

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>GEORGE W. O'DONNELL,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
v.	)	<i>Civil No. 04-41-P-H</i>
	)	
<b>JOHN E. POTTER,</b>	)	
<b>POSTMASTER GENERAL,</b>	)	
	)	
<i>Defendant</i>	)	

**RECOMMENDED DECISION ON DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

In this employment-discrimination action, defendant Postmaster General John E. Potter (“Defendant”) moves for summary judgment as to all of plaintiff George W. O’Donnell’s claims against him. *See generally* Defendant’s Motion . . . for Summary Judgment (“Defendant’s S/J Motion”) (Docket No. 20). For the reasons that follow, I recommend that the court grant in part and deny in part the Defendant’s motion.<sup>1</sup>

**I. Summary Judgment Standards**

**A. Federal Rule of Civil Procedure 56**

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if

---

<sup>1</sup> O’Donnell sought oral argument in connection with his opposition to the Defendant’s motion for summary judgment. *See* Motion for Oral Argument (Docket No. 27). I deny this motion on the ground that the parties’ papers provide a sufficient basis on which to decide the motion.

the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

## **B. Local Rule 56**

The evidence the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive “separate, short, and concise” statement of material facts in which it must “admit, deny or qualify the facts by

reference to each numbered paragraph of the moving party’s statement of material facts[.]” Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party’s statement of additional facts, if any, by way of a reply statement of material facts in which it must “admit, deny or qualify such additional facts by reference to the numbered paragraphs” of the nonmovant’s statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. “Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.” Loc. R. 56(e). In addition, “[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment” and has “no independent duty to search or consider any part of the record not specifically referenced in the parties’ separate statement of fact.” *Id.*; *see also, e.g., Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) (“We have consistently upheld the enforcement of [Puerto Rico’s similar local] rule, noting repeatedly that parties ignore it at their peril and that failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court’s deeming the facts presented in the movant’s statement of undisputed facts admitted.” (citations and internal punctuation omitted)).

## **II. Factual Context**

The parties’ statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56 and viewed in the light most favorable to O’Donnell as nonmovant, reveal the following relevant to this recommended decision:

O'Donnell was employed by the United States Postal Service ("Postal Service") from August 3, 1966 until September 2002, when he retired. Statement of Undisputed Facts in Support of Defendant's Motion for Summary Judgment ("Defendant's SMF") (Docket No. 14) ¶ 1; Plaintiff's Opposing Statement of Material Fact ("Plaintiff's Opposing SMF") (Docket No. 23) ¶ 1. From February 1993 until May 2001, O'Donnell worked as a special transfer clerk ("STC"), salary grade Level 7, at the Air Transport Facility ("ATF"), which was located at the Portland, Maine Jetport ("Jetport"). *Id.* ¶ 8. His generally scheduled hours of employment were from 3:30 p.m. to 12:30 a.m. *Id.*; Deposition of George W. O'Donnell ("O'Donnell Dep."), Attachment No. 6 to Defendant's SMF, at 17.<sup>2</sup>

O'Donnell's duties as an STC included serving as a postal representative in interactions with airline personnel when the Postal Service received or dispatched mail to the commercial airlines for transport. Defendant's SMF ¶ 9; EEO Investigative Affidavit (*Complainant*), Attachment No. 2 to Defendant's SMF, at 2. He also made spot checks of airline baggage rooms to make sure all mail was being handled expeditiously and prepared reports on late-arriving mail, unprotected mail and mail delivered to the wrong destination. *Id.*<sup>3</sup>

Until approximately three years prior to the closing of the ATF in May 2001, the Postal Service employed three STCs, one Level 5 clerk and three mail-handlers at the ATF. Defendant's SMF ¶ 10; Plaintiff's Opposing SMF ¶ 10. As a result of a decrease in workload at the ATF, the

---

<sup>2</sup> My recitation of the facts corrects the Defendant's apparent typographical error in stating that O'Donnell generally worked until 11:30 a.m. See Defendant's SMF ¶ 8. O'Donnell qualifies paragraph 8 of the Defendant's SMF by noting, in cognizable part, that he also regularly worked overtime until 2 or 2:30 a.m. on most days and frequently was requested to work on his scheduled days off. Plaintiff's Opposing SMF ¶ 8; O'Donnell Dep. at 90, 149. The balance of O'Donnell's qualification is disregarded inasmuch as it is unsupported by the citations given.

<sup>3</sup> O'Donnell qualifies paragraph 9 of the Defendant's SMF by asserting that he was the Postal Service's representative with respect to its interaction with airport personnel and airline representatives, was responsible for the security of the mail generally and was responsible to ensure that the commercial airlines performed their contractual obligations to the Postal Service. See Plaintiff's Opposing SMF ¶ 9; O'Donnell Dep. at 81, 159; Memorandum dated July 31, 1992 from Marlene D. Russell to All Regular Clerks (All Levels), Exh. A to Affidavit of Scott A. Adams ("Adams Aff.") (Docket (*continued on next page*))

Postal Service reduced the employee complement at the facility to the three STCs in or about 1999. *Id.* ¶ 12. The ATF was closed in early May 2001. *Id.* ¶ 28. O'Donnell and the two other STCs employed there were transferred to positions in other facilities at the same salary grade and pay level. *Id.* O'Donnell continued his employment with the Postal Service until September 2002, when he retired. *Id.* ¶ 29. From the time of his transfer until the date of his retirement, he continued to work at the same salary grade and pay level. *Id.*

O'Donnell's work as an STC at the ATF included interfacing with commercial-airline and airport officials, monitoring inbound and outbound mails for irregularities and assuring the security of the mails generally at all times at the Jetport. Additional Facts Relied on by Plaintiff To Oppose Summary Judgment ("Plaintiff's Additional SMF"), commencing at page 8 of Plaintiff's Opposing SMF, ¶ 31; Defendant's Response to Plaintiff's Additional Allegations of Fact in Opposition to Defendant's Motion for Summary Judgment ("Defendant's Reply SMF") (Docket No. 31) ¶ 31.<sup>4</sup> It was important work. Plaintiff's Additional SMF ¶ 31; Adams Aff. ¶ 18.<sup>5</sup> O'Donnell's work at the ATF was satisfying and provided him with a sense of self-worth. Plaintiff's Additional SMF ¶ 32; Defendant's Reply SMF ¶ 32. He had "no life" beyond his Postal Service work. *Id.* He took seriously his obligation to be the Postal Service's uniformed, professional representative at the Jetport. *Id.* ¶ 33.

For years, O'Donnell earned thousands of dollars in additional income as a result of the overtime that was regularly available. Plaintiff's Additional SMF ¶ 37; Affidavit of George W.

---

No. 26), at [2].

<sup>4</sup> The Defendant protests that a number of O'Donnell's additional statements are irrelevant. *See generally* Defendant's Reply SMF. To the extent that I have nonetheless recited those facts herein, the Defendant's individual objections should be understood to have been overruled.

<sup>5</sup> The Defendant states that the "deposition citations" do not support this portion of O'Donnell's statement, *see* Defendant's Reply SMF ¶ 31; however, he overlooks the fact that O'Donnell also relies on citation to an affidavit that does support it, *see* Plaintiff's Additional SMF ¶ 31. The Defendant seeks to qualify this statement by asserting that the (*continued on next page*)

O'Donnell ("O'Donnell Aff.") (Docket No. 25) ¶ 3; W-2 and Earnings Statements, Attachment No. 1 thereto; O'Donnell Dep. at 90, 149.<sup>6</sup>

The position of STC is the highest level job in the clerk craft, both in terms of pay and responsibility. Plaintiff's Additional SMF ¶ 38; Rule 30(b)(6) Deposition of Postal Service through its designee, Joseph M. Leonti ("Leonti Dep."), Attachment No. 15 to Plaintiff's Opposing SMF, at 7-8.<sup>7</sup> There were only three Level 7 clerks in the entire State of Maine during the time O'Donnell and the two other STCs worked at the ATF. Plaintiff's Additional SMF ¶ 39; Defendant's Reply SMF ¶ 39. There are no other Level 7 clerks in the entire state at present. Plaintiff's Additional SMF ¶ 39; Adams Aff. ¶ 4.<sup>8</sup> There are at least 2,500 clerk-craft employees in the state. Plaintiff's Additional SMF ¶ 39; Riley Aff. ¶ 3. The Level 7 transfer clerk is a "best qualified" position, meaning that the best qualified of those eligible for the job were selected. Plaintiff's Additional SMF ¶ 40; Defendant's Reply SMF ¶ 40. Virtually all other clerk-craft jobs are seniority-based. *Id.*

The work O'Donnell was assigned when he returned to the Postal Service's Portland Processing and Distribution Facility was without meaning, unnecessary and demeaning. Plaintiff's Additional SMF ¶ 41; Affidavit of John J. Riley ("Riley Aff.") (Docket No. 24) ¶ 4; Adams Aff.

---

"work performed at the ATF was no longer important or necessary at the time of . . . its closing[.]" Defendant's Reply SMF ¶ 31; however, that statement is unsupported by any record citation and hence is disregarded.

<sup>6</sup> The Defendant attempts to qualify this statement by denying that this overtime was necessary in all instances, *see* Defendant's Reply SMF ¶ 37; however, his assertion is unsupported by any record citation and is on that basis disregarded.

<sup>7</sup> The Defendant qualifies paragraph 38 of the Plaintiff's Additional SMF with the following assertions, *see* Defendant's Reply SMF ¶ 38: that (i) there are a number of positions within the American Postal Workers Union bargaining unit that have pay levels higher than Level 7, *see* Declaration of Raymond R. Amergian ("Amergian Decl."), Attachment No. 1 to Defendant's Reply SMF, ¶ 4; (ii) to the extent O'Donnell's use of the term "clerk craft" is limited to non-maintenance and non-vehicle clerks, his assertion is correct, *see id.*; (iii) O'Donnell's clerk position did not have more responsibility or prestige than other clerk positions, *see id.*; Declaration of Donna E. Lombardi ("Lombardi Decl."), Attachment No. 2 to Defendant's Reply SMF, ¶ 3; and (iv) O'Donnell's ability to advance was not in any way compromised, *see* Lombardi Decl. ¶ 3.

<sup>8</sup> The Defendant qualifies this statement by asserting that there are maintenance clerks at pay levels above Level 7. *See* Defendant's Reply SMF ¶ 39; Amergian Decl. ¶ 4.

¶ 18; O'Donnell Dep. at 134-36, 144.<sup>9</sup> O'Donnell bid for jobs that exceeded his physical capabilities because he wanted to do meaningful work. Plaintiff's Additional SMF ¶ 42; O'Donnell Dep. at 137-40.<sup>10</sup> O'Donnell voluntarily retired because he was unable to perform any meaningful work for which he was qualified and physically able. Plaintiff's Additional SMF ¶ 43; O'Donnell Dep. at 139-41.<sup>11</sup> The Postal Service's reassignment of O'Donnell resulted in lost earnings and loss of the self-esteem he derived by performing meaningful work. Plaintiff's Additional SMF ¶ 44; O'Donnell Dep. at 136, 149; Riley Aff. ¶ 4.<sup>12</sup>

O'Donnell filed his formal EEO [Equal Employment Opportunity] complaint on April 5, 2001, the basis of which was disability and age. Plaintiff's Additional SMF ¶ 98; Defendant's Reply SMF ¶ 98. He received the letter moving him from his position as a consequence of the ATF being closed on April 13, 2001. Plaintiff's Additional SMF ¶ 99; Leonti Dep. at 18; Letter dated Apr. 13,

---

<sup>9</sup> The Defendant denies this statement, *see* Defendant's Reply SMF ¶ 41; however, for purposes of summary judgment, I view the cognizable facts in the light most favorable to O'Donnell.

<sup>10</sup> The Defendant attempts to qualify this statement, *see* Defendant's SMF ¶ 42; however, his qualification is unsupported by the citation given and is on that basis disregarded.

<sup>11</sup> The Defendant denies this statement, *see* Defendant's SMF ¶ 43; however, I view the cognizable evidence in the light most favorable to O'Donnell.

<sup>12</sup> I have disregarded portions of O'Donnell's statement that are unsupported by the citations given (namely, that he lost "thousands of dollars," and suffered a "loss in the value of his retirement program"). The Defendant qualifies this statement, *see* Defendant's Reply SMF ¶ 44, asserting, *inter alia*, that (i) after the closing of the ATF, O'Donnell's base salary remained the same in each subsequent position he held, *see* Lombardi Decl. ¶ 5; (ii) overtime was offered on a rotating basis depending on the employee's skills and availability and mail availability, *see id.* ¶ 6; (iii) if O'Donnell had bid on a job with the requisite skills (flat sorter, automation or small-parcel sorter machine) or was qualified to perform that job, he would have been eligible to work more overtime hours, *see id.* ¶ 8; (iv) he could have become qualified to perform a job by having been placed in it, *see id.*; (v) many of those jobs were available at that time, *see id.*; (vi) bargaining-unit employees are eligible to bid on vacant positions in the bargaining unit in that facility, *see id.*; (vii) their eligibility for these vacancies is determined by their seniority in that facility, *see id.*; (viii) O'Donnell's seniority at the ATF counted toward seniority in the Portland plant and the Portland Post Office, *see id.*; (ix) if he had been awarded a bid that required that he obtain certain qualifications, he would have had to complete the training satisfactorily, *see id.*; (x) if he had been awarded a bid to one of these positions, for example flat-sorter operator or small-parcel-bundle-sorter operator, he would have been able to work considerably more overtime than he obtained as either a platform expeditor or in the unassigned position that he held, *see* Amergian Decl. ¶ 12, (xi) O'Donnell was considered very senior for bidding-rights purposes and could have bid on and been awarded just about any job posted during the time he was an unassigned regular, *see id.*; (xii) an employee's start time (beginning of tour) is also factored in when determining who would work overtime, *see* Lombardi Decl. ¶ 7; (xiii) for example, if the mail was delayed or there was a heavy volume of mail at midnight, clerks with an end tour around midnight would be asked to work overtime regarding that mail, *see id.*; (xiv) mail typically needs to be dispatched before O'Donnell's shift ended at 3 a.m., *see id.* ¶ 9; (xv) given his chosen work hours (6:30 p.m. to 3 a.m.), there was very little overtime available after his shift, *see id.*

2001 from Marc R. Belhumeur to George W. O'Donnell III, Attachment No. 7 to Plaintiff's Opposing SMF.<sup>13</sup> He amended his EEO complaint to include a retaliation claim. Plaintiff's Additional SMF ¶ 100; Defendant's Reply SMF ¶ 100.

### III. Analysis

In his three-count complaint, O'Donnell sued the Defendant for age discrimination (Count I), disability-based discrimination (Count II) and retaliation for the exercise of his EEO rights (Count III). *See generally* Complaint and Demand for Jury Trial ("Complaint") (Docket No. 1). O'Donnell clarifies that he continues to press only his retaliation claim, *see* Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's S/J Opposition") (Docket No. 22) at 2 n.1; *see also* Defendant's S/J Motion at 1 n.1.; Defendant's Reply to Plaintiff's Opposition to Motion for Summary Judgment ("Defendant's S/J Reply") (Docket No. 30) at 1 n.1, entitling the Defendant to summary judgment with respect to Counts I and II of the Complaint.

With respect to O'Donnell's claim of retaliation, the Defendant originally sought summary judgment on two bases: that (i) O'Donnell failed to make out a *prima facie* case of retaliation inasmuch as he could not demonstrate that he suffered an "adverse employment action" and, (ii) even assuming *arguendo* that he did make out a *prima facie* case, he could not show that the Defendant's reasons for closing the ATF were pretextual. *See* Defendant's S/J Motion at 12-17.<sup>14</sup> In his reply memorandum, the Defendant concedes that O'Donnell has adduced sufficient evidence, for purposes of either a pretext or "mixed motive" analysis, to preclude summary judgment with

---

<sup>13</sup> The Defendant qualifies this statement by asserting that unless the letter dated April 13, 2001 was hand-delivered to O'Donnell, it was not received by him on that date. *See* Defendant's Reply SMF ¶ 99.

<sup>14</sup> O'Donnell brings his retaliation claim pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). *See* Complaint ¶ 39; *see also, e.g., Morales-Vallellanes v. Potter*, 339 F.3d 9, 17-18 (1st Cir. 2003) (postal worker permitted to sue Postal Service for retaliation pursuant to Title VII to extent he exhausted administrative remedies). To make out a *prima facie* case of prohibited retaliation, a plaintiff must show that "(1) [he] engaged in protected conduct under Title VII; (2) [he] experienced an adverse employment action; and (3) a causal (continued on next page)

respect to the issue whether the Postal Service closed the ATF in retaliation for O'Donnell's EEO complaint. *See* Defendant's S/J Reply at 1-2 & n.2, 7 & n.5. Thus, the only issue before the court is whether O'Donnell succeeds in demonstrating the existence of a triable issue whether he was subjected to an adverse employment action.<sup>15</sup> I conclude that he does.

The First Circuit has cautioned that "the prima facie case is a small showing that is not onerous and is easily made." *Che v. Massachusetts Bay Transp. Auth.*, 342 F.3d 31, 38 (1st Cir. 2003) (citation and internal quotation marks omitted). With respect to the adverse-action prong of a *prima facie* case of retaliation, it has instructed:

To be adverse, an action must materially change the conditions of plaintiffs' employ. Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action. Material changes include demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations, and toleration of harassment by other employees.

*Gu*, 312 F.3d at 14 (citations and internal quotation marks omitted); *see also, e.g., Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996) (for an employment action to qualify as "adverse," an employer typically "must either (1) take something of consequence from the employee, by discharging or demoting her, reducing her salary, or divesting her of significant responsibilities, or (2) withhold from the employee an accouterment of the employee relationship, say, by failing to follow a customary practice of considering her for promotion after a particular period of service.") (citations omitted).

---

connection exists between the protected conduct and the adverse action." *Gu v. Boston Police Dep't*, 312 F.3d 6, 13-14 (1st Cir. 2002).

<sup>15</sup> As the Defendant observes, *see* Defendant's S/J Reply at 7 n.5, even in "mixed motive" cases, a plaintiff must first make out a *prima facie* case, *see, e.g., Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004); *McKenzie v. Potter*, No. Civ.A. 02-10727-DPW, 2004 WL 1932766, at \*3 n.9 (D. Mass. Aug. 20, 2004).

Whether an employment action is adverse, and therefore actionable, is gauged by an objective standard. *See id.*; *see also, e.g., Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994) (although change in reporting relationship may have bruised plaintiff's ego, "a plaintiff's perception that a lateral transfer would be personally humiliating is insufficient, absent other evidence, to establish a materially adverse employment action").

Nonetheless, a plaintiff need not necessarily suffer a pay or benefits cut for a transfer to qualify as "disadvantageous" or "materially adverse." *See, e.g., Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 23-24 (1st Cir. 2002) ("Congress recognized that job discrimination can take many forms, and does not always manifest itself in easily documentable sanctions such as salary cuts or demotions. Accordingly, Congress cast the prohibitions of Title VII broadly to encompass changes in working conditions that are somewhat more subtle, but equally adverse. Consistent with that broad statutory mandate, courts have rejected any bright line rule that a transfer cannot qualify as an 'adverse employment action' unless it results in a diminution in salary or a loss of benefits.") (citation omitted); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 886 (6th Cir. 1996) (listing, as among adverse employment actions, "significantly diminished material responsibilities, or other indices that might be unique to a particular situation") (citation and internal quotation marks omitted); *Dykstra v. First Student, Inc.*, 324 F. Supp.2d 54, 63 (D. Me. 2004) ("A decrease in pay is not required[,] and dramatically decreased supervisory authority alone could constitute an adverse employment action. However, a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities.") (citations and internal quotation marks omitted); *Bright v. Le Moyne Coll.*, 306 F. Supp.2d 244, 253-54 (N.D.N.Y. 2004) ("A transfer is an adverse employment action if it results in a change of responsibilities so significant as to constitute a set back to plaintiff's career. A 'purely

lateral transfer' that involves no demotion in form or substance is not a material adverse action. They key inquiry with regard to an involuntary transfer is whether the transfer constitutes a negative employment action tantamount to a demotion. In essence, the transfer must create a materially significant disadvantage, which may be shown by evidence of a transfer to a position that is materially less prestigious, less suited to one[']s skills, or less conduc[ive to advancement.]” (citations and internal quotation marks omitted).

The Defendant posits that the Postal Service did not substantively or tangibly affect O'Donnell's employment when it closed the ATF and transferred him to another position at the same pay and grade level. *See* Defendant's S/J Motion at 13-14; Defendant's S/J Reply at 2-7. O'Donnell rejoins that, to the contrary, he lost both substantive, meaningful job responsibility and an opportunity for significant overtime pay. *See* Plaintiff's S/J Opposition at 3-7.

The cognizable evidence, viewed in the light most favorable to O'Donnell, suffices to meet what the First Circuit has described as the “modest burden” of making out a *prima facie* case. *Cardona Jimenez v. Bancomercio de P.R.*, 174 F.3d 36, 41 (1st Cir. 1999). That evidence does indeed demonstrate that O'Donnell was transferred from an important, prestigious job within the world of Maine postal clerks (one of only three Level 7 STCs statewide, responsible for essentially running the ATF, including ensuring the security and efficient delivery of the mail by commercial air transport) to a make-work job, and that he lost thousands of dollars in overtime compensation following that transfer.

These impacts, if credited, constitute more than mere bruises to the ego, inconveniences or minor job alterations. *Compare, e.g., Gu*, 312 F.3d at 14 (plaintiffs did not suffer adverse employment action when reorganization caused no significant change in their overall job responsibilities); *Marrero*, 304 F.3d at 25 (plaintiff who claimed she felt stigmatized and punished

by transfer did not make objective showing of “tangible change in duties or working conditions”) (citation and internal quotation marks omitted); *Kocsis*, 97 F.3d at 886 (plaintiff did not suffer materially adverse employment action when, following transfer, she enjoyed same or greater rate of pay and benefits, her duties were not materially modified, and she submitted no evidence she lost any prestige in her position because of her working conditions or title change); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (plaintiff did not suffer adverse employment action when she was reassigned without diminution in title, salary or benefits, and substance of her complaint was that new job involved fewer secretarial duties and was more stressful in that she had to watch door, listen for fax and be in charge of security for people coming in and out of area); *Duncan v. Shalala*, No. 97 CV 3607 SJ, 2000 WL 1772655, at \*1, \*4 (E.D.N.Y. Nov. 29, 2000) (plaintiff did not suffer adverse employment action when, after his wife obtained job in Atlanta, he was denied hardship transfer to same position in Atlanta that he held in New York, even though court recognized that “the difference in location is certainly of tantamount importance to Plaintiff”).

Instead, the evidence adduced by O’Donnell meets the test, in the words of the First Circuit in *Blackie*, 75 F.3d at 725, of divestiture of “something of consequence.” *See, e.g., DeNovellis v. Shalala*, 124 F.3d 298, 306 (1st Cir. 1997) (“The court correctly found that the five-month assignment of DeNovellis to a financial position for which he had no background and the concomitant deprivation of meaningful duties constituted an adverse employment action within the meaning of Title VII.”); *Turpin v. Department of Corr.*, No. 94-2480-JWL, 1996 WL 227792, at \*8 n.1 (D. Kan. Apr. 5, 1996) (“The DOC argues that the transfer of the plaintiff from the position of Armory Officer to Correctional Specialist I was not a demotion. Viewing the facts in the light most favorable to the plaintiff, however, the court assumes that the transfer was a demotion. While there

is only one Armory Officer position at Lansing, there are over seventy individuals designated as a Correctional Specialist I. Moreover, the Armory Officer is one of the first officers called to the facility in emergency situations. The Armory Officer also has the potential to earn more overtime than other officers.”); *Ramazzotti v. El Al Israel Airlines*, No. 91 CIV. 6543 (KTD), 1994 WL 132275, at \*3 (S.D.N.Y. Apr. 14, 1994) (plaintiff demonstrated existence of adverse employment action, for purposes of *prima facie* discrimination case, when she asserted that transfer jeopardized security of her employment, her overall earning potential was reduced despite slight increase in salary because of loss of substantial overtime compensation, and her employment status was significantly diminished in terms of accountability, responsibility and quality of work).<sup>16</sup>

The Defendant accordingly falls short of demonstrating his entitlement to summary judgment with respect to Count III of the Complaint.

#### IV. Conclusion

For the foregoing reasons, I recommend that the Defendant’s motion for summary judgment be **GRANTED** with respect to Counts I and II of the Complaint and **DENIED** with respect to Count III.

#### NOTICE

*A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.*

---

<sup>16</sup> To the extent that the Defendant seeks to blame O’Donnell for his loss of overtime based on his asserted failure to bid for jobs that offered greater overtime opportunity, *see* Defendant’s S/J Reply at 3-4, his argument misses the mark. The Defendant’s contention presupposes that the “adverse” character of an employment action is neutralized by a plaintiff’s failure to mitigate his losses; however, he offers no authority in support of that proposition. *See id.* In any event, the Defendant’s own evidence suggests that O’Donnell might not have been qualified without further training for some or all of the then-available positions affording more overtime opportunity.

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 10th day of January, 2005.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

**Plaintiff**

**GEORGE W O'DONNELL**

represented by **THEODORE H. KIRCHNER**  
NORMAN, HANSON & DETROY  
415 CONGRESS STREET  
P. O. BOX 4600 DTS  
PORTLAND, ME 04112  
774-7000  
Email: tkirchner@nhdlaw.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JAMES K. GOOCH**  
NORMAN, HANSON & DETROY  
415 CONGRESS STREET  
P. O. BOX 4600 DTS  
PORTLAND, ME 04112  
207-774-7000  
Email: jgooch@nhdlaw.com  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

**POSTMASTER GENERAL**

represented by **DAVID R. COLLINS**  
OFFICE OF THE U.S. ATTORNEY  
DISTRICT OF MAINE  
P.O. BOX 9718  
PORTLAND, ME 04104-5018  
(207) 780-3257  
Fax: (207) 780-3304  
Email: david.collins@usdoj.gov  
*ATTORNEY TO BE NOTICED*