined several areas of improvement that were touched upon in the mid-year review and provided several specific

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tasks which Feng was expected to complete within the review period. *Id.* at 61-64. The PRP states that, "[i]f no immediate improvement is demonstrated and sustained, or there are further issues impacting performance, workflow or productivity, further disciplinary action will occur up to and including termination of your employment." *Id.* at 63. Feng refused to sign or acknowledge the PRP. *See id.* at 64.

On May 13, 2013, Feng sent Komenda an email stating that she had not slept in the previous three days, since the meeting regarding the PRP, and that she required time off. *Id.* at 192. She reiterated that she did not agree with the issuance of a PRP and indicated that she would return to work "as soon as possible." *Id.* Feng remained on leave until May 20, 2013. *See id.* at 194.

On May 30, 2013, Feng again went on leave, and returned to work on July 8, 2013. *Id.* at 66-67. Also on May 30, 2013, Feng filed a formal complaint with the Ombudsman. *See id.* at 69-71. In the complaint, Feng stated that Komenda "conducted [her] performance review in an unfair, biased, and inconsistent way" and forced her into a PRP, treating her differently than her white coworkers and raising the possibility of racial discrimination. *Id.* at 69. The Ombudsman conducted an investigation, including interviewing a number of Feng's coworkers and Komenda. *Id.* at 70. Feng was largely unable to provide specific examples of unfair or discriminatory treatment and Feng's coworkers similarly had no examples. *Id.* One coworker reiterated that he had never heard anyone, including Komenda, make a negative comment regarding race, but that other coworkers had complained about Feng's work product. *Id.* On June 19, 2013, the Ombudsman closed the complaint, finding that the allegation of discrimination was unsubstantiated. *Id.* at 71.

On August 2, 2013, Komenda and Lisa Oetken, Senior Human Resources Representative for Rockwell, met with Feng to re-initiate the PRP after Feng had been on leave. Rockwell Statement of Facts ¶ 25. The August PRP had updated performance

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expectations and deadlines. Rockwell Appendix at 74-75. Again, Feng declined to immediately sign the PRP, electing to review the document and determine whether to sign it at a later date. *Id.* at 76. At the meeting, Komenda scheduled a thirty-day and sixty-day review to assess Feng's progress, as well as weekly one-on-one meetings with herself and Oetken. Rockwell Statement of Facts ¶¶ 26-27.

On August 28, 2013, Feng filed a second formal complaint with the Ombudsman. *See* Rockwell Appendix at 78-79. In it, Feng stated that she believed that she was being treated unfairly and differently than her white coworkers. *Id.* at 78. She also expressed confusion regarding how she was placed on a PRP when she had been rated as a basic contributor, while Rockwell's company policy makes PRPs mandatory only when an employee is rated as an unsatisfactory contributor. *Id.* On September 10, 2013, the Ombudsman closed the case, finding that the allegations were unsubstantiated. *Id.* at 79.

On September 4, 2013, Komenda and Oetken met with Feng to conduct her thirty-day review as contemplated under the PRP. *See id.* at 81. The thirty-day review revealed that Feng was satisfactorily emailing a work schedule and providing weekly written status reports on her assignments, and had satisfactorily completed a research and development forecast. *Id.* However, Komenda concluded that Feng had failed to satisfactorily complete several other projects. *Id.* Feng refused to sign the thirty-day review. *Id.* at 82.

On September 5, 2013, Feng emailed Komenda that she felt "uncomfortable" and requested the day off. *Id.* at 84. Feng then requested and was granted leave from September 9, 2013 through March 17, 2014. *See id.* at 86; Rockwell Statement of Facts ¶ 32. In late September 2013, Komenda completed Feng's Fiscal Year 2013 PR&DP and forwarded it to Human Resources for Feng's review since Feng was on leave at that time. Rockwell Statement of Facts¶ 33. The Fiscal Year 2013 PR&DP rated Feng as an unsatisfactory contributor. *See* Rockwell Appendix at 117.

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D. Termination

Feng returned to work on March 18, 2014. Rockwell Statement of Facts ¶ 35. On March 20, 2014, Komenda and Oetken again met with Feng to re-initiate the PRP. Rockwell Appendix at 90-95. The March PRP again updated performance expectations and provided three specific projects to be completed within the following week to two weeks. *Id.* Feng signed the March PRP but stated that she disagreed with Komenda's conclusions in the thirty-day review. *Id.* at 94. Following the March 20, 2014 meeting, Komenda and Feng spoke regularly via email regarding Feng's work and her progress on the assignments mentioned in the PRP. Rockwell Statement of Facts ¶ 37; *see also* Feng Appendix IV (docket no. 16-4) at 20-33.

In the weeks following, Komenda recommended Feng's dismissal and Komenda's recommendation was approved by her supervisors. *See* Rockwell Statement of Facts ¶ 39. Komenda's recommendation was reviewed by Oetken on behalf of Human Resources. *Id.* ¶ 40. On April 23, 2014, Oetken recommended Feng's dismissal to her superiors. *See id.*; *see also* Rockwell Appendix at 97-101. In Oetken's termination recommendation, she states that Feng "has been in [her] position for over five years, and she has not grown or performed satisfactorily. When compared to other C2 Tax Accountants within Rockwell Collins with lesser education and experience, Feng not only falls short of her peers, but is incapable of performing satisfactorily in her role." Rockwell Appendix at 97. Oetken also cited Feng's poor communication skills, as well as an apparent disconnect between Feng's desire to produce a good work product and her ability or capacity to do so. *Id.* at 98-100 ("Feng does not distinguish between her desire to perform well and her ability to perform at the level expected. . . . [Feng's] most significant deficiency relates to Feng's inability to clearly communicate her thought process, approach and conclusion via written communication.").

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On April 24, 2014, Komenda and Oetken met with Feng to discuss her sixty-day review under the PRP. The sixty-day review states that Feng failed to satisfactorily complete the three additional assignments included in the March PRP. *See id.* at 158. The sixty-day review noted that, "[a]though [Feng] did genuinely attempt to complete the tasks, [she] w[as] unable to achieve satisfactory results. The quality of the information, and the matter in which the data was communicated did not meet the expectations." *Id.* Feng refused to sign the sixty-day review. *Id.* at 159. On that same date, Feng was terminated. Rockwell Statement of Facts ¶ 42.

E. Administrative Proceedings

On or about May 13, 2014, Feng filed a charge of discrimination with the Iowa Civil Rights Commission ("ICRC") and the Cedar Rapids Civil Rights Commission alleging race-based discrimination and retaliation under the ICRA. *See id.* ¶ 43; *see also* Rockwell Appendix at 161-62. This charge was cross-filed with the Equal Employment Opportunity Commission ("EEOC"). *See* Rockwell Statement of Facts ¶ 43. On April 16, 2015, the ICRC sent Feng a notice that her case was being administratively closed and that further investigation was not warranted. *Id.* ¶ 44; *see also* Rockwell Appendix at 164-75. The ICRC concluded that there was no reasonable possibility that further investigation would result in probable cause regarding Feng's discrimination or retaliation claims. *See* Rockwell Appendix at 172, 174. On August 19, 2015, the EEOC sent Feng a notice of dismissal and apprised her of her right to sue. Rockwell Statement of Facts ¶ 45; Rockwell Appendix at 177-78. Therefore, Feng has exhausted her administrative remedies as to the Title VII claims.

VI. ANALYSIS

Title VII of the Civil Rights Act of 1964 makes it unlawful "to discharge any individual, or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such

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individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1). Title VII also makes it unlawful for an employer "to discriminate against any individual . . . because [she] has opposed any [unlawful employment] practice . . . or because [she] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. *Id.* § 2000e-3(a). In this way, Title VII prohibits employment discrimination based on suspect classifications and prohibits retaliation for engaging in protected activity related to allegations of discrimination.

A plaintiff may demonstrate that he or she has been the subject of race or national origin discrimination or retaliation in violation of Title VII by employing either direct or indirect evidence. *See Blackwell v. Alliant Techsystems, Inc.*, 822 F.3d 431, 435 (8th Cir. 2016). "Direct evidence of discrimination must show 'a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action.'" *Hutton v. Maynard*, 812 F.3d 679, 683 (8th Cir. 2016) (quoting *Russell v. City of Kansas City*, 414 F.3d 863, 866 (8th Cir. 2005)). Such evidence "encompasses comments or statements indicating discriminatory intent, where those comments are made by people with decision-making authority." *Id.* Here, Feng has not produced direct evidence of discrimination or retaliation. Accordingly, to prevail on her claims, Feng must demonstrate the existence of a genuine dispute of material fact regarding indirect evidence of discrimination or retaliation.

Courts analyzing indirect discrimination claims apply the familiar *McDonnell Douglas* burden-shifting framework. *See Grant v. City of Blytheville*, 841 F.3d 767, 773 (8th Cir. 2016); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "Under this framework, if an employee carries his burden of establishing a *prima facie* case of discrimination, the burden then shifts to the employer to articulate a legitimate,

non-discriminatory reason for the adverse employment action. If the employer meets this burden of production, the employee must then 'prove beyond a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination.'" *Grant*, 841 F.3d at 773 (alteration in original) (citation omitted) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000)). "Although the 'burden of establishing a *prima facie* case . . . is not onerous,' the plaintiff must satisfy every element of [her] *prima facie* case, carrying at all times the 'ultimate burden of proof and persuasion' to establish that the employer discriminated against [her] on an impermissible basis.'" *Id.* (first alternation in original) (quoting *Torgerson*, 643 F.3d at 1046-47)).

Here, Feng alleges that Rockwell discriminated against her on the basis of race and national origin by placing her on the PRP and later terminating her. She also alleges that she suffered retaliation for complaining that she was the subject of discrimination on the basis of race and national origin. The court shall address these two claims separately.

A. Race and National Origin Discrimination

"To establish a *prima facie* case of race discrimination, an employee must show that: (1) [she] is a member of a protected class; (2) [she] was meeting [her] employer's legitimate job expectations; (3) [she] suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination, *e.g.*, [she] was treated differently than similarly situated employees who were not members of [her] protected class."[2] *Jones v. City of St. Louis*, 825 F.3d 476, 480 (8th Cir. 2016). "A plaintiff prevails under Title VII by showing that race was a 'motivating factor' for an employment practice . . . ."

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[2] The court shall analyze Feng's claims of race discrimination and national origin discrimination under the same framework because the elements of each claim are identical. *See, e.g.*, *Habib v. NationsBank*, 279 F.3d 563, 566 (8th Cir. 2001) (listing the elements of a *prima facie* case of discrimination based on the fact that the plaintiff was a Muslim Pakistani woman).

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Washington v. Am. Airlines, Inc., 781 F.3d 979, 981 (8th Cir. 2015) (citing 42 U.S.C. § 2000e-2(m)). Rockwell does not dispute that Feng is a member of a protected class or that she suffered an adverse employment action when she was terminated. *See* Brief in Support of the Motion (docket no. 15-1) at 11. Accordingly, the only elements in dispute are whether Feng was meeting Rockwell's legitimate job expectations and whether the circumstances give rise to an inference of discrimination.

1. **Prima facie** ***case***

Rockwell argues that Feng cannot establish a *prima facie* case of race or national origin discrimination because "the material facts not in dispute demonstrate that Feng did not meet the legitimate expectations of Rockwell . . . and the circumstances of her case do not give rise to an inference of discrimination." *Id.* In particular, Rockwell argues that Feng was well aware of the weaknesses in her job performance and failed to correct them even after being placed on notice that she was not meeting expectations. *Id.* at 11-13. Rockwell further argues that Feng cannot raise an inference of discrimination because she has failed to submit evidence of disparate treatment of similarly situated employees or that Rockwell had violated its internal policies. *Id.* at 13-14. Feng argues that summary judgment is not appropriate because Rockwell falsified her performance reviews and she was meeting the legitimate job expectations of her employer. *See* Resistance at 2-3. Feng also argues that the facts demonstrate that Rockwell failed to follow its internal policies regarding the PRP and criticizes Rockwell's attempt to proffer a similarly situated white employee who was also placed on a PRP. *Id.* at 4-7.

a. Legitimate job expectations

Rockwell argues that Feng cannot demonstrate that she was meeting Rockwell's legitimate expectations and, therefore summary judgment is appropriate. Brief in Support of the Motion at 11-13. Rockwell argues that Komenda's Fiscal Year 2012 review placed Feng on notice that "a higher level of performance was expected of her and she needed to

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improve her teamwork, innovation, customer focus, and leadership skills." *Id.* at 11. Rockwell further maintains that, after Feng was placed on the PRP, the thirty-day performance review revealed that she was still not meeting Rockwell's expectations. *Id.* at 12. After Feng's extended leave of absence, Komenda and Oetken met with Feng again and directed her to complete three projects within a specified time period, none of which were satisfactorily completed, despite the fact that "Komenda spoke with Feng regularly and they exchanged several emails regarding Feng's work on the three tasks assigned to her." *Id.* at 13. In short, Rockwell argues that it "fully advised Feng of her unsatisfactory work performance, set clear expectations for her continued employment, and gave Feng significant time in which to demonstrate sustained improvement." *Id.*

Feng argues that there exists a genuine issue of fact as to whether she was meeting Rockwell's performance expectations. Feng repeatedly makes reference to what she refers to as her "true" or "real performance" during the PRP period and argues that such "true performance" met the threshold of Rockwell's expectations. *See, e.g.*, Resistance at 3, 5, 7, 13. In support of her position, Feng argues that her work performance did not change between Fiscal Year 2011 and Fiscal Year 2012, when Komenda became her supervisor and began criticizing her work performance. *Id.* at 7. Feng argues that, if her performance truly was not meeting Rockwell's expectations, then she should have been receiving poor work evaluations in the years leading up to Fiscal Year 2012 and "should [have] be[en] disciplined or fired more than [eight] times by [two] previous manager[s] in the first [four] year[s]" of her employment. *Id.* Feng further asserts that Komenda's evaluation of her performance was unfair, and focused on minor "imperfection[s] to conclude all [Feng's] overall good work [w]as unsatisfactory" and notes that she regularly completed her work with 99.7% accuracy. *Id.* at 13. Feng also suggests that Rockwell's performance expectations were illegitimate because the work assigned to her during the PRP process was "higher level work" than that which she should be expected to do. *Id.*

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An employee's self-serving statements that he or she is qualified or meeting expectations, without further evidence, are insufficient to demonstrate that the employee was meeting the legitimate expectations of their employer. *See, e.g., Shanklin v. Fitzgerald*, 397 F.3d 596, 602 (8th Cir. 2005) ("Shanklin states her teaching ability far exceeded any other teacher at the Positive School. However, Shanklin failed to offer any evidence to suggest she met the Board's legitimate expectations."). An employee does not demonstrate that he or she was meeting the employer's legitimate expectations merely by demonstrating that, in the past, he or she met the employer's legitimate expectations. *See Naik v. Boehringer Ingelheim Pharm., Inc.*, 627 F.3d 596, 600 (7th Cir. 2010) (characterizing the past performance of an employee as "irrelevant" because the inquiry is not whether the employee had previously met the employer's legitimate expectations but rather is whether the employee was meeting the employer's legitimate expectations at the time of termination). Similarly, an employer's expectations are not rendered illegitimate merely because they extend beyond the four corners of a position's written job description. *See Ho v. Abbott Labs., Inc.*, 618 Fed. App'x 852, 855 (7th Cir. 2015) ("The omission from [plaintiff's] written job description of any reference to batch-record training does not mean that this task was not among Abbott's legitimate employment expectations." (citing *Huang v. Continental Cas. Co.*, 754 F.3d 447, 451 (7th Cir. 2014))); *Renken v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2008)).

Here, the court finds that Feng has not demonstrated the existence of a genuine dispute regarding whether she was meeting Rockwell's legitimate performance expectations. The record demonstrates that the issues for which Feng was ultimately terminated were consistently communicated to her well before she was placed on the PRP or terminated. Feng's previous supervisors, Woods and Peifer, both consistently stated that Feng's weaknesses included communication regarding the status of projects, the general quality of her work products and the timeliness of the completion of her projects.

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See Feng Appendix I at 30 (Woods noting that Feng should focus on communicating with other team members regarding the status of assignments); Feng Appendix II at 7 (Woods noting that Feng should communicate regarding the status of assignments and criticizing Feng for her "tendency to rush through things and make mistakes"); Feng Appendix II at 13 (Peifer characterizing mistakes Feng makes as "silly" and that they occurred as a result of working too quickly); Feng Appendix II at 21 (Peifer noting that Feng had the tendency to push projects off until they were nearly due and urging Feng to become more proactive about communication). When Komenda became Feng's supervisor, she criticized Feng's communication skills and noted a "lack of growth/development" since she began employment with Rockwell. Rockwell Appendix at 55. In her Fiscal Year 2013 mid-year review of Feng, Komenda again noted Feng's problems with communication regarding the status of projects and noted Feng's resistance to accepting feedback. Rockwell Appendix at 121. Similarly, during the Ombudsman's investigation of Feng's first complaint of discrimination, her coworkers confirmed that there were issues with Feng's work product. *See id.* at 70.

The shortcomings for which Komenda criticized Feng, and ultimately placed her on the PRP, were consistently noted by Feng's previous supervisors and her coworkers. That Peifer had previously rated Feng as a "successful contributor" does not alone demonstrate that she continued to meet Rockwell's expectations. *See Naik*, 627 F.3d at 600. Nor does the unsupported argument that the assignments given to Feng during the PRP period were not the sort of assignments that someone in Feng's position would normally be expected to complete. *See Ho*, 618 Fed. App'x at 855. In any event, Komenda had taken Feng's education and work experience into account when giving her assignments and setting performance expectations for her. *See* Rockwell Appendix at 55. Rockwell has provided legitimate reasons for criticizing Feng's work product. *See* Rockwell Statement of Facts ¶ 38.

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Aside from providing self-serving statements, Feng has provided no evidence that she was meeting Rockwell's legitimate expectations. Such statements are insufficient to defeat summary judgment. *See Anuforo*, 614 F.3d at 807; *Shanklin*, 397 F.3d at 602. The only documentary evidence that Feng has included regarding this issue are emails written from Feng to Komenda and Oetken between March 24, 2014 and April 21, 2014. *See* Feng Appendix IV at 20-33. Such emails generally consist of Feng recapitulating the weekly one-on-one meetings between herself and Komenda and Oetken during the PRP period and generally indicate that Feng was "on the right track" with her projects. *See id.* However, the emails also highlight some of the issues that Komenda had with Feng's job performance. For example, Feng acknowledged that she had been struggling with communicating regarding one of her projects. *See id.* at 24. Additionally, the emails that Komenda sent in response to several of Feng's emails demonstrate that Komenda wanted Feng to think more deeply and critically about the projects than she currently was. *See, e.g., id.* at 29-30 (April 10, 2014 email from Komenda to Feng requesting her to supplement a project with additional considerations); *id.* at 32 (April 21, 2014 email from Komenda to Feng expressing concern that Feng had mischaracterized certain statements that Komenda made in an earlier meeting). The remainder of the evidence presented by Feng consists of her own assessments of her work and Komenda's criticism of it. *See, e.g., id.* at 18-19 (providing a "work self-assessment" and concluding that she had met or exceeded all of Komenda's expectations).

In short, the record demonstrates that Komenda's criticisms of Feng do not materially differ from those of Feng's prior supervisors. However, even if they did, the mere fact that Feng preformed satisfactorily at one time does not indicate that she continued to perform in the same manner under Komenda. The majority of Feng's arguments rest on self-serving statements unsupported by documentary evidence in the record. The record also demonstrates that Komenda did not rely on accuracy percentages

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in evaluating Feng's performance. *See* Rockwell Statement of Facts ¶ 38. Therefore, even if Feng were correct, and she completed her work with 99.7% accuracy, this fact alone does not give rise to a genuine dispute as to whether Feng was meeting Rockwell's legitimate expectations. Accordingly, the court shall grant the Motion with regard to Feng's discrimination charge.

b. Inference of discrimination

Rockwell further argues that the circumstances of Feng's dismissal do not give rise to an inference of discrimination and, therefore, summary judgment is likewise appropriate on that ground. Rockwell argues that Feng's reliance on disparate treatment of similarly situated coworkers is misplaced because she cannot demonstrate that such coworkers were similarly situated in all relevant respects. *See* Brief in Support of the Motion at 14. Rockwell affirmatively directs the court to a white employee of Rockwell who was rated as a "basic contributor" by Komenda and who was later placed on a PRP as a more appropriate example of a similarly situated employee who was treated the same as Feng. *Id.* Rockwell further argues that Feng's argument that Rockwell's departure from its own policies raises the inference of discrimination is incorrect because its policies do not limit the use of PRPs to those rated as unsatisfactory contributors. *Id.*

Feng argues that Rockwell's reliance on the white employee is inapposite because the white employee was supervised by Komenda after Feng had already been discharged and that this subsequent discipline of a white employee does not demonstrate that Feng's own discipline was not discriminatory. Resistance at 4. Feng also argues that Komenda must have falsified statements in her reviews of Feng to place her on the PRP because she was not rated as an unsatisfactory contributor, which would have made a PRP mandatory. *Id.* at 3. She also states that Rockwell has shifted its justification for her termination and placement on the PRP at different stages of the dispute. *Id.* Feng suggests that Komenda's criticism of Feng's ability to communicate stands in as a proxy for race or national origin,

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as English is not Feng's primary language. *See id.* at 10. Finally, Feng argues that she was regularly blamed for the mistakes of her white coworkers during the time period during which Komenda was supervising her. *Id.* at 9-10.

In assessing whether the circumstances give rise to an inference of discrimination

> a plaintiff can establish an inference of discrimination to satisfy the fourth element "in a variety of ways, such as by showing more-favorable treatment of similarly-situated employees who are not in a protected class, [by showing] biased comments by a decisionmaker," *Pye v. Nu Aire, Inc.*, 641 F.3d 1011, 1019 (8th Cir. 2010), or by showing pretext with evidence that an employer "failed to follow its own policies" or "shifted its explanation of the employment decision . . . ."

Grant, 841 F.3d at 774 (alteration in original) (citation omitted); *see also Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1040 (8th Cir. 2010) (noting that, in a sex discrimination case, the critical inquiry is not merely whether an employer has treated female employees differently from male employees, but whether an employer discriminates against an employee based on his or her sex). If an employee seeks to demonstrate that similarly situated employees not belonging to a protected class were treated more favorably, the employee bears the burden of producing such employees and must prove, by a preponderance of the evidence, that the other employees were "similarly situated in all respects to her." *Gilmore v. AT&T*, 319 F.3d 1042, 1046 (8th Cir. 2003). "The individuals used as comparators 'must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.'" *Id.* This inquiry is a "rigorous" one. *See Palesch v. Mo. Comm'n on Human Rights*, 233 F.3d 560, 568 (8th Cir. 2000) (quoting *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994)); *see also Fields v. Shelter Mut. Ins. Co.*, 520 F.3d 859, 864 (8th Cir. 2008) ("The test [to determine whether employees were similarly situated] is rigorous and requires that the other employees be similarly

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situated in all relevant aspects before the plaintiff can introduce evidence comparing herself to the other employees.").

Here, Feng has failed to raise a genuine issue of material fact regarding whether her white coworkers were similarly situated in every relevant respect. The record is nearly devoid of any information regarding such coworkers. Rather than establishing that her coworkers were similarly situated to her, Feng herself admits that several of her coworkers were rated as higher level tax accountants than her. *See* Feng Appendix IV at 19 (noting that her "peers of a higher level" included a C3 and C4 tax accountant). Feng has not put forth any evidence that such coworkers were rated as "basic contributors" by Komenda and subsequently not placed on PRPs. She has also not put forth any evidence that Komenda was subjecting them to the same scrutiny as she was placing on Feng. In essence, the record does not demonstrate the existence of any employee who was similarly situated to Feng. Regardless of whether the white employee to whom Rockwell points is similarly situated or not, Feng has failed in her burden to establish a genuine issue of fact regarding the disparate treatment of similarly situated individuals.

Likewise, Feng has failed to establish that Rockwell violated its own policies when it initially placed her on the PRP. Rockwell's discipline policy states that a PRP is a "[d]ocument used to clarify expectations when performance expectations are not being met. A PRP containing target objectives and timeframes is mandatory when a PR&DP rating of ['Unsatisfactory Contributor'] is received." Rockwell Appendix at 57. The policy also directs supervisors and human resources to consider the individual circumstances of each case to determine the appropriate course of action. *Id.* at 58. Contrary to Feng's assertions, Rockwell's policies do not limit the use of PRPs only to those rated as unsatisfactory contributors. Rather, the plain language of the policy injects flexibility and discretion into the process.

Feng is similarly unsuccessful with her argument that Rockwell has shifted its justification for the PRP or her termination at different points in the dispute. *See* Resistance at 3 ("Komenda[] and the company told [Feng] one 'reason', told [the Iowa Civil Rights Commission] a different 'reason', now [a] totally different 'reason' to the court."). The only evidence in the record regarding the reason that Rockwell gave for Feng's termination is completely consistent with the representations made in the instant action. *Compare* Rockwell Appendix at 97-101 (outlining the justification for Feng's termination sent to Rockwell's human resources department), *with* Rockwell Appendix at 167-68 (the Iowa Civil Rights Commission's screening analysis outlining the justifications for the PRP and termination given after Feng's administrative charge of discrimination and retaliation). Feng has produced no evidence regarding the justification given to Feng at the time of her dismissal.

Furthermore, "criticizing a foreign employee's facility with the English language [does not] constitute discrimination against a particular race or national origin." *Hannoon v. Fawn Eng'g Corp.*, 324 F.3d 1041, 1048 (8th Cir. 2003) (quoting *Hannoon v. Fawn Eng'g Corp.*, No. 4-01-CV-90170, at *7 (S.D. Iowa April 2, 2002)); *see also Jianquin Wu v. Special Counsel, Inc.*, 54 F. Supp. 3d 48, 56 (D.D.C. 2014) ("Education and language skills . . . are not protected characteristics . . . ."); *Brewster v. City of Poughkeepsie*, 447 F. Supp. 2d 342, 351 (S.D.N.Y. 2006) ("Indeed, where the challenged conduct relates to the language an employee speaks, '[a] classification is implicitly made, but it is on the basis of language, *i.e.*, English-speaking versus non-English speaking individuals, and not on the basis of race [] or national origin. Language, by itself, does not identify members of a suspect class." (second alteration in original) (quoting *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983))); *Reyes v. Pharma Chemie, Inc.*, 890 F. Supp. 2d 1147, 1158-59 (D. Neb. 2012) (noting that "language itself is not a protected class" and that "language and national origin [are not] interchangeable," but also noting that "language is closely tied

to national origin" and an employer's blanket rule that employees may only speak English at work could give rise to a hostile work environment claim). *But see Marti Navarro v. United States*, 104 F. Supp. 2d 96, 104 n.6 (D.P.R. 2000) (noting as dicta, in a case wherein a plaintiff complained of "unfair criticism of his performance and derision of his English language skills," that "discrimination on the basis of one's language or accent can ground a Title VII claim for national origin discrimination"). Feng has identified no off-color comments made about her English. The only evidence in the record regarding Feng's mastery of English is Komenda's comment in the Fiscal Year 2012 PR&DP that some of Feng's communication issues may stem from her difficulties with English. This alone is insufficient to defeat summary judgment.

Feng has provided no documentary evidence to support her self-serving statement that she was blamed for her white coworkers' mistakes. Furthermore, even if Feng is factually correct, there is no evidence in the record that Komenda blamed Feng for such mistakes out of any sort of discriminatory animus. Even if Komenda did indeed wrongfully blame Feng for her coworkers' mistakes, without evidence suggesting that such an action was motivated in part by Feng's race, it is not actionable. *See, e.g., Logan v. Liberty Healthcare Corp.*, 416 F.3d 877, 883 (8th Cir. 2005) ("[Courts] do not 'sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination or unlawful retaliation.'" (quoting *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1034 (8th Cir. 2005))). This complaint, like most of Feng's arguments regarding the inference of discrimination, reflects a general belief that Feng was treated unfairly in some way. However, without evidence tying this treatment to a protected classification, it is not the province of the court to rectify such unfairness. In all, Feng has not carried her burden of demonstrating the existence of a genuine dispute as to whether the circumstances of her termination raise an inference of discrimination. The factors to which

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Feng points lack admissible evidence supporting them. Summary judgment is appropriate on these grounds.

2. Pretext

However, even assuming that Feng is able to establish a *prima facie* case of race or national origin discrimination, she fails to demonstrate that her termination was pretextual. Rockwell has proffered Feng's poor performance as its legitimate, nondiscriminatory reason for her termination. *See* Brief in Support of the Motion at 14-15. Therefore, the burden shifts back to Feng to demonstrate the existence of a genuine issue of material fact regarding pretext. Feng cannot do so.

The Eighth Circuit Court of Appeals has stated:

> There are at least two routes by which a plaintiff may demonstrate a material question of fact at this final stage of the [*McDonnell Douglas*] analysis. First, a plaintiff may succeed indirectly by showing that the employer's proffered explanation is unworthy of credence because it has no basis in fact. Second, a plaintiff may succeed directly by persuading the court that a prohibited reason more likely motivated the employer.

Dixon v. Pulaski Cty. Special Sch. Dist., 578 F.3d 862, 869 (8th Cir. 2009) (quoting *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1120 (8th Cir. 2006)), *abrogated on other grounds by Torgerson*, 643 F.3d 1031. Feng cannot prevail under either route. The record is replete with evidence supporting Rockwell's position. Feng has not demonstrated that Rockwell's justification in placing her on the PRP or terminating her is false. No evidence in the record directly contradicts Rockwell's stated purpose for its actions. Therefore, Feng cannot prevail under the first route.

Under the second route, Feng need not necessarily disprove Rockwell's proffered justification. Instead, she "must adduce enough admissible evidence to raise genuine doubt as to the legitimacy of [Rockwell's] motive, even if that evidence does not directly contradict or disprove [Rockwell's] articulated reasons for its actions." *Id.* at 870 (quoting

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Buettner v. Arch Coal Sales Co., 216 F.3d 707, 717 (8th Cir. 2000)). Feng cannot do so. The evidence supporting pretext under this route is the same evidence that the court considered and rejected in deciding whether Feng had alleged a *prima facie* case of discrimination. The unsworn, self-serving statements and documents in the record do not give rise to a question of fact regarding pretext.[3] However, even if the quantum of evidence presented by Feng is sufficient to establish a *prima facie* case of discrimination, it falls far short of the amount required to demonstrate a genuine issue of fact with respect to pretext. Even if Feng sufficiently calls into question the factual basis of Rockwell's decision, she has not put forth sufficient evidence to infer that discrimination was the real reason for Rockwell's actions. *See id.* at 872 ("A reason cannot be proved to be a 'pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." (quoting *Floyd v. Mo. Dep't of Social Servs., Div. Of Family Servs.*, 188 F.3d 932, 937 (8th Cir. 1999))). Feng's lack of evidence of pretext, coupled with the weak showing in her *prima facie* case, fails to survive summary judgment on this issue. *See Wallace*, 442 F.3d at 1120 n.2 (noting that "a strong *prima facie* case coupled with proof of pretext may suffice to create a triable question of fact"). The court shall grant the Motion with respect to Feng's discrimination claim.

B. Retaliation

"To establish a *prima facie* case of retaliation, a plaintiff must show that: '(1) she engaged in statutorily protected conduct; (2) she suffered an adverse employment action; and (3) a causal connection exists between the two.'" *DePriest v. Milligan*, 823 F.3d

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[3] Such documents include self-prepared and unsworn summaries and tables outlining the discrimination Feng believes she endured under Komenda's supervision. *See, e.g.*, Feng Appendix III at 21-28; Feng Appendix IV at 1-2; Feng Appendix I at 8-15. Such documents are insufficient to defeat summary judgment because they are unsworn and self-serving. The tables and summaries are largely Feng's own impressions on whether Komenda correctly criticized Feng's work product and work performance and do not touch on whether such criticisms served to mask a discriminatory animus.

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1179, 1187 (8th Cir. 2016) (quoting *Fiero v. CGS Sys., Inc.*, 759 F.3d 874, 880 (8th Cir. 2014)). "Further, retaliation must be the 'but for' cause of the adverse employment action." *Jackman v. Fifth Judicial Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 804 (8th Cir. 2013); *see also Blomker v. Jewell*, 831 F.3d 1051, 1059 (8th Cir. 2016) (noting that "[i]t is not enough that retaliation was a 'substantial' or 'motivating' factor in the employer's decision" to take an adverse employment action against an employee (quoting *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 90-91 (2d Cir. 2015))). Rockwell does not dispute that Feng engaged in protected activity in lodging complaints with the Ombudsman on May 30, 2013 and August 28, 2013. *See* Brief in Support of the Motion at 17. However, Rockwell does dispute that Feng suffered an adverse employment action and maintains that she cannot demonstrate a causal connection between the protected activity and her termination. *See id.*

1. **Prima facie** ***case***

Rockwell argues that Feng cannot establish a *prima facie* case of retaliation because instituting the PRP was not an adverse employment action. *Id.* at 18. Rockwell also argues that Feng cannot prove a causal connection between the PRP or termination and Feng's complaints to the Ombudsman. *Id.* at 18-19. Feng argues that being placed on the PRP ten days after complaining to Komenda during the Fiscal Year 2013 mid-year review constitutes retaliation. *See* Resistance at 7. She further generally argues that being placed on the PRP is an adverse employment action and is causally connected to her protected activity when it is based on falsified performance reviews. *See id.* at 13-14. Feng also suggests that the temporal proximity of her termination to her complaints raises the inference that it is retaliatory. *Id.* at 14.

a. Protected activity

Rockwell does not dispute that Feng's complaint to the Ombudsman was protected activity. However, because Feng argues that she was retaliated against for complaining

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to Komenda during her Fiscal Year 2013 mid-year review, the court must determine whether this constitutes protected activity. If making an informal complaint to her supervisor about unfair treatment does not constitute protected activity, then Feng's retaliation claim based on such activity must fail. Feng argues that her complaints at the Fiscal Year 2013 mid-year review were the but for cause of Komenda's placement of Feng on the PRP. *Id.* ("[M]y first complaint caused Komenda [to] change[] (no plan for PRP before my complaint, started to work on the PRP discipline right after my complaint) . . . .). At the Fiscal Year 2013 mid-year review, Feng confronted Komenda about her perception that she was being blamed for her coworkers' mistakes, expressed that she believed she was being treated unfairly and disagreed with Komenda's evaluation of her. *Id.* at 11.

Courts in the Eighth Circuit "apply the retaliation provisions of [42 U.S.C.] § 2000e-3(a) broadly to cover opposition to employment actions that are not unlawful, as long as the employee acted with a good faith, objectively reasonable belief that the practices were unlawful." *Blomker*, 831 F.3d at 1059. Therefore, Title VII protects the rights of individuals to file charges of discrimination. *See Fiero*, 759 F.3d at 880 ("Title VII prohibits employers from retaliating against employees who file charges of discrimination . . . ." (quoting *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 818 (8th Cir. 1998))). In the Eighth Circuit, filing an internal complaint with the company qualifies as protected conduct. *See Pye*, 641 F.3d at 1020 (noting that the "filing of [an] internal discrimination complaint qualifies as protected conduct" (citing *Helton v. Southland Racing Corp.*, 600 F.3d 954, 961 (8th Cir. 2010))).

However, "[f]or a report of discrimination to be statutorily protected activity under Title VII, it must include a complaint of [race or] national-origin discrimination or sufficient facts to raise that inference." *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 978 (8th Cir. 2012). Complaints to the employer, unrelated to a protected trait, are not

actionable under Title VII. *See id.*; *see also Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997, 1007 (7th Cir. 2000) (noting that an employee who complained that she was being paid less than coworkers with a shorter tenure but did not mention her pregnancy did not engage in Title VII protected activity); *Francis v. Perez*, 970 F. Supp. 2d 48, 68 n.10 (D.D.C. 2013) (finding that a Seventh Day Adventist employee's verbal complaint to a superior that she had suffered "unwelcome, offensive, and unprofessional" behavior at the hands of her supervisor and memorandum in response to being placed on a performance improvement plan did not constitute protected activity because she failed to mention religious discrimination), *aff'd*, No. 13-5333, 2014 WL 3013727 (D.C. Cir. May 16, 2014); *Hemphill v. United Parcel Serv., Inc.*, 975 F. Supp.2d 548, 562 (D.S.C. 2013) (finding that an employee's email to her supervisor that "she was 'being treated unfairly,' had been 'spoken to in a very unprofessional, disrespectful, and degrading manner'" was not protected activity because such allegations did not make any reference to discriminatory treatment based on race or sex); *cf. Shaw v. Oklahoma* ex rel. *Oklahoma Dep't of Mental Health & Substance Abuse*, 485 Fed. App'x 971, 975-76 (10th Cir. 2012) (finding, in a case arising under 42 U.S.C. § 1981, that an East Indian physician did not engage in protected activity, despite complaining that he was subject to verbal abuse, where he did not allege that such abuse was racially discriminatory). Furthermore, at least one court has found that an employee may not base a Title VII claim on informal oral complaints where the employer maintained a formal process to communicate claims of discrimination, and the employee failed to utilize that process. *See Dillard v. Chicago Transit Auth.*, 105 Fed. App'x 107, 111 (7th Cir. 2004) (citing *Durkin v. City of Chicago*, 341 F.3d 606, 615 (7th Cir. 2003)).

Rockwell has provided no evidence that Feng did not have at least a good faith reasonable belief that she was being treated unfairly in the Fiscal Year 2013 mid-year review. Therefore, there exists at least a question of fact as to whether she held such a

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belief. However, the record conclusively demonstrates that Feng may not base a retaliation claim on the Fiscal Year 2013 mid-year review because she has not provided evidence connecting her complained-of treatment to a protected classification—namely, her race or national origin. The only statements suggesting that Feng confronted Komenda regarding disparate treatment based on race appear as unsworn statements in Feng's brief. Feng states:

> Later I asked "why only me, why not Chad (my white coworker involved in the team failure) . . .", "why not so many other people (my white coworker involved in the team communications deficiency), but only me . . . ?" I repeated that "this is not true that . . . .", "this is not fair to me that only me . . . but not the others (my white coworkers)", "I don't agree . . .".

Resistance at 11-12 (alterations in original). It is unclear to the court whether the statements in the parentheses in the above-quoted statements were communicated to Komenda, but it appears that they are merely editorial and for the court's benefit. The objective evidence in the record concerning the Fiscal Year 2013 mid-year review makes no mention of race or national origin-based discrimination. The May 8, 2013 email that Feng sent Komenda to follow up with the mid-year review made no mention of discrimination, but merely recognized some of the performance-based issues that Komenda identified in the mid-year review. *Compare* Rockwell Appendix at 118-21 (Fiscal Year 2013 mid-year review), *with* Feng Appendix III at 18-19 (email from Feng to Komenda regarding the mid-year review). Based on the record, there exists no genuine dispute regarding whether Feng complained to Komenda regarding discrimination based on a protected trait. Furthermore, even if Feng did make the statements to Komenda regarding her white coworkers, because she did not utilize the Ombudsman to do so regarding the Fiscal Year 2013 mid-year review until after the PRP was instated, she may not base a retaliation claim on it. *See Dillard*, 105 Fed. App'x at 111.

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b. Adverse employment action

Rockwell argues that placing Feng on the PRP does not constitute an adverse employment action. *See* Brief in Support of the Motion at 18. Rockwell further argues that required performance meetings do not constitute adverse employment actions. *Id.* Feng attempts to distinguish the authority cited by Rockwell by stating that, in those cases, the performance improvement plans in question were based on "the true performance" of the individual, rather than on falsified statements leading to the imposition of the PRP. *See* Resistance at 13.

"An adverse employment action is defined as a tangible change in working conditions that produces a material employment disadvantage, including but not limited to, termination, cuts in pay or benefits, and changes that affect an employee's future career prospects, as well as circumstances amounting to a constructive discharge." *Jones*, 825 F.3d at 480 (quoting *Jackman*, 728 F.3d at 804-05). "In the retaliation context, a materially adverse action is one that 'might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Jackman*, 728 F.3d at 804-05 (quoting *Recio v. Creighton Univ.*, 521 F.3d 934, 940 (8th Cir. 2008)). "While '[t]o be 'adverse' the action need not always involve termination or even a decrease in benefits or pay . . . not everything that makes an employee unhappy is an actionable adverse action." *Kelleher v. Wal-Mart Stores, Inc.*, 817 F.3d 624, 632 (8th Cir. 2016) (alterations in original) (quoting *Sellers v. Deere & Co.*, 791 F.3d 938, 941 (8th Cir. 2015)). "[M]inor changes in duties or working conditions, even unpalatable or unwelcome ones, which cause no materially significant disadvantage, do not rise to the level of an adverse employment action." *Id.* (quoting *Jackman*, 728 F.3d at 804); *see also Brown v. Am. Golf Corp.*, 99 Fed. App'x 341, 343 (2d Cir. 2004) ("To be 'materially adverse' a change in working conditions must be 'more disruptive than a mere inconvenience or an alteration of job

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responsibilities.'" (quoting *Galabya v. N.Y. City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000))).

Placing an employee on a performance improvement plan, like the PRP, does not alone constitute an adverse employment action. *See Fiero*, 759 F.3d at 880 n.2 ("[Plaintiff's] placement on the [performance improvement plan] alone does not constitute an adverse employment action and cannot support her claim of retaliation."); *see also Brown*, 99 Fed. App'x at 343 (holding that being placed on a performance improvement plan which required a plaintiff to "attend several seminars, read certain materials, implement ways to reward his [coworkers], review and follow a business plan, conduct weekly staff meetings and implement certain planning and scheduling mechanisms" did not constitute an adverse employment action because it was not a material change in the terms and conditions of his employment). Implementation of such a plan only becomes potentially actionable if it is later used to alter, in detrimental ways, the terms or conditions of a plaintiff's employment. *See Givens v. Cingular Wireless*, 396 F.3d 998, 998-99 (8th Cir. 2005) (per curiam) (citing *Henthorn v. Capitol Commc'ns, Inc.*, 359 F.3d 1021, 1028 (8th Cir. 2004)). Finally, "required performance meetings have not been seen as adverse employment actions." *Robinson v. Am. Red Cross*, 753 F.3d 749, 756 (8th Cir. 2014).

Here, while Feng mistakenly confuses the adverseness of an employment action with the causal connection requirement, the court nevertheless finds that there exists at least a genuine issue of fact regarding whether the PRP was an adverse employment action. While it is true that the PRP alone may not constitute an adverse employment action, it is undisputed that the institution of the PRP was the first link in a chain of events that ultimately ended in Feng's termination. *See* Rockwell Appendix at 98-101 (portions of Oetken's termination recommendation outlining how Feng had failed to satisfy Komenda's expectations during the PRP period and recommending Feng's termination). Had Feng been placed on the PRP and then taken off, without being terminated or suffering some

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other material change in the terms and conditions of her employment with Rockwell, summary judgment may be appropriate. However, because Feng was ultimately terminated based, in large part, on the PRP, there exists at least a genuine issue of material fact as to whether she suffered an adverse employment action. Summary judgment on these grounds is not appropriate.

c. Causal connection

Rockwell argues that, even if the PRP is considered an adverse employment action, it cannot be causally connected to any protected activity because the PRP was instituted prior to the first instance of protected activity. *See* Brief in Support of the Motion at 18. Rockwell further argues that Feng cannot tie her termination to any protected activity because Feng's dismissal was temporally removed from the protected activity in question and, even assuming Feng's complaint and termination were sufficiently close in time, more than mere temporal proximity is required to demonstrate causation. *Id.* at 18-19. Feng argues that the PRP was instituted as a direct result of her complaints at the Fiscal Year 2013 mid-year review. *See* Resistance at 12. Feng also argues that her termination was causally connected to her filing of complaints with the Ombudsman because of the temporal proximity of the complaints and her termination. *Id.* at 14. She argues that the time during which she was on leave should not count toward determining temporal proximity between her protected activity and her termination. *Id.*

Initially, the court notes that, because it found Feng's complaints to Komenda during the Fiscal Year 2013 mid-year review not to be protected activity, Feng's argument that there exists a causal connection between the two is inapposite and cannot support her retaliation claim.[4] "The timing of an adverse employment action in connection with the protected activity 'can sometimes establish causation for purpose of establishing a *prima*

[4] However, even if the court were to consider it, it would conclude that Feng fails to raise a genuine dispute of fact regarding pretext. *See* Part IV.B.2 *infra*.

facie case.'" *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 915 (8th Cir. 2006) (quoting *Sherman v. Runyon*, 235 F.3d 406, 410 (8th Cir. 2000)). Feng has not provided any authority that an employee's time on leave from the company should be excluded from the court's consideration of temporal proximity and the court is aware of none. In the instant action, even accepting Feng's novel argument, approximately fifteen "working" weeks elapsed between her first complaint to the Ombudsman and her termination[5] and approximately eight "working" weeks elapsed between her second complaint to the Ombudsman and her termination.[6] These time periods skirt the boundary at which temporal proximity alone can even satisfy the causation element of Feng's *prima facie* case. *See Tyler v. Univ. of Ark. Bd. Of Trs.*, 628 F.3d 980, 986 (8th Cir. 2011) ("As more time passes between the protected conduct and the retaliatory act, the inference of retaliation becomes weaker and requires stronger alternate evidence of causation."); *see also, e.g.*, *Muor v. U.S. Bank Nat'l Ass'n*, 716 F.3d 1072, 1079 (8th Cir. 2013) (noting that an eight-month gap between the protected activity and the adverse action was insufficient); *Pettus v. Harvey*, 494 Fed. App'x 698, 699 (8th Cir. 2012) (unpublished table opinion) (noting that an "almost three-month interval" between the protected activity and termination was insufficient to raise the inference of retaliation); *Fercello v. Cty. of Ramsey*, 612 F.3d 1069, 1081-82 (8th Cir. 2010) (noting that a nearly four-month interval between the protected activity and the adverse action was insufficient).

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[5] The first complaint was filed on May 30, 2013, while Feng was on leave. The relevant time periods during which she was working after the filing of the first complaint are from July 8, 2013 through September 5, 2013 and March 8, 2014 through her termination on April 24, 2014.

[6] The second complaint was filed on August 28, 2013, when Feng was working. The relevant time periods during which she was working after the filing of the second complaint are from the filing of the complaint on August 28, 2013 through September 5, 2013 and March 8, 2014 through her termination on April 24, 2014.

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The instant action is somewhat similar to *Thompson v. Bi-State Dev. Agency*, 463 F.3d 821 (8th Cir. 2006). In *Thompson*, the plaintiff was a bus driver who suffered a second preventable accident in a twelve-month period, which generally carried a penalty of suspension without pay for one to five working days and retraining for one to three days. *Thompson*, 463 F.3d at 823. Following his second accident, the plaintiff went on sick leave for approximately six months. *Id.* Upon his return, his employer placed him on a five-day suspension and ordered three days of retraining. *Id.* at 824. The plaintiff filed suit for, among other things, retaliation—claiming that the suspension and retraining resulted from his filing of a discrimination suit approximately four months earlier, while he was on leave. The Eighth Circuit held that the four-month gap between the two events was insufficient to demonstrate retaliation. *Id.* at 826. The Eighth Circuit noted that there was no evidence in the record to suggest that the plaintiff's employer "would not have imposed discipline on [the plaintiff] immediately after the accident had [the plaintiff] continued working at that time." *Id.* The Eighth Circuit further noted that "it is difficult to believe [the employer] went through the trouble of reinstating [the plaintiff] just so it could retaliate against him." *Id.*

Here, as in *Thompson*, Feng was placed on the PRP and almost immediately went on leave. When she returned from leave, she worked under the PRP until going on leave again. When she returned from leave a second time, she worked under the PRP until her termination. Also, as in *Thompson*, there is no evidence in the record to suggest that Rockwell would not have required Feng to serve the entire term of the PRP. Nor is there evidence that it would not have terminated her for poor performance at the end of the PRP term even had she not taken leave or instituted the Ombudsman complaints. The court further notes that it makes little logical sense for Rockwell to reinstate Feng from leave not once, but twice, after her complaints to the Ombudsman if it were simply going to terminate her for doing so. Because the temporal proximity between the protected activity

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and Feng's termination is at the outer bounds of what may be thought to raise the inference of causation, and, in light of the reasoning in *Thompson*, the court finds that Feng cannot establish a *prima facie* case of retaliation.

2. Pretext

Feng's claim also fails because she cannot demonstrate that Rockwell's legitimate, non-discriminatory reason for her placement on the PRP and her termination—her poor work performance—was pretext for retaliation. *See* Brief in Support of the Motion at 19-20. "[Temporal] proximity alone is insufficient to establish pretext." *Gibson v. Geithner*, 776 F.3d 536, 541 (8th Cir. 2015). "Rather, [courts] evaluate 'the timing of the discharge . . . in light of other evidence, or lack of other evidence, in the record.'" *Id.* (second alteration in original) (quoting *Sherman*, 235 F.3d at 410). "An inference of a causal connection between a charge of discrimination and termination can be drawn from the timing of the two events, but in general more than a temporal connection is required to present a genuine factual issue on retaliation." *Green*, 459 F.3d at 915. Accordingly, even assuming that Feng has established a *prima facie* case of retaliation, she fails to demonstrate the existence of a genuine dispute regarding pretext.

In order to succeed on her claim, Feng "must both discredit [Rockwell's] asserted reasons for [her] termination and show that the circumstances permit drawing a reasonable inference that the real reason for [her] termination was retaliation." *Hutton*, 812 F.3d at 684. This she cannot do. Feng has advanced no evidence, save her own self-serving and unsworn statements and documents, from which the court could draw an inference that her termination was related to her complaints to the Ombudsman besides the temporal proximity of the events. The evidence in the record supports Rockwell's proffered reason for Feng's termination. *See, e.g.*, Rockwell Statement of Facts ¶ 38. For the same reasons that Feng fails to demonstrate an issue of fact regarding pretext in her discrimination claim, none of the arguments she makes in support of her retaliation claim

can draw a fair inference of causation between her protected activities and her termination. In short, even if the evidence presented by Feng was sufficient to establish a *prima facie* case of retaliation under the causation element of her claim, *see Green*, 459 F.3d at 915, she has not produced any additional evidence to support pretext other than temporal proximity, *see Gibson*, 776 F.3d at 542. Accordingly, the court shall grant the Motion.

C. Count IV

The court is unclear as to the exact legal basis of Count IV of the Complaint. *See* Complaint ¶ 25. The court is unaware of any independent cause of action under Title VII for "supporting discrimination and retaliation" other than the garden-variety discrimination and retaliation claims already addressed by the court. Feng provides no further legal support for such a claim. To the extent that the claims contained in Count IV of the Complaint are state law claims, the court finds that they are preempted by the ICRA and thus not cognizable in the instant action for the reasons stated in the court's April 14, 2016 Order. *See* April 14, 2016 Order at 6-8, 10-12 (citing *Toppert v. N.W. Mech., Inc.*, 968 F. Supp. 2d 1001, 1006 (S.D. Iowa 2013); *Smidt v. Porter*, 695 N.W.2d 9, 17 (Iowa 2005)). Summary judgment is appropriate on these grounds.

VII. CONCLUSION

In light of the foregoing, the Motion to Strike (docket no. 19) is **GRANTED** and the Motion (docket no. 15) is **GRANTED**. The Clerk of Court is **DIRECTED** to enter judgment in accordance with the above findings. The trial date is vacated.

IT IS SO ORDERED.

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DATED this 10th day of January, 2017.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

JINGYUAN FENG, Plaintiff, vs. ROCKWELL COLLINS, INC., Defendant.	CASE NO. 15-CV-139-LRR **JUDGMENT**

DECISION BY COURT: This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: Judgment is entered in accordance with the attached Order.

DATED: This 10th day of January, 2017.

Approved as to form:

Linda R. Reade, Chief Judge
United States District Court
Northern District of Iowa

Robert L. Phelps, Clerk of Court
United States District Court
Northern District of Iowa

(By) Karen S Yorgensen, Deputy Clerk

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

JINGYUAN FENG, Plaintiff, vs. SHEENA KOMENDA and ROCKWELL COLLINS, INC., Defendants.	No. 15-CV-139-LRR **ORDER**

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I. INTRODUCTION

The matter before the court is Defendant Sheena Komenda's "Motion to Dismiss" ("Motion") (docket no. 4).

II. RELEVANT PROCEDURAL BACKGROUND

On November 12, 2015, Plaintiff Jingyuan Feng filed a pro se Petition (docket no. 2) in the Iowa District Court for Linn County. In the Petition, Feng asserts the following five claims against Komenda and Rockwell Collins, Inc. ("Rockwell") (collectively,

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"Defendants"): Count I asserts that Defendants committed fraud by falsifying certain statements made in Feng's performance reviews; Count II asserts that Komenda discriminated against Feng based on her race, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-2, and the Iowa Civil Rights Act ("ICRA"), Iowa Code § 216.6; Count III asserts that Komenda retaliated against Feng after Feng complained that she felt she was being treated unfairly in the form of negative performance reviews; Count IV asserts that Rockwell "factually supported" Komenda's retaliation "by knowingly and intentionally using . . . false statements"; and Count V asserts that Defendants wrongfully terminated Feng. Feng requests compensatory damages.

On December 14, 2015, Komenda filed the Motion. On the same date, Rockwell filed an Answer (docket no. 5) in which it generally denies liability and sets forth affirmative defenses. On April 4, 2016, Feng filed an untimely Resistance (docket no. 11). Komenda requests oral argument on the Motion, but the court finds that oral argument is unnecessary. The Motion is fully submitted and ready for decision.

III. FACTUAL BACKGROUND[1]

Viewed in the light most favorable to Feng, the facts are as follows: Feng is an Asian foreign national living in Cedar Rapids, Iowa. Rockwell employed Feng from on or about June 2008 until she was terminated on April 21, 2014. From 2008 to 2012, Feng received generally positive performance reviews from her two supervisors. Beginning in September 2012, Komenda became Feng's third supervisor. On April 30, 2013, Komenda gave Feng a performance rating of "minimally meeting expectations" and criticized Feng's

[1] The court draws its factual background from the Petition and "some materials that are part of the public record." *Blakely v. Schlumberger Tech. Corp.*, 648 F.3d 921, 931 (8th Cir. 2011) (quoting *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)). This includes Equal Employment Opportunity Commission ("EEOC") charges and filings, as well as filings made with the Iowa Civil Rights Commission ("ICRC"). *See id.* ("We have previously held that an EEOC charge is a part of the public record and may be considered on a motion to dismiss.").

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work performance. Feng disagreed with Komenda's evaluation and voiced her opposition to the performance rating. After a friend told Feng that she would be fired for "talk[ing] back" to Komenda, Feng sent an email to Komenda "to clarify some cases [they] discussed during the meeting, and [Feng] expressed [her] intention and action plans to follow [Komenda's] lead in the future." Petition ¶ 9.

On May 10, 2013, Komenda and a human resources representative asked Feng to sign a sixty-day "Performance Recovery Plan" ("PRP"), stating that she was not meeting performance expectations. The PRP stated that a possible outcome was termination. Feng requested the company's discipline policy, which she received. According to the discipline policy, a PRP is "mandatory" when the employee receives a work performance rating of "not meeting performance expectations." *Id.* ¶¶ 11-12. Feng states that Komenda changed her April 30, 2013 rating of "minimally meeting expectations" to "not meeting performance expectations" some time between April 30, 2013 and May 10, 2013. This alleged downgrade in performance rating occurred within ten days of Feng opposing Komenda's evaluation.

As a result, Feng requested that Komenda and Rockwell's human resources department "correct the false statement in the . . . PRP." *Id.* ¶ 14. They declined to do so. Feng refused to sign the PRP and refused to participate in the PRP discipline process. Feng subsequently contacted Rockwell's Ombudsman to complain of Komenda's actions. Feng stated that she believed they were motivated by race-based discrimination. From August 2, 2013 to September 4, 2013, Feng worked under the PRP. She maintains that Komenda "manipulated the performance statements in an obviously discriminatory and retaliatory manner." *Id.* ¶ 17. For example, Feng states that her performance during this time exceeded Komenda's "own predefined 'measurement criteria'" but that Komenda still rated Feng's performance as unsatisfactory. *Id.* On September 27, 2013, Feng complained to the Ombudsman again.

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From September 10, 2013 to March 17, 2014, Feng was on a leave of absence and was not working. Upon her return to work in March 2014, she again worked under the PRP. During this period, Komenda assigned Feng tasks above her job grade. Again, Feng states that her performance exceeded Komenda's measurement criteria, but again Komenda rated her performance as "unsatisfactory" because it was not completed in a timely manner. On April 24, 2014, Rockwell terminated Feng, citing the PRP.

On May 13, 2014, Feng filed a charge of discrimination with the ICRC and the Cedar Rapids Civil Rights Commission alleging race based discrimination and retaliation under ICRA. *See* Brief in Support of the Motion (docket no. 4-1) at 17-19. The charge names "Rockwell Collins, Inc." as the discriminating party. *Id.* On May 16, 2014, Feng filed a charge of discrimination with the EEOC under Title VII alleging discrimination based on her race and national origin. *Id.* at 20-21. On April 16, 2015, the ICRC sent Feng a notice that her case was being administratively closed and that further investigation was not warranted. *Id.* at 22-33. The ICRC concluded that there was no reasonable possibility that further investigation would result in probable cause regarding Feng's discrimination or retaliation claims. *Id.* at 30, 32. The letter accompanying the notice from the ICRC stated that Feng had several "legal options" and provided instructions for requesting a right to sue letter. *Id.* at 22. On August 18, 2015, the EEOC sent Feng a notice of dismissal and apprised her of her right to sue. *Id.* at 34-35.

IV. ANALYSIS

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint on the basis of "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).[2] The question for a court considering a Rule 12(b)(6) motion is not whether

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[2] Komenda also attacks the court's subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). It appears that such an attack is based upon an argument that Feng failed to exhaust her administrative remedies. *See, e.g.*, Brief in Support of the (continued...)

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the plaintiff will ultimately prevail, but rather "whether his complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 562 U.S. 521, 529-30 (2011) (citation omitted). In order to cross the federal court's threshold, the complaint need not be "a model of the careful drafter's art," nor need it "pin plaintiff's claim for relief to a precise legal theory." *Id.* at 530. This is especially true when the plaintiff is appearing pro se, which requires the court to liberally construe the pleadings. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)); *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 849 (8th Cir. 2014) (citing *Estelle*, 429 U.S. at 106). To be sufficient, a complaint must simply state a "plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." *Skinner*, 562 U.S. at 530 (citing 5 Charles Alan Wright & Arthur A. Miller, Federal Practice & Procedure § 1219 (3d ed. 2004 & Supp. 2010)).

In order for the statement of the plaintiff's claim to survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim satisfies the plausibility standard "when the plaintiff pleads factual content that allows the court to draw the

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[2](...continued)
Motion at 7 (citing a case dismissing a Title VII action pursuant to Rule 12(b)(1) for failure to exhaust administrative remedies). However, Rule 12(b)(1) is not the proper avenue to attack the Petition. Instead, a Rule 12(b)(6) motion appears to be proper. *See, e.g.*, *Greenwood v. Ross*, 778 F.2d 448, 450-51 (8th Cir. 1985) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1983)) (suggesting that the failure to exhaust administrative remedies is not a jurisdictional prerequisite under Title VII); *see also Robinson v. Dalton*, 107 F.3d 1018, 1021 (3d Cir. 1997) ("[T]his court has previously determined that questions of whether a plaintiff has timely exhausted the administrative remedies in Title VII actions 'are in the nature of statutes of limitation. They do not affect the district court's subject matter jurisdiction.'" (citations omitted)). Accordingly, the court shall proceed to analyze the Motion under the Rule 12(b)(6) standard.

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reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). Although a plaintiff need not provide "detailed" facts in support of his or her allegations, the "short and plain statement" requirement of Federal Rule of Civil Procedure 8(a)(2) "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 677-78 (quoting *Twombly*, 550 U.S. at 555) (internal quotation marks omitted); *see also Erickson v. Pardus*, 551 U.S. 89, 93 (2007) ("Specific facts are not necessary [under Rule 8(a)(2)]."). It is insufficient to "plead[] facts that are 'merely consistent with' a defendant's liability." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

"Where the allegations show on the face of the complaint [that] there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate." *Benton v. Merrill Lynch & Co.*, 524 F.3d 866, 870 (8th Cir. 2008) (citing *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 (8th Cir. 1997)). Although the court must accept as true all factual allegations contained in the Complaint, the court need not accept legal conclusions disguised as facts. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

A. Failure to Exhaust Administrative Remedies Under ICRA

Komenda argues that the court should dismiss the Petition because "Feng has not been issued a 'right to sue' release from the Iowa Civil Right Commission" and, therefore, "she cannot pursue her claims under the Iowa Civil Rights Act in any court." Brief in Support of the Motion at 3. ICRA provides two avenues into court. First, a complainant may file an action in district court if he or she has "timely filed the complaint with the [ICRC] as provided" by statute and "[t]he complaint has been on file with the commission

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for at least sixty days and the commission has issued a release to the complainant . . . ." Iowa Code § 216.16(2). Otherwise, if the ICRC retains the complaint, conducts an investigation and renders a final decision, the complainant may seek judicial review of that decision. *Id.* § 216.17.

Therefore, in order to establish that she has exhausted her administrative remedies, Feng must demonstrate that she has obtained a release in the form of a right to sue letter from the ICRC. *See* Iowa Admin. Code § 161-3.10(1) ("After the expiration of [sixty] days from the timely filing of a complaint with the commission, the complainant may request a letter granting the complainant the right to sue for relief in the state district court."); *see also Toppert v. N.W. Mech., Inc.*, 968 F. Supp. 2d 1001, 1006 (S.D. Iowa 2013) (stating that "before initiating a lawsuit, a plaintiff must request a right to sue letter from the ICRC"). "A right to sue letter follows from an administrative release. It signals that the administrative stage of the case is over and the plaintiff has permission to file suit in the district court." *Toppert*, 968 F. Supp. 2d at 1005 n.2; *cf. Faibisch v. Univ. of Minn.*, 304 F.3d 797, 803 (8th Cir. 2002) ("Administrative remedies are exhausted by the timely filing of a charge and the receipt of a right-to-sue letter.").

Here, Feng has not obtained a right to sue letter from the ICRC. The only documentation the court has before it concerning her ICRA claims is the notice of administrative closure from the ICRC. *See* Brief in Support of the Motion at 22. Under ICRA, there is a distinction between an administrative closure and the right to sue. In fact, the Iowa Administrative Code states that one of the potential reasons that the ICRC might refuse to issue a right to sue letter is because "[t]he complaint has been administratively closed and two years have elapsed since the issuance date of the administrative closure." Iowa Admin. Code § 161-3.10(4); *see also* Iowa Code § 216.16(3)(a)(4) (stating that the ICRC will not issue a release to sue if the complaint is administratively closed for more than two years). Additionally, the letter Feng received from the ICRC contains

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instructions regarding how to request a right to sue letter and commence a lawsuit. *See* Brief in Support of the Motion at 22. In the absence of a right to sue letter authorizing Feng to proceed in district court, the court cannot find that Feng has exhausted her administrative remedies regarding her state law claims under ICRA.[3] Accordingly, the court shall grant the Motion with regard to Feng's claims under ICRA and shall grant it with respect to both Komenda and Rockwell.[4]

B. The Title VII Claims

Komenda argues that dismissal of Feng's Title VII claims against her is appropriate because Feng failed to name Komenda in her complaint to the ICRC and EEOC. *See* Brief in Support of the Motion at 6-7. Because Feng failed to do so, Komenda argues that Feng failed to exhaust administrative remedies against her and that Feng's Title VII claims should be dismissed. *Id.* Alternatively, Komenda argues that "supervisors are not individually liable under Title VII," and, therefore, Feng's Title VII claims against her should be dismissed. *Id.* at 13.

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[3] The court notes that this does not foreclose Feng from relief on her ICRA claims. The statute states that Feng may request a right to sue letter from the ICRC before the two year limitation expires and, if she receives one, she may proceed accordingly.

[4] Though Rockwell has not moved for dismissal on these grounds, because the controlling issues regarding Feng's ICRA claims are identical for both Komenda and Rockwell, such issues have been briefed and Feng was given the opportunity to respond to them, the court finds that dismissal against all Defendants is appropriate. *See Chrysler Credit Corp. v. Cathey*, 977 F.2d 447, 449 (8th Cir. 1992); *see also Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 742-43 (9th Cir. 2008) ("A [d]istrict [c]ourt may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants." (quoting *Silverton v. Dep't of Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981) (alterations in original)); *Transclean Corp. v. Jiffy Lube Int'l, Inc.*, 474 F.3d 1298, 1308 (Fed. Cir. 2007); *Columbia Steel Fabricators, Inc. v. Ahlstrom Recovery*, 44 F.3d 800, 802-03 (9th Cir. 1995).

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Feng argues that "Komenda is not only an employee, but . . . is also the decision maker involved in the discipline and termination" of employees under her supervision. Resistance at 7. Feng argues that it was Komenda who made the allegedly false statements precipitating the PRP and Feng's eventual termination. *Id.* Feng also argues that Komenda had adequate notice of the discrimination charges filed with the ICRC and EEOC because "'Komenda' was mentioned 253 times in the file." *Id.*

Generally, a complainant must name a party in EEOC filings prior to suit under Title VII. *See Sedlacek v. Hach*, 752 F.2d 333, 336 (8th Cir. 1985). Exceptions to the general rule have been recognized where there is a "substantial identity" between the named and unnamed parties, *see id.*, or, alternatively, where the unnamed party has adequate notice of the claim and an opportunity to participate in conciliation attempts. *See Winbush v. State of Iowa by Glenwood State Hosp.*, 66 F.3d 1471, 1478 n.9 (8th Cir. 1995) (finding that plaintiffs who filed EEOC complaints against a school alone could name individual school officials in their Title VII suit because there was a "sufficient identity of interest" between them (quoting *Greenwood*, 778 F.2d at 451) (internal quotation marks omitted)); *Greenwood*, 778 F.2d at 451.

Here, the court need not decide whether Komenda and Rockwell share a sufficient identity of interest or whether Komenda had adequate notice and opportunity to participate in conciliation such that Feng was not required to name Komenda in her EEOC claim. Dismissal of Feng's Title VII claims against Komenda is appropriate because Title VII "does not provide for an action against an individual supervisor . . . ." *Van Horn v. Best Buy Stores, L.P.*, 526 F.3d 1144, 1147 (8th Cir. 2008) (citing *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1111 (8th Cir. 1998)); *see also Asplund v. iPCS Wireless, Inc.*, 602 F. Supp. 2d 1005, 1010 (N.D. Iowa 2008) (noting that the text of Title VII applies only to "employers" and recognizing that individual supervisors may not be held liable under

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Title VII).[5] Therefore, taking all facts asserted in the Petition as true, Feng's Title VII claims against Komenda must fail as matter of law. Accordingly, the court shall grant the Motion with regard to the Title VII claims.

C. The Common Law Claims

Komenda argues that the court should dismiss Feng's wrongful termination and fraud claims because they are preempted by ICRA. *See* Brief in Support of the Motion at 8-9, 11-12. Alternatively, Komenda argues that Feng's wrongful termination claim should be dismissed because "Feng fails to identify any clearly defined and well-recognized public policy that protected any of her activity, other than her complaints of employment discrimination and retaliation that are preempted by" ICRA. *Id.* at 10. She also argues that Count I of the Petition is deficient pursuant to Federal Rule of Civil Procedure 9, which requires allegations of fraud to be pleaded with "particularity." *Id.* at 12.

The Iowa Supreme Court has recognized that "a claimant asserting a discriminatory practice must pursue the remedy provided by" ICRA because "[i]t is clear from a reading of [Iowa Code § 216.16] that the procedure under [ICRA] is exclusive." *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193, 197 (Iowa 1985). Therefore, courts refuse to recognize stand-alone common law claims predicated on discriminatory acts because such claims are preempted by ICRA. *Id.*; *see also Smidt v. Porter*, 695 N.W.2d 9, 17 (Iowa 2005) ("To the extent . . . ICRA provides a remedy for a particular discriminatory

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[5] The court notes that ICRA does provide a cause of action against individual supervisors. *See, e.g.*, *Van Horn*, 526 F.3d at 1147; *Vivian v. Madison*, 601 N.W.2d 872, 878 (Iowa 1999) ("[W]e hold that a supervisory employee is subject to individual liability for unfair employment practices under . . . the Iowa Civil Rights Act."); *Asplund*, 602 F. Supp. 2d at 1010 (recognizing the distinction between Title VII actions, which do not provide relief against an individual supervisor, and actions arising under ICRA, which do provide such relief). However, because the court has found that Feng has not exhausted her administrative remedies with regard to her ICRA claims, *see* Part IV.A, *supra*, it need not address whether Komenda is liable under ICRA for the alleged discrimination.

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practice, its procedure is exclusive and the claimant asserting that practice must pursue the remedy it affords."); *Mitchell v. Iowa Protection & Advocacy Servs., Inc.*, 325 F.3d 1011, 1015 (8th Cir. 2003) (recognizing that ICRA preempts common law claims based on discrimination). "Preemption occurs unless the claims are 'separate and independent, and therefore incidental, causes of action.'" *Smidt*, 695 N.W.2d at 17 (quoting *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 857 (Iowa 2001)). The court determines whether the claims are separate and independent by reference to the pleadings and must determine whether "discrimination is made an element of" the common law claim. *Channon*, 629 N.W.2d at 857 (quoting *Greenland v. Fairtron Corp.*, 500 N.W.2d 36, 38 (Iowa 1993)). In determining whether Feng's wrongful termination and fraud claims are preempted by ICRA, the court considers whether "the operative facts which she alleges give rise to her claims under . . . ICRA are the same as those upon which she relies as giving rise to her [common law] claim[s]." *Id.* at 858.

Here, it is clear that Feng's wrongful termination and fraud claims are predicated on her ICRA discrimination claims. The basis of her fraud claim is her allegation that Komenda changed her April 30, 2013 performance rating from "minimally meeting expectations" to "not meeting performance expectations" in order to support a discriminatory PRP. *See* Petition ¶ 22. She also alleges that Komenda's statement that Feng completed assignments late during the PRP period was fraudulent. *Id.* Both of these statements are implicated in her discrimination and retaliation claims under ICRA. The fraud claims require proof of the same facts as her ICRA claims. Therefore, the court finds that the fraud claims are preempted by the ICRA claims. Similarly, the basis for Feng's wrongful termination claim is the PRP, which Feng alleges "was framed up with false statement[s]." Petition ¶ 26. This is, in fact, the exact same basis for her discrimination and retaliation claims under ICRA. Therefore, the common law wrongful discharge claim is preempted by ICRA. Accordingly, the court shall grant the Motion with

regard to the common law claims of fraud and wrongful discharge and shall grant it with regard to both Komenda and Rockwell.[6] Because the court finds that dismissal is appropriate on preemption grounds, the court need not address Komenda's alternate grounds for dismissal.

V. CONCLUSION

In light of the foregoing, it is hereby **ORDERED**:

(1) The Motion (docket no. 4) is **GRANTED**;

(2) All counts against Defendant Komenda are **DISMISSED**. Therefore, Komenda is **DISMISSED** from the instant action;

(3) Counts I and V in their entirety and the ICRA claims in Counts II and III against Defendant Rockwell are **DISMISSED**; and

(4) The Title VII claims in Counts II and III, and the entirety of Count IV against Rockwell remain and shall proceed to trial.

IT IS SO ORDERED.

DATED this 14th day of April, 2016.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

[6] As with the court's treatment of the ICRA claims above, the court finds that dismissal of Feng's common law claims against Rockwell is appropriate as well. *See, e.g.*, *Cathey*, 977 F.2d at 449.

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Other Orders/Judgments

1:15-cv-00139-LRR Feng v. Komenda et al - See Order at [12] for Dismissed Counts

U.S. District Court

Northern District of Iowa

Notice of Electronic Filing

The following transaction was entered on 4/14/2016 at 12:28 PM CDT and filed on 4/14/2016
Case Name: Feng v. Komenda et al - See Order at [12] for Dismissed Counts
Case Number: 1:15-cv-00139-LRR
Filer:
Document Number: 13

Docket Text:
TRIAL Management Order: Witness and exhibit lists exchanged by parties (but not filed) at least 21 days before FPTC. Exhibits marked. Motions in limine 14 days before FPTC. Bench Trial set for 3/6/2017 09:00 AM in 111 7th Avenue SE Courtroom 1, 2nd Floor before Chief Judge Linda R Reade. Final Pretrial Conference set for 2/2/2017 04:00 PM in 111 7th Avenue SE Courtroom 1, 2nd Floor before Chief Judge Linda R Reade. Proposed Pretrial Order due by 1/28/2017. Signed by Chief Judge Linda R Reade on 4/14/2016 (copy w/NEF mailed to Plt). (skm)

1:15-cv-00139-LRR Notice has been electronically mailed to:

Kelly R Baier kbaier@bradleyriley.com, pkuennen@bradleyriley.com

Raymond Richard Rinkol, Jr rrinkol@bradleyriley.com, pkuennen@bradleyriley.com

1:15-cv-00139-LRR Notice has been delivered by other means to:

Jingyuan Feng
640 Colton Circle NE
Unit 9
Cedar Rapids, IA 52402

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1025896836 [Date=4/14/2016] [FileNumber=1669002-0
] [303bccc8b499608af451d91316d241978688ec63b86c6ec6b1b82dbe428ca7c848e
41e9299bacf991843b8c9af2b7ff56a6439768e33885fb977b2652d76c42d]]

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

JINGYUAN FENG, Plaintiff, vs. SHEENA KOMENDA and ROCKWELL COLLINS, INC., Defendant.	No. 15-CV-139-LRR **ORDER**

ORDER SETTING CIVIL BENCH TRIAL, FINAL PRETRIAL CONFERENCE, AND REQUIREMENTS FOR THE PROPOSED FINAL PRETRIAL ORDER

IT IS ORDERED:

I. ***TRIAL DATE***: This case has been placed on the calendar of United States District Court Chief Judge Linda R. Reade for a bench trial[1] scheduled to commence at the

[1] The court notes that Feng requested a jury trial in her Resistance to Komenda's Motion to Dismiss. *See* Resistance (docket no. 11) at 8. Federal Rule of Civil Procedure 38(d) provides that the right to a jury trial is waived unless a demand for the same is properly served and filed. Rule 38(b)(1) requires service of a jury demand "no later than 14 days after the last pleading directed to the issue is served." Fed. R. Civ. P. 38(b)(1). Here, the "last pleading directed to the issue" is Defendant Rockwell Collins, Inc.'s Answer (docket no. 4), which Rockwell Collins, Inc. filed on December 14, 2015. *See* Fed. R. Civ. P. 7(a) (listing the pleadings allowed and stating that, among other things, an "answer to a complaint" is a proper pleading); *see also McCarthy v. Bronson*, 906 F.2d 835, 940 (2d Cir. 1990) ("'[T]he last pleading directed to' an issue is not the pleading that raises the issue, it is the pleading that contests the issue. Normally, that pleading is an answer . . . ."). Feng did not serve her jury demand until April 2, 2016, well past the fourteen-day window provided in Rule 38. Feng's Resistance also contains a response to the Answer. However, this is not a proper pleading and does not serve to revive Feng's (continued...)

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United States Courthouse, Courtroom 1, 111 7th Avenue SE, Cedar Rapids, Iowa, at some time during the two-week period beginning on **March 6, 2017**. The exact dates and times of the trial will be determined closer in time to the trial date.

II. ***CONTINUANCE OF TRIAL OR FINAL PRETRIAL CONFERENCE DATES:*** Unless requested within **14 days** after the date of this order, no continuance of the trial date will be granted except upon written application and for exceptional cause.[2]

III. ***FINAL PRETRIAL CONFERENCE:*** A final pretrial conference ("FPTC") is scheduled before **Chief Judge Reade** on **Thursday, February 2, 2017** at 4:00 p.m. The FPTC will be held in person at the United States Courthouse, Courtroom 1, 111 7th Avenue SE, Cedar Rapids, Iowa.[3] At the FPTC, the parties should be prepared to argue all pretrial motions, evidentiary issues and procedural disputes.

IV. ***CONSENT TO MAGISTRATE JUDGE:*** If the parties intend to consent to the exercise of jurisdiction by a Magistrate Judge, they shall sign and file the consent form,

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[1](...continued)
ability to demand a jury. A reply to an answer is only proper if it is court-ordered. *See* Fed. R. Civ. P. 7(a)(7). Here, the court has not ordered such a reply, and thus it is improper. Additionally, Feng has offered no explanation for her failure to include a jury demand in the Petition (docket no. 2) or for this late demand. Therefore, Feng's jury demand was untimely and she has waived the right to a jury trial. *See Ind. Lumbermens Mut. Ins. Co. v. Timberland Pallet & Lumber Co.*, 195 F.3d 368, 374 (8th Cir. 1999) ("The right to a jury trial in a civil case is not absolute and can be waived if the request for a jury trial is not timely made."); *see also Ackra Direct Mktg. Corp. v. Fingerhut Corp.*, 86 F.3d 852, 856 (8th Cir. 1996) ("In general, pro se representation does not excuse a party from complying with . . . the Federal Rules of Civil Procedure." (formatting omitted)).

[2] Deadlines as specified herein apply to the original trial date or any subsequent trial date to which the trial is continued.

[3] The parties may seek special permission from the court to appear telephonically at the FPTC. The court will require that all parties appear in the same manner either telephonically or in person.

which will authorize a Magistrate Judge to dispose of the case. The consent form can be found on the court's website at *www.iand.uscourts.gov*. The consent must be filed by the dispositive motions deadline.[4] In exceptional cases, the parties may seek leave of court for permission to consent after that deadline, however, it is not likely that the court will agree to transfer jurisdiction to a Magistrate Judge after the dispositive motions deadline.

V. ***FINAL PRETRIAL ORDER:*** The parties are jointly responsible for the preparation of the proposed Final Pretrial Order. *See* LR 16.1.b. Before the FPTC, pro se parties and counsel for represented parties must prepare, agree upon and sign a proposed Final Pretrial Order prepared for Chief Judge Reade's signature in the format attached to this order. A copy of the proposed order must be received by Chief Judge Reade via e-mail at Danielle Cripe@iand.uscourts.gov **and** ecfmail@iand.uscourts.gov (but not filed) at least **5 calendar days** before the FPTC.[5]

VI. ***WITNESS AND EXHIBIT LISTS:*** Exhibit lists must be attached to, and witness lists must be included as part of, the proposed Final Pretrial Order, in accordance with the instructions in the attached form order. The parties are not required to list rebuttal witnesses or impeachment exhibits; however, the exhibits should be marked as described in the following section. Proposed witness and exhibit lists must be exchanged by the parties (but not filed) at least **21 calendar days** before the FPTC. At the time the parties exchange their exhibit lists, they also must give written notice to all adverse parties of any intent to use a declaration under Federal Rules of Evidence 803(6), 902(11) or

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[4] The dispositive motions deadline is set forth in the Scheduling Order and Discovery Plan.

[5] All documents e-mailed to Chief Judge Reade pursuant to this order should list the case name and number in the subject line. Opposing parties should be copied on each e-mail. In the event a pro se party does not have access to an email account, the pro se party shall deliver the proposed order to Chief Judge Reade's chambers via U.S. mail, facsimile or hand-delivery.

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902(12) to establish foundation for records of regularly conducted activities, and must immediately thereafter make the records and the declaration available for inspection. The parties have a continuing duty to keep the lists current and correct, with opposing parties and the court.

VII. ***EXHIBITS***: Exhibits must be prepared for trial in accordance with the following instructions:

A. Marking of Exhibits. All exhibits must be marked by the parties before trial, in accordance with Local Rule 83.6.a. The plaintiff(s) must use numbers and the defendant(s) must use letters. *See* LR 83.6.a.1. Exhibits also must be marked with the case number. *See* LR 83.6.a.2. All exhibits longer than one page must contain page numbers at the bottom of each page. *See* LR 83.6.a.3. Personal Data Identifiers must be redacted from all exhibits. *See* LR 10.h.

B. Elimination of Duplicates. The parties should compare the exhibits and eliminate duplicates. If more than one party wants to offer the same exhibit, then it should be marked with a number and listed as a joint exhibit on the plaintiff's exhibit list.

C. Listing of Exhibits and Objections. Exhibits must be listed separately, unless leave of court is granted for a group exhibit. If a party objects to parts of an exhibit but not to other parts, the offering party must prepare separate versions of the exhibit, one that includes the parts to which objections are being asserted and another that redacts those parts.

D. Copies for the Court. **Five calendar days** before trial, each party must supply Chief Judge Reade with a hard copy of all exhibits to be used at trial. The parties must place the hard copy in one or more three-ringed binders with a copy of the exhibit list at the front and with each exhibit tabbed. *See* LR 83.6.c. The parties may also supply Chief Judge Reade with a courtesy copy of the exhibits in

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PDF format on a compact disc. The court's copies of exhibits shall be separate from the original trial exhibits for the official records of the Clerk of Court. *See* LR 83.6.d.

E. Objected-to Exhibits. **Copies of all exhibits as to which there may be objections must be brought to the FPTC.** If the parties have been granted special permission to appear telephonically for the FPTC, they shall provide the court with copies of the objected-to exhibits prior to the FPTC. If an exhibit is not brought to the FPTC and an objection to the exhibit is asserted at the FPTC, the exhibit may be excluded from evidence for noncompliance with this order.

VIII. TRIAL BRIEFS: If the trial of a case will involve significant issues not adequately addressed by the parties in connection with dispositive motions or other pretrial motions, the parties must prepare trial briefs addressing such issues and electronically file their trial briefs at least **5 calendar days prior to the FPTC**.[6] *See also* LR 16.1.d.

IX. DEMONSTRATIVE AIDS: **At least 3 calendar days before trial**, a party using a demonstrative aid during trial must show the demonstrative aid to representatives of all other parties participating in the trial and to Chief Judge Reade. The term "demonstrative aid" includes charts, diagrams, models, samples and animations, but does not include exhibits admitted into evidence or outlines of opening statements or closing arguments.

X. PROTOCOL FOR WITNESSES: A party who may call a witness to testify at trial must, before the witness testifies, advise the witness of the accepted protocol for witnesses testifying in this court. This advice should include the following information:

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[6] In the case of pro se parties who do not have access to the court's CM/ECF electronic filing system, such parties shall file hard copies of documents with the Clerk of Court in each instance where this order mandates electronic filing.

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(A) the location of the witness box; (B) the proper route from the courtroom door to the witness box; (C) the fact that the witness will be placed under oath; (D) where the witness should stand while the oath is being administered; (E) that the witness should adjust the witness chair and the microphone so the microphone is close to and directly in front of the witness's mouth; (F) that the witness should speak only in response to a question; (G) that the witness should wait for a ruling on any objections before proceeding to answer a question; (H) that the witness should answer all questions verbally; and (I) that substances such as food, beverages and chewing gum should not be brought into the courtroom.

A party also must advise the witness of proper dress for the courtroom. Proper dress does not include blue jeans, shorts, overalls, t-shirts, collarless shirts, shirts with printed words or phrases on the front or back, tank tops or the like.

XI. RESTRICTIONS ON WITNESSES:

A. Exclusion of Witnesses. A witness who may testify at the trial or at an evidentiary hearing shall not be permitted to hear the testimony of any other witnesses before testifying, and is excluded from the courtroom during the trial or hearing until after the witness has completed his or her testimony, unless exclusion of the witness is not authorized by Federal Rule of Evidence 615 or unless the court orders otherwise. A witness who is excluded from the courtroom pursuant to this paragraph also is prohibited from reviewing a verbatim record of the testimony of other witnesses at the trial or hearing until after the witness has completed his or her testimony at the trial or evidentiary hearing, unless the court orders otherwise.

B. Restrictions on Communications with Witnesses. Unless the court orders otherwise, after the commencement of the trial or an evidentiary hearing and until the conclusion of the trial or hearing, a witness who may testify at the trial or hearing is prohibited from communicating with anyone about what has occurred in the courtroom during the trial or hearing. If the witness does testify at the trial or

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hearing, after the witness is tendered for cross-examination and until the conclusion of the witness's testimony, the witness is prohibited from communicating with anyone about the subject matter of the witness's testimony. A witness may, however, communicate with his or her attorney about matters of privilege, and may communicate with anyone if the right to do so is guaranteed by the United States Constitution.

C. Parties. The restrictions on witnesses in paragraphs (A) and (B) of this Part do not apply to the parties or a party representative.

D. Duties of Counsel. A party who may call a witness to testify at the trial or an evidentiary hearing must, before the trial or hearing, advise the witness of the restrictions in this section and the court's ruling on any motion in limine.

XII. TESTIMONY BY DEPOSITION: With respect to any witness who will appear by deposition, at least **21 calendar days** before trial, the party intending to offer the witness must serve on the opposing parties a written designation, by page and line number, of those portions of the deposition the offering party intends to have read into evidence. At least **14 calendar days** before trial, an opposing party must serve on the offering party any objections to the designated testimony and a counter-designation, by page and line number, of any additional portions of the deposition which the opposing party intends to have read into evidence. At least **7 calendar days** before trial, the party offering the witness must serve upon the opposing parties any objections to the designated testimony and a written designation, by page and line number, of any additional portions of the deposition the offering party intends to have read into evidence. At least **5 calendar days** before trial, the parties must consult, either personally or by telephone, and attempt to work out any objections to the proposed deposition testimony.

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Preferably at the FPTC, but, in any event, **not less than 48 hours before the deposition testimony is offered into evidence**, the offering party must provide the court with the following: (1) a full copy of the deposition transcript or recording; (2) a redacted exhibit containing only the lines of the transcript or parts of the video recording to be admitted into evidence; (3) a statement listing all unresolved objections to the deposition testimony; and (4) the parties' combined list of all of the portions of the deposition to be admitted into evidence (listing transcript sections by page and line number and video recordings by counter number).

The court will review any objections, listen to any arguments and make any necessary rulings. The court also will expect the parties to edit any video deposition accordingly.

The court does not require the court reporter to report the reading of deposition transcripts or the playing of video deposition testimony. The court considers a deposition transcript to be read as published in the written version. The parties should make a record as to any misreads of the transcript at the conclusion of the reading of the transcript.

All references in depositions to exhibit numbers or letters must be changed to correspond to the exhibit designation for trial.

Prior to the close of evidence, the party offering the deposition testimony must furnish the original deposition transcript to the court. The offering party must clearly highlight the portions of the transcript which were read into evidence. If a deposition video is used at trial, it also must be furnished to the court. The transcript and/or video recording will be marked as a court exhibit and preserved as part of the official record.

XIII. MOTIONS:

A. Pretrial Motions. The parties are required to notify the court by motion in limine or by motion under Federal Rule of Evidence 104(a) of any novel, unusual or complex legal, factual or procedural issues reasonably anticipated to arise at

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trial. **Each parties' motion in limine shall be submitted in one document only.** If a motion in limine is submitted in multiple documents, the court will only consider the first document filed. Each motion must be served and filed at least **14 calendar days** before the FPTC. A resistance to a motion in limine must be served and filed within **7 calendar days** after service of the motion. **All pretrial motions, including motions in limine, will be argued at the FPTC**, unless the court enters a written ruling on the motion before the FPTC.

B. Summary Judgment Motions. Each party may file only **one** summary judgment motion, and must file it in one document. Absent a showing of extraordinary circumstances, the court will only consider the first summary judgment motion filed. *See* LR 56.

XIV. OPENING STATEMENTS; CLOSING ARGUMENTS: Opening statements are limited to **30 minutes** and closing arguments are limited to **60 minutes**. A request for additional time for opening statements or closing arguments must be made no later than the FPTC.

XV. COURTROOM TECHNOLOGY: Prior to trial, parties and witnesses who intend to utilize the technology available in the courtroom must familiarize themselves with the proper manner of operation of the equipment. Instruction and training on the proper use of the equipment may be obtained from the court's automation staff. Parties may request an appointment via iandml helpdesk@iand.uscourts.gov or by calling 319-286-2300. Information also may be obtained from the court's website at the following web address: *www.iand.uscourts.gov*. The court encourages parties to consult the website, but such consultation is not a substitute for the requirement that parties must consult and train with the court's automation staff if they wish to use any of the courtroom equipment during trial.

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If a party wishes to use video conferencing technology for the testimony of any witness, the party **must** contact the court's automation staff and complete a video conference "External End-Point Certification" form **at least 10 calendar days in advance of the start of the trial**. The court will require at least one test connection prior to the start of trial. **Failure to comply with the court's requirements for video conferencing will result in the court denying the opportunity to have a witness testify via video conferencing.**

If a party wishes to connect a laptop computer to the courtroom equipment, the party **must** have the laptop computer tested by the court's automation staff **at least 7 calendar days in advance of the start of the trial. Failure to have the laptop computer tested will result in the court denying the connection of the laptop computer to the courtroom equipment.**

If a party wishes to present evidence in the form of a VHS tape, a DVD, an audio cassette, an audio CD or any other form of media requiring use of the courtroom equipment, the party **must** have such items of evidence tested by the court's automation staff **at least 7 calendar days in advance of the start of the trial** to ensure compatibility with the courtroom equipment.

XVI. SETTLEMENT CONFERENCE: Any party desiring a settlement conference should contact the Magistrate Judge at 319-286-2340. Such contact should be made at the earliest opportunity. Such contact may be *ex parte* for the sole purpose of requesting a settlement conference. A settlement conference will be scheduled with a Magistrate Judge who will not be involved in trying the merits of the case.

XVII. SETTLEMENT DEADLINE: The court hereby imposes a settlement deadline of **5:00 p.m., 5 calendar days** before the first scheduled day of trial. If the case is settled after that date, the court may enter an order to show cause why costs and sanctions should not be imposed on the party or parties causing the delay in settlement.

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IT IS SO ORDERED.

DATED this 14th day of April, 2016.

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

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UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF IOWA
DIVISION

[*INSERT PARTIES AND CASE NUMBER*]

FINAL PRETRIAL ORDER (PROPOSED)

[*NOTE: Instructions for preparing this form appear in brackets and should not be reproduced in the proposed Final Pretrial Order. All material not appearing in brackets should be reproduced in the proposed Final Pretrial Order.*]

This final pretrial order was entered after a final pretrial conference held on [date]. The court expects the parties to comply fully with this order. [*Full compliance with the order will assist the parties in preparation for trial, shorten the length of trial, and improve the quality of the trial. Full compliance with this order also will help "secure the just, speedy, and inexpensive determination" of the case. Fed. R. Civ. P. 1.*]

The following counsel or pro se party, who will try the case, appeared at the conference:

1. For plaintiff(s):
   Name(s)
   Street Number, Street Name and/or Box Number
   City, State and Zip Code
   Phone Number [include area code]
   Facsimile Number [include area code]
   E-mail address [if available]

2. For defendant(s):
   Name(s)
   Street Number, Street Name and/or Box Number
   City, State and Zip Code
   Phone Number [include area code]
   Facsimile Number [include area code]
   E-mail address [if available]

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I. **STIPULATION OF FACTS:** The parties agree that the following facts are true and undisputed:[*The parties are to recite all material facts as to which there is no dispute. Special consideration should be given to such things, for example, as life and work expectancy, medical and hospital bills, funeral expenses, cause of death, lost wages, back pay, the economic value of fringe benefits, and property damage. The parties should stipulate to an undisputed fact even if the legal relevance of the stipulated fact is questioned by one or more party, but in such instances the stipulated fact should be followed by an identification of the objecting party and the objection (e.g. "Plaintiff objects to relevance.")*]

A.

B.

II. **EXHIBIT LIST:** The parties' exhibit lists are attached to this Order.[*The parties are to **attach to this order** (not include in the body of the order) exhibit lists that list all exhibits (except for impeachment exhibits) each party intends to offer into evidence at trial. Exhibit lists are to be prepared in the attached format, indicating objections using the categories described in the form.*

*All exhibits are to be made available to opposing counsel for inspection at least **21 calendar days** before the date of the FPTC. Failure to provide an exhibit for inspection constitutes a valid ground for objection to the exhibit, and should be noted on the exhibit list.*

Copies of all exhibits as to which there may be objections must be brought to the FPTC. If an exhibit is not brought to the FPTC and an objection is asserted to the exhibit at the FPTC, the exhibit may be excluded from evidence by the court. Any exhibit not listed on the attached exhibit list is subject to exclusion at trial. The court may deem any objection not stated on the attached exhibit list as waived.]

III. **WITNESS LIST:** The parties intend to call the following witnesses at trial:[*Each party must prepare a witness list that includes all witnesses (except for rebuttal witnesses) whom the party intends to call to testify at trial. The parties are to exchange their separate witness lists at least **21 calendar days** before the date of the FPTC. The witness lists are to be included in the following format. A witness testifying by deposition must be listed in the witness list with a designation that the testimony will be by deposition.*]

A. Plaintiff(s) witnesses [*list name, **substance of testimony**, whether any party objects to the witness, and the nature of and grounds for any objection*]:

1.

2.

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B. Defendant(s) witnesses [*list name, **substance of testimony**, whether any party objects to the witness, and the nature of and grounds for any objection*]:

1.
2.

All parties are free to call any witness listed by an opposing party. A party listing a witness guarantees his or her presence at trial unless it is indicated otherwise on the witness list. ***Any objection to the offer of testimony from a witness on the witness list is waived if it is not stated on this list.***

V. EVIDENTIARY AND OTHER LEGAL ISSUES:

A. Plaintiff(s) Issues:

1.
2.

B. Defendant(s) Issues:

1.
2.

[*The parties must list all unusual evidentiary and legal issues which are likely to arise at trial, including such things as disputes concerning the admissibility of evidence or testimony under the Federal Rules of Evidence; the elements of a cause of action; whether recovery is barred as a matter of law by a particular defense; disputes concerning the measure, elements, or recovery of damages; and whether the Statute of Frauds or the Parol Evidence Rule will be raised. The purpose of this listing of issues is to advise the court in advance of issues and problems that might arise at trial.*]

IT IS SO ORDERED.
DATED this day of , 20 .

LINDA R. READE
CHIEF JUDGE, U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA

Apeendix D

(PLAINTIFF'S) (DEFENDANT'S) EXHIBIT LIST [*Form*]

The following categories have been used for objections to exhibits:

A. **Category A.** The exhibits shall be offered by the parties and admitted as evidence during trial before the parties seek to publish them to the court.

B. **Category B.** These exhibits are objected to on grounds **other than** foundation, identification, or authenticity. This category has been used for objections such as hearsay or relevance.

C. **Category C.** These exhibits are objected to on grounds of foundation, identification, or authenticity. This category **has not** been used for other grounds, such as hearsay or relevance.

(Plaintiff's)(Defendant's) Exhibits	Objections [Cite Fed. R. Evid.]	Category A, B, C	Offered	Admit/Not Admitted (A) (NA)
1. [*describe exhibit*]				*
2. [*describe exhibit*]				
3. [*describe exhibit*]				
4. [*describe exhibit*]				
5. [*describe exhibit*]				

[**This column is for use by the trial judge at trial. Nothing should be entered in this column by the parties.*]

Apeendix D

Additional material from this filing is available in the Clerk's Office.