

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**MARCEL G. LAROSE, JR.,** )  
 )  
 **Plaintiff** )  
 )  
 **v.** )  
 )  
 **WILLIAM J. HENDERSON, United** )  
 **States Postmaster General,** )  
 )  
 **Defendant** )

**Docket No. 97-231-P-C**

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

This action arises out of the plaintiff’s employment by the United States Postal Service. Counts I and V of the amended complaint, as well as any claims included in the plaintiff’s December 1995 charge filed with the Equal Employment Opportunity Commission (“EEOC”), have been dismissed, and summary judgment in favor of the defendant has been entered on Count VI of the amended complaint. Order Affirming the Recommended Decision of the Magistrate Judge (Docket No. 16) at 2. The defendant now seeks summary judgment on the remaining counts of the amended complaint, which allege retaliation for participation in activity protected by 42 U.S.C. § 2000e *et seq.* (Count II) and state-law claims of intentional and negligent infliction of emotional distress (Counts III and IV). Amended Complaint (Docket No. 2) ¶¶ 45-61. I recommend that the court grant the motion in part and deny it in part.

## I. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute 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 . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). 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. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

## II. Factual Background

The following undisputed facts are appropriately supported in the summary judgment record.

### A. The 1991 Claims

The plaintiff filed a complaint with the Postal Service on or about February 19, 1991, initiating an action that came to be known as EEO Case 1K-1005-91, in which he alleged that he had been the victim of discrimination based on reprisal for his filing of complaints of discrimination<sup>1</sup> in seven particular incidents. Complaint Form, LaRose Deposition Exhibit 16 ("LaRose Dep. Exh. 16"), included in Exhibit 19 filed with Plaintiff's Response to Defendant's Motion for Summary Judgment ("Plaintiff's Response") (Docket No. 38).<sup>2</sup> The parties agree that those incidents were:

1. A letter of commendation initiated on May 3, 1989 was delayed and not acted upon until August 8, 1989.
2. On December 15, 1989 the plaintiff was removed from a 120-day detail as a Mail Processing Equipment Supervisor.

---

<sup>1</sup> The defendant does not include in his statement of material facts the necessary facts that the plaintiff based his 1991 complaint on a claim, *inter alia*, that he had been the victim of retaliation for claims of discrimination filed earlier, or even that the plaintiff had filed such earlier claims. The plaintiff also fails to provide some necessary background factual information, including the dates and nature of the prior complaints which are alleged to be the protected activity for which the incidents listed in the 1991 complaint constituted retaliation by the employer. The court's ability to resolve a motion for summary judgment is compromised when the parties' submissions begin with the legal controversy and omit the necessary factual background. That such factual background may be undisputed is not the point. As this court has reminded parties and counsel too many times, in too many cases, a trial court cannot and will not comb through a summary judgment record to do the work that should be done by the parties and their counsel under Fed. R. Civ. P. 56 and this court's Local Rule 56, and instead will confine itself to properly supported statements of fact contained in the parties' statements of material facts.

<sup>2</sup> Unless otherwise indicated, all referenced LaRose deposition exhibits are found in Exhibit 19 filed with the Plaintiff's Response.

3. The plaintiff was removed from a detail as a Mail Processing Equipment Supervisor in June 1990.

4. A quality step increase for the plaintiff that was initiated in early 1990 was delayed until November 1990.

5. The plaintiff's request for safety glasses in August 1990 was delayed for ten days and handled differently from the requests of other employees.

6. Verbal abuse of the plaintiff by a fellow employee, occurring through an incident on September 16, 1990, went unchecked despite the plaintiff's complaints.

7. The plaintiff was denied promotion to the position of Electronic Technician Supervisor, EAS-17, on November 30, 1990.

Affidavit of Marc Scheele, attached to Defendant's Statement of Undisputed Material Facts in Support of the Motion for Summary Judgment ("Defendant's SMF") (Docket No. 30), ¶ 3; Deposition of Marcel G. LaRose ("Plaintiff's Dep."), attached to Defendant's SMF, at 29. The Postal Service's final decision on this complaint, dated August 1, 1997, finds that the plaintiff failed to prove that he was subjected to discrimination on the basis of reprisal. Letter from Mary E. Burrell to Marcel Larose [sic], Exh. 7 filed with Plaintiff's Response.

The plaintiff had complained to the Postal Service's local EEO counselor on July 30, 1990 about the alleged denial of the detail as a Mail Processing Equipment Supervisor, asserting that this denial was in reprisal for unspecified protected prior conduct. Request for Counseling, Exh. 1 filed with Plaintiff's Response.

In May 1989 the plaintiff's supervisor recommended him for a certificate of appreciation. Affidavit of Thomas McGonagle ("McGonagle Aff."), attached to Defendant's SMF, at 1005-91-89. After completing the necessary form, the supervisor submitted it to his supervisor. *Id.* After a delay

of several months, the plaintiff received the award, which carried no monetary compensation. Plaintiff's Dep. at 8.<sup>3</sup>

In December 1989 Joseph W. Barlock, whose job title is not provided by the parties, directed the plant manager to assign Thomas Lussier to the position of acting supervisor, Mail Processing Equipment, due to the Christmas rush. Affidavit of Joseph W. Barlock ("Barlock Aff."),<sup>4</sup> attached to Defendant's SMF, at 1005-91-80. The plaintiff contends that he was better qualified for this position than was Lussier.

By letter dated March 9, 1990 the plaintiff requested that his name be removed from the list of eligible candidates for the Maintenance Supervisor 204B program. Plaintiff's Dep. at 23 & LaRose Dep. Exh. 4. In April 1990 the plaintiff requested that his name be restored to this list, and Ervin P. Morin, then Manager, Plant and Equipment Engineering, used him in the position until he was instructed to remove plaintiff from the position until the plaintiff sent written notice of his request to be restored to the list to all persons to whom he had sent copies of his earlier request to be removed.

---

<sup>3</sup> The plaintiff contends in Plaintiff's Objections to the Defendant's Statement of Undisputed Material Facts in Support of the Motion for Summary Judgment ("Plaintiff's Objections") (Docket No. 36) that "33 other employees of the USPS received recognition almost immediately." *Id.* at [2], ¶ 4. In fact, the document cited in support of this contention, Exhibit 17 to the "Formal EEO Investigative File dated May 8, 1995," a lengthy unpaginated document identified as Exhibit 4 to Plaintiff's Response, lists Maine employees of the Postal Service who received quality step increases in fiscal year 1990. The plaintiff is not listed. Quality step increases and letters of commendation are not the same thing. The plaintiff also cites this document later, in connection with his claim that a quality step increase to which he was entitled was also delayed. The document does not support his claim on this point.

<sup>4</sup> Mr. Barlock's affidavit, like all but one of those filed by the defendant in connection with his motion for summary judgment, is made on information and belief. Counsel for the defendant should be aware that Fed. R. Civ. P. 56(e) requires all affidavits submitted in connection with motions for summary judgment to be made only on personal knowledge. Because the plaintiff has not objected to the affidavits, I will rely on them when cited by the defendant.

Affidavit of Ervin P. Morin (“Morin Aff.”), attached to Defendant’s SMF, at 1005-91-85.<sup>5</sup> This instruction apparently came from Barlock. Barlock Aff. at 1005-91-80.

The parties present little in their statements of material facts concerning the disputed quality step increase beyond the facts that the plaintiff’s increase was delayed from April to November 1990, Plaintiff’s Dep. at 24-25, and that thirty-three other employees of the USPS in Maine received quality step increases in fiscal year 1990 with considerably less delay, Exh. 17 to Exh. 4 filed with Plaintiff’s Response.<sup>6</sup>

The plaintiff’s first request for prescription safety glasses, made in August 1990, was delayed for ten days. Plaintiff’s Dep. at 28-29. The plaintiff was not injured during this ten-day period. *Id.* at 29-30. The plaintiff’s request was treated differently from all other employees’ requests for safety glasses in that it was sent to the safety office for approval. Affidavit of Bruce Day, Exhibit 2 filed with Plaintiff’s Response, ¶ 1. Requests other than that of the plaintiff reviewed by Barlock in 1995 were all for replacement glasses for employees previously approved. Barlock Aff. at 1005-91-81.

Management was aware of a personality conflict between the plaintiff and Lussier. Barlock

---

<sup>5</sup> References to an affidavit as the citation to the record required by Local Rule 56 to support a party’s statement of a material fact in support of or opposition to a motion for summary judgment are of little assistance to the court where, as here, the citing party makes no effort to identify the portion of the affidavit where the supporting information appears. “Morin Affidavit” as a citing reference is insufficient.

<sup>6</sup> The defendant appropriately objects to this document as unauthenticated hearsay. Defendant’s Reply to Plaintiff’s Opposition to the Motion for Summary Judgment (“Defendant’s Reply”) (Docket No. 40) at 5 n.9. Fed. R. Civ. P. 56(c) requires that summary judgment motions be made upon the pleadings, depositions, answers to interrogatories, admissions, and affidavits. Rule 56(e) requires that affidavits set forth such facts as would be admissible in evidence and that certified copies of papers referred to in affidavits be attached thereto. Exhibit 17 to Exhibit 4 filed with the Plaintiff’s Response is not certified, attached to any affidavit, or referred to in any affidavit filed by the plaintiff. Under the circumstances, I cannot rely on this document to support the plaintiff’s factual assertion that other employees were treated differently in this regard.

Aff. at 1005-91-81. The plaintiff has not worked with Lussier since 1991 or 1992. Plaintiff's Dep. at 35. After testifying that he was humiliated in front of his peers by ongoing verbal abuse from Lussier in 1990, the plaintiff was asked "Did you ever verbally abuse Mr. Lussier?" *Id.* at 32. He replied, "I believe in retaliation for — from time to time in response to his initial abuses." *Id.* The parties dispute whether management's response to this situation was adequate.<sup>7</sup>

In November 1990 Lussier received a promotion to the position of supervisor, Mail Processing Equipment, EAS-17. Barlock Aff. at 1005-91-82. Lussier received this position as the result of the settlement of an EEO claim that he had filed. *Id.* The plaintiff was aware that this was the reason for Lussier's promotion at the time. Plaintiff's Dep. at 37-38. The plaintiff testified that it was "common knowledge" at the time that Lussier was to receive the next position representing a promotion for which he applied and was minimally qualified. *Id.* at 38. Morin, who selected Lussier for the position, considered Lussier to be qualified for it. Morin Aff. at 1005-91-86. The plaintiff contends that he was qualified for the position, but that Lussier was not.

### **B. The 1996 Claims**

In a complaint filed on or about April 2, 1996, which came to be known as EEO Case 1B-041-1008-96, the plaintiff made the following allegations:

---

<sup>7</sup> The plaintiff's entire citation to the summary judgment record on this point is "See Defendant's answers to interrogatories propounded by LaRose." Plaintiff's Objections at ¶ 28. The plaintiff neglects to point out that this document is apparently Exhibit 8 filed with the Plaintiff's Response. Even if that information had been provided, however, the citation is insufficient. My review of the document suggests that only Question 8, at page 3, might address this issue. The defendant's response is "see EEO files produced herewith." This information is not at all helpful to the court and cannot be viewed as supporting the plaintiff's position. The "EEO files produced herewith" *might* be Exhibits 3 and 4 filed with the Plaintiff's Response. *If* that is the case, those two exhibits contain over 300 unnumbered pages. It is not the role of the court to comb through a summary judgment record in search of disputed factual issues. *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995).

1. On January 26, 1996 a letter of warning was issued to the plaintiff by Robert Humbarger and Joseph Manganaro without justification.

2. The plaintiff's Official Personnel File had been removed from its usual location without being signed out.

3. The plaintiff's Official Personnel File, including the letter of warning, was seen by the members of a board convened to select the top candidates for a Level 18 position for which the plaintiff applied. No other applicant's Official Personnel File was reviewed by this board.

4. The plaintiff's application for this position was rejected due to the review of his file.

LaRose Dep. Exh. 48 (attached to Defendant's SMF). The plaintiff was one of eleven applicants for this position, from whom the members of the board chose four finalists, none of whom was the plaintiff. Affidavit of Daniel J. Ryan, III, attached to Defendant's SMF, ¶ 4 and EAS Selection Form attached thereto.<sup>8</sup> None of the members of the board who reviewed the candidates and chose the finalists saw the plaintiff's Official Personnel File or was aware of the letter of warning, which was later withdrawn. Affidavit of Lawrence Cachia, attached to Defendant's SMF, at D-90; Affidavit of James Bruce Dogan, attached to Defendant's SMF, ¶ 3 and D-92 to D-93 ¶¶ 6-7; Affidavit of Lorraine J. Martin, attached to Defendant's SMF, at D-97 ¶¶ 6-7 & Review Committee Recommendations attached thereto; Affidavit of Robert Humbarger ("Humbarger Aff."), attached to Defendant's SMF, ¶ 3 and at D-79. When the letter of warning was issued, and until a point after it was withdrawn, the

---

<sup>8</sup> The plaintiff disputes this and the following factual statements concerning this incident on the grounds of Exhibits 7 and 8 to the Deposition of Daniel J. Ryan, III, Exhibit 15 filed with the Plaintiff's Response, and the Deposition of Diane L. Kelley, Exhibit 13 filed with the Plaintiff's Response, at 12. Plaintiff's Objections ¶¶ 35-36, 39-41. A review of these documents reveals that they refer to the selection of an employee to fill the position of Supervisor of Maintenance Operations, EAS-16 in 1993, a different position altogether from the one included in the plaintiff's 1996 complaint, which was awarded to the same individual in 1996. The defendant's factual assertions in its SMF on this issue, to the extent that they are properly supported by record citations, are therefore deemed admitted.

plaintiff's Official Personnel File was missing. Humbarger Aff. ¶ 3 and at D-80.

### **C. Other Incidents**

The plaintiff submits the following factual information, which the defendant has not disputed, in support of allegations in his amended complaint.<sup>9</sup> In March or April 1991 Lussier recommended that the plaintiff be ordered to undergo a fitness-for-duty examination, which was performed. Deposition of Marc A. Scheele ("Scheele Dep."), Exh. 14 filed with Plaintiff's Response, at 59-60; LaRose Dep. Exh. 17. By letter dated July 18, 1991 signed by the Manager, Plant Equipment and Engineering, of the Portland office of the Postal Service the plaintiff was notified that he was being placed on off-duty, non-pay status effective July 20, 1991 due to the result of the fitness-for-duty examination. LaRose Dep. Exh. 21. The letter presents the change in status as a proposal, giving the plaintiff ten days to submit an "answer" for full consideration before Barlock, then the MSC Director, City Operations, made a final decision. *Id.* Scheele testified that the notice was technically deficient in that it "placed [the plaintiff] into a nonpay status versus a pay status" and "it didn't give him proper appeal rights." Scheele Dep. at 97-98.

The plaintiff also submits the following factual information, not apparently tied to any allegations in his amended complaint, which the defendant has not disputed. In the summer of 1990 the plaintiff was on "light duty" status when ordered by Lussier to perform work that the plaintiff felt was beyond his physical limitations. Exh. 21 to Exh. 4 filed with Plaintiff's Response at 6. This

---

<sup>9</sup> The plaintiff also includes in his Supplemental Statement of Material facts as to Which There are No Genuine Issues to be Tried in Addition to the Response to Defendant's Statement in Support of His Motion for Summary Judgment ("Plaintiff's SMF") (Docket No. 37) many factual assertions relevant only to claims for which he may not recover in this case by virtue of the court's Order Affirming Recommended Decision. These include the following paragraphs in his SMF: 11-12, 21, 27-44, 47-50, 53-55.

incident resulted in a union grievance that was resolved. *Id.* at 1-2, 4-7. The plaintiff requested permanent light duty status by a letter dated June 13, 1991 to Alexander Lazaroff, then postmaster. Scheele Dep. Exh. 26. Believing that this request had been denied, the plaintiff sought reconsideration by a memorandum to Lazaroff dated July 24, 1991, requesting his response by July 28, 1991. Exh. 6 filed with Plaintiff's Response.

### **III. Discussion**

#### **A. The Retaliation Claims (Count II)**

The defendant first argues that the plaintiff is not entitled to compensatory damages on Count II because all of the incidents alleged to provide evidence of retaliation prohibited by 42 U.S.C. § 2000e-3(a), also called a Title VII claim, *Byrd v. Ronayne*, 61 F.3d 1026, 1030 (1st Cir. 1995), occurred before the effective date of the 1991 amendment to the Civil Rights Act that first provided a right to compensatory damages for Title VII claims. 42 U.S.C. § 1981a. Compensatory damages are only available under Title VII for acts that occurred after November 21, 1991, the effective date of the amendment. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 282 (1994).

The plaintiff responds that the incidents included in his 1991 EEO complaint, which are set forth in Count II of the amended complaint, are part of a continuing violation that extended beyond November 21, 1991, citing *Morrison v. Carleton Woolen Mills, Inc.*, 108 F.3d 429 (1st Cir. 1997). However, the plaintiff also concedes that he “cannot recover compensatory damages for conduct that occurred before November 21, 1991.” Plaintiff's Response at 8. Under these circumstances, I can discern no need to determine whether the plaintiff can establish a continuing violation by the defendant. The defendant does not contend that the plaintiff may not recover compensatory damages

for retaliatory actions violating section 2000e-3 that occurred after November 21, 1991.

The defendant argues that he is entitled to summary judgment on Count II because the facts do not support a claim of retaliation, the plaintiff was not subjected to adverse actions that are compensable under Title VII, “the underlying problem has been resolved,” and there is no justification for injunctive relief. Defendant’s Motion for Summary Judgment and Incorporated Memorandum of Law (“Defendant’s Motion”) (Docket No. 29) at 5. In response, the plaintiff offers a “time line of events,” each of which he asserts constituted an adverse action, and argues that each of these events was causally connected to protected activity by the plaintiff. Plaintiff’s Response at 10-19.

Because the plaintiff offers no evidence of direct retaliation in his statements of material facts, he must satisfy the test established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), in order to prevail. *King v. Town of Hanover*, 116 F.3d 965, 968 (1st Cir. 1997). First, he must make a prima facie showing of retaliation. *Id.* If he does so, the burden of production shifts to the defendant who must articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* “The production of such a nondiscriminatory reason dispels the presumption of improper discrimination generated by the prima facie showing.” *Id.* The plaintiff must then show that the proffered reason is actually a pretext for retaliation. *Id.*

In order to establish a prima facie case, the plaintiff must show

- (1) that he engaged in an activity protected under Title VII or engaged in protected opposition to an activity, which participation or opposition was known by the employer;
- (2) one of more employment actions disadvantaging him; and
- (3) a causal connection between the protected activity and the employment action.

*Id.* In the First Circuit, “[d]etermining whether an action is materially adverse necessarily requires a case-by-case inquiry.” *Blackie v. State*, 75 F.3d 716, 725 (1st Cir. 1996). “[T]he 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." *Id.*

Typically, the employer must either (1) take something of consequence from the employee, say, by discharging or demoting her, reducing her salary, or divesting her of significant responsibilities, or (2) withhold from the employee an accouterment of the employment relationship, say, by failing to follow a customary practice or considering her for promotion after a particular period of service.

*Id.* To be an adverse employment action, the action at issue must, at a minimum, impair or potentially impair the plaintiff's employment in some cognizable manner. *Nelson v. University of Maine Sys.*, 923 F. Supp. 275, 281 (D. Me. 1996).

Assuming *arguendo* that the plaintiff can demonstrate that he engaged in protected activity, despite the lack of entries in his statements of material facts on this issue other than those cast in conclusory terms, his "time line of events" includes many entries that could not possibly constitute adverse employment action by the Postal Service (*e.g.*, "LaRose contacts EEO counselor," "LaRose files complaint in US District Court," "The EEOC issues a decision," Plaintiff's Response at 11-12) and many entries that are not presented in his statements of material facts or not properly supported in the summary judgment record if present in one of the two statements of material facts (*e.g.*, "Letter of removal is rescinded," "The EEOC orders the USPS to provide more information," "LaRose is sent for another fitness for duty exam without justification," *id.*). The incidents alleged in the 1991 and 1996 EEO complaints are not included in the time line of events, but are mentioned separately in the plaintiff's argument. *Id.* at 13-14.

The plaintiff has failed to establish a prima facie case of retaliation as to the events included in the 1996 EEO complaint. The third and fourth events alleged — that the plaintiff's personnel file

was seen by the members of the board convened to choose finalists for the 1996 position and that the plaintiff's application was rejected due to the board's review of this file — are denied by the undisputed affidavits of all of the members of the board. There is no evidence to support these allegations, and accordingly they cannot constitute adverse employment actions. The second allegation in the 1996 complaint is that the plaintiff's personnel file had been removed from its usual location without being signed out and had apparently been lost for an undetermined period of time. The plaintiff suggests no adverse employment consequences from this situation, and none is apparent. The first allegation in the 1996 complaint is that a letter of warning was issued to the plaintiff without justification. The letter was subsequently withdrawn. The plaintiff finds it significant that Humbarger, a supervisor who took no part in the board's selection of finalists for the position for which the plaintiff applied, erroneously thought that the letter had been placed in the plaintiff's file. The plaintiff offers no explanation of the way in which the temporary existence of this letter, whatever Humbarger's belief about its location, constituted an adverse employment action, other than to state the conclusion that it did. Plaintiff's Response at 14. Based on the summary judgment record, no reasonable factfinder could conclude that the letter of warning, subsequently withdrawn, constituted an adverse employment action. The plaintiff has failed to establish a prima facie case of retaliation based on the events listed in the 1996 EEO complaint, and the defendant is entitled to summary judgment on any such claims.

I turn next to the allegations included in the 1991 EEO complaint and review them on the same basis. The first allegation is that a letter of commendation (called a "certificate of appreciation" by the defendant, *see* Exh. 5 to Exh. 4 filed with Plaintiff's Response) initiated on May 3, 1989 was not issued until August 8, 1989. The defendant contends that the delay was not an adverse

employment action because the plaintiff suffered no tangible detriment due to the delay. Defendant's Motion at 9. The plaintiff responds that the adverse action involved was the creation of "a less desirable official personnel folder than had [the letter] been issued and placed in the OPF properly." Plaintiff's Response at 13.<sup>10</sup> The plaintiff does not suggest that the existence of a "less desirable" folder for three months significantly impaired his ability to function in his position during that period. *See Nelson*, 923 F. Supp. at 282. At most, this incident had a tangential effect on the plaintiff's employment and therefore did not rise to the level of an employment decision intended to be actionable under Title VII. *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997).

The second allegation in the 1991 EEO complaint concerns the removal of the plaintiff from a 120-day detail as a mail processing equipment supervisor. In fact, there is no evidence in the summary judgment record that the plaintiff was removed from this temporary position, but only that it was given to Lussier in spite of the fact that the plaintiff believed himself to be qualified for the detail. Even the plaintiff admits that his experience with respect to the position was not equal to that of Lussier, a fact that he ascribes to the failure of the defendant to give him training for the position. Plaintiff's Response at 13. This assertion is included in the Plaintiff's Objections at paragraph 10 but is not supported by the record citations listed there. Refusal to promote may be an adverse employment action. *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994). Assuming for purposes of this incident only both that denial of a temporary promotion, without evidence concerning concomitant income and benefits, is within the realm of adverse employment action and that the

---

<sup>10</sup> The plaintiff also contends that others employees received such letters "almost immediately" and that this contrast with the treatment of his letter also constitutes an adverse employment action. Plaintiff's Response at 13. As noted earlier, this factual assertion is not supported in the summary judgment record.

plaintiff could establish the other necessary elements of a prima facie case, the defendant has articulated a legitimate, nondiscriminatory reason for the assignment of Lussier and the plaintiff has made no evidentiary showing beyond a conclusory allegation that the stated reason was pretextual or that the failure to assign the plaintiff was in retaliation for previous protected activity. Under these circumstances, the plaintiff has not carried his summary judgment burden on the second alleged incident. *King*, 116 F.3d at 968; *Mercado-Garcia v. Ponce Federal Bank*, 979 F.2d 890, 893 (1st Cir. 1992).

The third incident alleged in the 1991 complaint is the removal of the plaintiff from a detail as a mail processing equipment supervisor in June 1990. This occurred because Barlock refused to restore the plaintiff's name to a list of employees eligible for the detail until the plaintiff had given written notice to all of the individuals whom he had notified of his earlier request to be removed from that list. While there is no evidence in the summary judgment record of the time necessary for the plaintiff to accomplish this notification nor the financial or other benefits to the plaintiff involved in this temporary promotion, if any, the defendant argues only that there is no proof of pretext or retaliation in connection with this incident, apparently conceding that the elements of a prima facie case have been established. Defendant's Motion at 10-11. Here again, the plaintiff has offered no evidence that would support a finding that the reason stated by the defendant for this action was pretextual, nor does he offer evidence beyond his conclusory assertion that the act was undertaken in retaliation for past protected activity. *Mercado-Garcia*, 979 F.2d at 893.

The fourth incident alleged in the 1991 complaint is a seven-month delay in the processing of a quality step increase. The defendant does not argue that the plaintiff has not made out a prima facie case concerning this incident but proceeds directly to an assertion that there is no proof of

retaliation or pretext because the plaintiff at his deposition could not identify any employee who had received a quality step increase without delay and gave the delay itself as the only reason for his conclusion that retaliation was involved. Defendant's Motion at 11. In fact, the plaintiff testified at his deposition that "[e]very other person or — that I have known of did not have any delays like this," that he could not identify those employees "[a]t this moment," and that his belief that Barlock delayed his increase in retaliation for the plaintiff's EEO activity was based on the delay itself and no other reason "that I can think of right now." Plaintiff's Dep. at 26. The problem with the defendant's position is that it has offered no legitimate, nondiscriminatory explanation for the delay.<sup>11</sup> For purposes of summary judgment, the burden of production does not shift back to the plaintiff under these circumstances. The "presumption of improper discrimination generated by the prima facie showing" is not dispelled. *King*, 116 F.3d at 968. The defendant is not entitled to summary judgment as to this incident.

The next incident included in the 1991 complaint is a ten-day delay between the plaintiff's request for safety glasses and approval of that request. Here, the defendant contends, and I agree, that the plaintiff has offered no evidence to support a conclusion that this delay constituted an adverse employment action. The plaintiff has not established a prima facie case concerning this incident.

The 1991 complaint next attacks the failure of the defendant to stop verbal abuse of the plaintiff by Lussier, a fellow employee, despite complaints made by the plaintiff to the defendant. With regard to this allegation, the defendant argues that management took actions to try to correct the

---

<sup>11</sup> The defendant's assertion that the plaintiff "has not shown any harm associated with the delay," Defendant's Reply at 5, is incorrect. Inherent in the concept of an "increase" is the fact that it is of some benefit to the recipient. In fact, the plaintiff testified at his deposition that he suffered a monetary loss associated with the delay. Plaintiff's Dep. at 25.

situation, an apparent attack on the plaintiff's prima facie case, and that there is no proof of retaliatory motive or pretext. Defendant's Motion at 12.<sup>12</sup> The plaintiff's assertion that "management took little, if any, action to try to correct the situation," Plaintiff's Response at 14, is not appropriately supported in the summary judgment record. Toleration of harassment by other employees may constitute an adverse action covered by section 2000e-3. *Wyatt*, 35 F.3d at 15-16. However, Title VII is not a "general civility code," nor does it make actionable the "ordinary tribulations of the workplace." *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2283-84 (1998). An employer may be held liable for retaliatory harassment by co-workers if the employer orchestrated the harassment or knew about the harassment and acquiesced in it in such a manner as to condone and encourage the co-workers' actions. *Gunnell v. Utah Valley State Coll.*, \_\_\_ F.3d \_\_\_, 1998 WL 488796, \*10 (10th Cir. Aug. 19, 1998). Here, there is no allegation that the defendant orchestrated the harassment at issue. The allegation is that the defendant knew about the verbal abuse and did little or nothing to stop it. The only evidence in the summary judgment record is to the contrary. Accordingly, the plaintiff has failed to establish a prima facie case as to this claim.

The final incident included in the 1991 complaint is the denial of promotion to the position awarded to Lussier on November 30, 1990. Lussier was awarded the position pursuant to an agreement settling an EEO complaint. The defendant contends that there is no evidence of pretext or retaliatory motive concerning this action. The plaintiff responds that the award of the position to Lussier was pretextual because the terms of the settlement agreement required that Lussier be

---

<sup>12</sup> The defendant's assertion that "[the plaintiff] responded to [the verbal abuse] with verbal abuse of his own," Defendant's Reply at 6, is essentially irrelevant to the burden-shifting framework which the court must apply in analyzing this claim once the existence of a prima facie case is admitted.

minimally qualified for the position and Lussier was not. The plaintiff has failed to provide any evidence in either his objection to the defendant's statement of material facts or his own supplemental statement of material facts to support the allegation that Lussier was not minimally qualified for the position. In addition, in order to establish his prima facie case, the plaintiff would have to show that he would have received the position if Lussier did not, *see Welsh v. Derwinski*, 14 F.3d 85, 87 (1st Cir. 1994), or at least that there would not have been any other candidates for the position more qualified than he. He has made no attempt to do so. Thus, whether because he has failed to establish a prima facie case as to this claim or because he has failed to demonstrate pretext in response to the defendant's showing of a legitimate nondiscriminatory reason for the appointment of Lussier, the plaintiff cannot avoid entry of summary judgment for the defendant on this claim.

The defendant has not addressed the additional factual contentions set forth by the plaintiff involving the 1990 order that he perform work beyond the limits of his light duty status, the April 1991 fitness-for-duty examination, the July 1991 letter proposing to place him on off-duty, non-pay status, and his June 1991 request for permanent light duty status. I must therefore assume for purposes of the motion for summary judgment that these incidents occurred as represented. The defendant addresses these incidents only in the context of his argument that they cannot form part of a serial continuing violation, Defendant's Reply at 2-3, thus apparently assuming that they otherwise constitute incidents of retaliatory activity for which the plaintiff may recover, *Jensen v. Frank*, 912 F.2d 517, 522 (1st Cir. 1990) (serial continuing violation requires a number of discriminatory acts) (cited by defendant).

As result of the court's prior rulings in this case, the events surrounding the settlement of the plaintiff's 1991 EEO complaint and subsequent activities concerning that settlement and the events

supplying the basis for the claims raised in the plaintiff's 1995 EEO complaint may not provide a basis for recovery. The plaintiff has included in his summary judgment submissions many statements of material fact concerning these events. Accordingly, I will make my recommended decision on the motion for summary judgment on Count II very clear: the motion should be granted except as to any claims of unlawful retaliation based on the delayed quality step increase in 1991, the 1990 order that the plaintiff perform work beyond the limits of his light duty status, the ordering of the April 1991 fitness-for-duty examination, the plaintiff's June 1991 request for permanent light duty status, the July 1991 letter proposing to place the plaintiff on off-duty non-pay status, and the alleged 1992 order by Kenneth Winters to Marcel Desrosiers to antagonize the plaintiff into acting in a manner that would allow the Postal Service to terminate the plaintiff's employment.<sup>13</sup>

#### **B. The State-Law Claims (Counts III and IV)**

Count III of the amended complaint alleges intentional infliction of emotional distress. Count IV alleges negligent infliction of emotional distress. Both claims invoke Maine law. The defendant contends that he is entitled to summary judgment on both counts because (i) they are barred by the terms of the Federal Employees Compensation Act ("FECA"), 5 U.S.C. § 8101 *et seq.*, (ii) Title VII is the exclusive remedy for such claims, (iii) the plaintiff has failed to exhaust his administrative remedies for such claims as required by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-80, and (iv) such claims are pre-empted by the Postal Reorganization Act, 39 U.S.C. § 1001 *et*

---

<sup>13</sup> The plaintiff's time line also includes an allegation that the plaintiff was sent for another fitness-for-duty examination without justification in 1996, Plaintiff's Response at 12, but that assertion is not supported in the plaintiff's statements of material facts as required by Local Rule 56. The time line also includes allegations concerning the promotion of Robert Olbrias in November 1993 that are properly supported in the summary judgment record, but there is no allegation that the plaintiff either applied for or was qualified for this position, so there is no basis for recovery by the plaintiff on any claim arising out of this event.

*seq.* The plaintiff argues in response that the defendant’s contentions are all affirmative defenses, and that the defendant’s allegedly insufficient answers to interrogatories asking him to state all facts supporting his affirmative defenses and to identify all admissions require the court to deny the motion for summary judgment, apparently as a sanction. The only authority cited by the plaintiff in support of his argument is 8A C. Wright, A. Miller, & R. Marcus, *Federal Practice & Procedure* § 2182 (2d ed. 1994). That section of the treatise deals with sanctions under Fed. R. Civ. P. 37. In order to invoke the sort of sanction sought by the plaintiff here, there must be a violation of an order of the court concerning discovery. Rule 37(b)(2). The plaintiff never sought the court’s assistance to obtain more complete answers to the interrogatories at issue, no order concerning those answers was issued, and the sanctions provided by the rule are therefore unavailable.

*1. FECA Preclusion.*

The defendant relies on 5 U.S.C. § 8116(c), which provides in relevant part that “[t]he liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive . . . .” Both parties rely on *Bruni v. United States*, 964 F.2d 76 (1st Cir. 1992), to support their arguments. In that case, the First Circuit held that FECA “provides the exclusive avenue of redress for a federal employee’s injury sustained while in the performance of his/her duty.” *Id.* at 78 (internal punctuation marks omitted). “The liability imposed by FECA supplants all other liability . . . on the part of the United States to an injured federal employee.” *Id.* See also *Heilman v. United States*, 731 F.2d 1104, 1109 (3d Cir. 1984) (if a claim is covered under FECA, then federal courts have no subject matter jurisdiction to entertain the action) (cited with approval in *Bruni*, 964 F.2d at 79). “[T]he employee must first seek and be denied relief under the FECA unless his/her injuries do not present a substantial question of compensability under

that act. A substantial question exists unless it is *certain* that the Secretary [of Labor] would not find coverage.” 964 F.2d at 79 (emphasis in original; citation omitted).

The plaintiff contends that he was not injured on the job so as to invoke coverage of FECA because his emotional injury was not sustained while in the performance of his duty but rather “from the never-ending abuse he suffered at the hands of management personnel who were fixated on running him out of the workplace.” Plaintiff’s Response at 21-22. According to the plaintiff, the Secretary could not find that his injury was covered by FECA unless it was caused by “maintaining equipment and facilities at the postal service,” *id.*, the tasks that made up his job description. However, the First Circuit does not limit the definition of “injured on the job” so narrowly. There is a substantial question of compensability under FECA if the employee’s injury arose from the “zone of special danger” created by his employment. *Bruni*, 964 F.2d at 79. The plaintiff’s decedent in *Bruni* was killed in the employees’ parking lot on her way to start work by a co-worker who had harassed her at the work place. *Id.* at 80. The First Circuit held that this factual situation presented a substantial question as to whether the decedent was killed while in performance of her duties and the federal courts accordingly lacked jurisdiction over the claim. *Id.* I see no basis upon which *Bruni* may be distinguished from the facts presented here. *See also Saltsman v. United States*, 104 F.3d 787, 790 (6th Cir. 1997) (applying FECA exclusivity to claim of intentional infliction of emotional distress). This court lacks jurisdiction over Counts III and IV of the amended complaint under FECA and the defendant is therefore entitled to summary judgment on those claims.

## 2. *Other Arguments.*

My conclusion that the court lacks jurisdiction over Counts III and IV of the amended complaint under FECA makes it unnecessary to reach the defendant’s remaining arguments

concerning these counts. However, I note that Title VII also provides the exclusive remedy for such claims. *Brown v. General Svcs. Admin.*, 425 U.S. 820, 829 (1976). The plaintiff argues that his emotional distress “arises out of conduct that exceeds ‘employment discrimination’ and evinces a pattern of antagonism that is so egregious to constitute separate acts of intentional misconduct.” Plaintiff’s Response at 22. Without citation to authority, the plaintiff argues that such conduct entitles him to exemption from the exclusivity provision of Title VII because it “deserves a remedy under the common law of Maine.” *Id.* The plaintiff in *Pfau v. Reed*, 125 F.3d 927 (5th Cir. 1997), *petition for cert. filed* 66 U.S.L.W. 3720 (U.S. Apr. 8, 1998), made a similar argument in her sexual harassment action brought under Title VII against a federal agency. She argued, *inter alia*, that her claim of intentional infliction of emotional distress was not pre-empted by Title VII because the “types and instances of conduct [advanced] in support of her intentional infliction of emotional distress claims [were] different from those she ha[d] advanced in support of her Title VII claims.” *Id.* at 932. The Fifth Circuit held that “[w]hen the same set of facts supports a Title VII claim and a non-Title VII claim against a federal employer, Title VII preempts the non-Title VII claim,” and that a plaintiff “cannot avoid Title VII preemption by picking and choosing which of her factual allegations she wishes to allocate to her Title VII claims and to her independent torts claims.” *Id.* at 933. *See also Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 493 (7th Cir. 1997) (common-law claim of infliction of emotional distress supported by identical factual allegations of Title VII claim preempted); *Chergosky v. Hodges*, 975 F. Supp. 799, 801 (E.D.N.C. 1997) (same).

The defendant is entitled to summary judgment on Counts III and IV on the ground of preemption by Title VII as well. I do not reach the defendant’s remaining arguments.

#### IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as all claims raised in Count II of the amended complaint except any claims of unlawful retaliation based on a delayed quality step increase in 1991, the 1990 order that the plaintiff perform work beyond the limits of his light duty status, the ordering of the April 1991 fitness-for-duty examination, the plaintiff's June 1991 request for permanent light duty status, the July 1991 letter proposing to place the plaintiff on off-duty non-pay status, and the alleged 1992 order by Kenneth Winters to Marcel Desrosiers to antagonize the plaintiff into acting in a manner that would allow the Postal Service to terminate the plaintiff's employment; and as to Counts III and IV of the amended complaint.

#### 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, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*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 6th day of October, 1998.*

---

*David M. Cohen  
United States Magistrate Judge*