



## I. Summary Judgment Standards

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 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 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 . . . .’” *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 Context

The parties' statements of material facts, credited to the extent that they are either admitted or supported by record citations in accordance with Loc. R. 56, and viewed in the light most favorable to Shaw, reveal the following:<sup>1</sup>

Shaw worked in the food-service department of MSAD #61, first as a food-service worker for four or five years and then as director of food-service operations from midyear 1989 through the end of the 1997-98 school year. Statement of Material Facts Not in Dispute ("Defendants' SMF") (Docket No. 11) ¶ 1; Plaintiff's Opposing Statement of Material Facts and Additional Facts ("Plaintiff's Opposing SMF") (Docket No. 16) ¶ 1. While Shaw was director of food-service operations Terrance Towle, business manager of MSAD #61, was her supervisor. *Id.* ¶ 2. Towle was the only male who worked in the MSAD #61 central office. *Id.* ¶ 3. Shaw felt that she had a poor working relationship with Towle from the beginning. *Id.* ¶ 4. As Shaw described it, Towle "would yell at me in a hostile manner. He would be red faced, use finger pointing, fist shaking and a loss of control." *Id.*

During the 1996-97 school year Towle interviewed all of the food-service workers in MSAD #61 regarding complaints about Shaw. *Id.* ¶ 5.<sup>2</sup> A number of workers Towle interviewed did indeed have complaints about Shaw. *Id.* Towle met with Shaw in approximately February 1997 to go over

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<sup>1</sup> The defendants failed to file a separate reply statement of material facts, instead incorporating responses to the plaintiff's facts in the body of their reply memorandum. *See generally* Defendants' Reply Memorandum in Support of Motion for Summary Judgment ("Defendants' Reply") (Docket No. 20). Local Rule 56 requires the filing of a separate reply statement of material facts containing numbered paragraphs admitting, denying or qualifying the opponent's statements, with denials and qualifications supported by proper record citations. The strewing of responses to facts throughout the body of a brief contravenes not only the letter but also the spirit of the rule, key purposes of which are to focus the issues and to conserve the time of counsel and the court. To the extent the reply brief attempts to respond to the plaintiff's opposing statement of material facts, it is accordingly disregarded. *See Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995) ("The parties are bound by their [Local Rule 56] Statements of Fact and cannot challenge the court's summary judgment decision based on facts not properly presented therein.").

<sup>2</sup> Shaw asserts that the defendants' statement that "Brown was told by various members of the MSAD 61 Board of Directors that they had received complaints about Mrs. Shaw" is hearsay and should be excluded. Plaintiff's Opposing SMF ¶ 5. It is unclear whether the statement is hearsay in the sense that it is offered to prove the truth of the matter asserted; however, in that nothing of significance turns on it I disregard it. The parties dispute whether Brown directed Towle to investigate complaints. *Id.* In any event, Brown never saw any reports of the "investigation" and Towle has no documents relating to it. Plaintiff's Opposing SMF ¶ 5.

the substance of the complaints he had heard. *Id.* ¶ 6. Thereafter, Shaw’s performance in the areas criticized improved. *Id.* By spring 1997 the MSAD #61 lunch program was operating at a significant deficit. *Id.* ¶ 7.<sup>3</sup>

Towle and Shaw had an altercation on June 24, 1997 arising from the fact that Towle had asked a clerk who generally was assigned to food service to answer telephones in the Business Office while employees there were busy closing out the year. *Id.* ¶ 8. Shaw claims that when she raised the issue with Towle he spoke to her in “loud, inappropriate tones.” *Id.* As a result of that incident, Shaw met with Brown on July 1, 1997 to communicate her concerns about Towle, including a harassment complaint. *Id.* ¶ 9. Shaw told Brown that Towle had behaved inappropriately to her, yelled at her and behaved in a threatening manner. *Id.* ¶ 10. After receiving Shaw’s complaint, Brown interviewed Towle and other employees whom Shaw claimed had witnessed the incident. *Id.* ¶ 11. Towle and the other employees told Brown that “in essence” Shaw was the aggressor and was yelling and screaming. *Id.* ¶ 12. Brown met again with Shaw and, after receiving her permission, invited Towle to join the meeting. *Id.* ¶ 13. At the meeting, the three discussed ways in which Towle and Brown could improve their communication. *Id.* Brown did not bring up the fact that Shaw believed Towle’s actions constituted harassment; instead, Brown said it was her impression Shaw and Towle had a “communication” problem. Plaintiff’s Opposing SMF ¶ 13. Shaw denies that it was simply a problem with communication. *Id.* In her view, Towle’s conduct was harassment. *Id.* At the conclusion of the meeting, Brown believed that Towle and Shaw would be able to work together productively. Defendants’ SMF ¶ 13; Plaintiff’s Opposing SMF ¶ 13. She did not tell the school board about Shaw’s complaint. *Id.*

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<sup>3</sup> Shaw states that the deficit was not attributable to any negligence on her part, Plaintiff’s Opposing SMF ¶ 7; however, that statement is not supported by the record citations given. A second statement, that Shaw was a good, dedicated director of food services, is appropriately supported. *Id.*

On June 26, 1997 Towle gave Shaw an evaluation. *Id.* ¶ 14. Shaw viewed the second and third paragraphs of the written-comment portion as negative and as having resulted from her complaint about Towle. Plaintiff’s Opposing SMF ¶ 14.<sup>4</sup> Shaw started work at the beginning of the 1997-98 school year. Defendants’ SMF ¶ 15; Plaintiff’s Opposing SMF ¶ 15. However, on September 26, 1997 she missed work for health reasons and did not return for the remainder of the year. *Id.* MSAD #61 knew that Shaw contended she was out of work as a result of stress and anxiety caused by Towle’s harassment. Plaintiff’s Opposing SMF ¶ 15. The school district received a number of doctor’s notes indicating that Shaw was unable to work because of stress, as well as workers’ compensation forms indicating that she was out of work as a result of harassment and verbal abuse by a supervisor. Defendants’ SMF ¶ 16; Plaintiff’s Opposing SMF ¶ 16.

In spring 1998 MSAD #61 was informed that Shaw could not return to work if she were required to work under Towle. *Id.* ¶ 17.<sup>5</sup> It is important that the food-service director report to the business manager at MSAD #61 because much of what the food-service director does impacts directly on the budget. *Id.* ¶ 18. Moreover, Brown felt that the reporting structure was appropriate given that Towle had prior experience in food-service programs. *Id.* However, MSAD #61’s transportation/custodial maintenance supervisor at one time reported to Towle as business manager but later was allowed to report directly to the superintendent. Plaintiff’s Opposing SMF ¶ 18.<sup>6</sup>

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<sup>4</sup> Shaw asserts that the evaluation was dated July 2, 1997, Plaintiff’s Opposing SMF ¶ 14; however, the evaluation is dated June 26, 1997. Evaluation of Performance, attached as Exh. 7 to Deposition of Susan K. Shaw, filed with Defendants’ SMF. Shaw’s signature acknowledging that she read the evaluation is dated July 2, 1997. *Id.* The defendants dispute that the evaluation was negative. Defendants’ SMF ¶ 14.

<sup>5</sup> Shaw objects to this statement *inter alia* on the ground that it arose from settlement discussions and accordingly is inadmissible pursuant to Fed. R. Evid. 408. Plaintiff’s Opposing SMF ¶ 17. However, Shaw’s assertion that “Brown claims she learned this from her lawyer while the parties were attempting to resolve their differences” is unsupported by any citation to the record.

<sup>6</sup> The defendants also assert that Shaw refused to resume her position as food-service director unless she could report to someone other than Towle; however, that statement is unsupported by any record citation. Defendants’ SMF ¶ 21; Plaintiff’s Opposing SMF ¶ 21.

The MSAD #61 board of directors voted to eliminate the position of food-service director. Defendants' SMF ¶ 19; Plaintiff's Opposing SMF ¶ 19.<sup>7</sup> The earliest time that MSAD #61 could have eliminated Shaw's position after she reported harassment by Towle was in spring 1998, when the budget was being approved by the financial committee of the school board. Plaintiff's Opposing SMF ¶ 27. According to MSAD #61, the sole reason for the decision was to cut costs; Shaw contends that this was a pretext. Defendants' SMF ¶ 19; Plaintiff's Opposing SMF ¶ 19. Elimination of Shaw's position was not the only option outlined by Towle, who did not recommend to the board that it eliminate the position. *Id.* ¶ 20.<sup>8</sup> Towle presented as an option that the food program be subsidized; however, he knew that "the school board in district 61, whether it[']s right or [it's] wrong, will not subsidize the lunch program, they absolutely refused for years to subsidize [that] lunch program. . . . They will not put any money into it, it has to be self supporting." Plaintiff's Opposing SMF ¶ 20.<sup>9</sup> Shaw was paid all to which she was entitled under her contract. Defendants' SMF ¶ 22; Plaintiff's Opposing SMF ¶ 22.<sup>10</sup>

Shaw filed complaints with the Maine Human Rights Commission and the Equal Opportunity Employment Commission ("EEOC") alleging sexual discrimination and disability discrimination and stating that "I was retaliated against by Mr. Towle after I reported his behavior[.]" *Id.* ¶ 23.<sup>11</sup>

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<sup>7</sup> Shaw's additional assertion that her job was eliminated "halfway through her written contract" is not supported by the citation given. Plaintiff's Opposing SMF ¶ 19.

<sup>8</sup> The defendants' statement that the board acted only after Towle "outlined a number of options" is not supported by the citation given. Defendants' SMF ¶ 20.

<sup>9</sup> Shaw's assertion that this was "[t]he other option" presented to the board is not supported by the citation given. Plaintiff's Opposing SMF ¶ 20.

<sup>10</sup> Shaw denies this statement, asserting that she was not paid for six days in contract-year 1997 and was paid nothing during contract-year 1998. Plaintiff's Opposing SMF ¶ 22. However, this assertion is not supported by its accompanying citation to the deposition testimony of Judene Dyer. Dyer testified that Shaw should have had only six days of unpaid leave during the 1997-98 school year and that, although Dyer did not know how many unpaid days MSAD #61 gave Shaw, Shaw's last paycheck was received during April vacation week. Deposition of Judene B. Dyer, attached to Plaintiff's Opposing SMF, at 29-36, & Exh. 1 thereto.

<sup>11</sup> The defendants claim that Shaw did not allege retaliation. Defendants' SMF ¶ 23. The document cited shows that, although Shaw did not check a box marked "retaliation," she reported retaliation in the narrative portion of her charge. *See* Charge of Discrimination, attached as Exh. B to Affidavit of Candace Brown (Docket No. 12).

Shaw's concerns about Towle included, among other things, the way he looked at her, his unexpected appearances very close behind her, comments he made about his sex life with his wife, stories about extramarital affairs on snowmobile trips, calling her a "dumb broad," and that he did not treat women the same way he treated men. Plaintiff's Opposing SMF ¶ 25.<sup>12</sup>

Following Shaw's complaint to Brown concerning Towle on or about July 1, 1997, she was retaliated against in the following ways: (i) she was suddenly counseled that she could not work the hours she had previously worked; (ii) she was denied reimbursement for college courses that had previously been approved, although there had been no change that would explain the denial; (iii) she was denied paid sick and personal leave to which she was entitled by contract; (iv) her office was not included in plans for a new building; and (iv) ultimately her position was "eliminated" in the middle of a two-year written contract. *Id.* ¶ 26.<sup>13</sup>

### III. Analysis

In Count I of her complaint Shaw asserts that she was subject to retaliation, in violation of Title VII of the Civil Rights Act of 1964 and the Maine Human Rights Act, for reporting what she believed to be an unlawfully hostile work environment. Complaint ¶¶ 23-24. The defendants seek summary judgment as to this count on the alternative grounds that Shaw failed to exhaust her remedies and, in any event, her claim founders on the merits. Defendants' Motion at 7-12. While I find that Shaw exhausted her remedies, I agree that she makes out too weak a case to survive summary judgment.<sup>14</sup>

"[A] claimant who seeks to recover for . . . an asserted violation of Title VII, first must exhaust administrative remedies by filing a charge with the EEOC, or alternatively, with an appropriate state

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<sup>12</sup> I have deleted those portions of Shaw's statement that are unsupported by the citations given.

<sup>13</sup> I have deleted those portions of Shaw's statement that are unsupported by the citations given.

<sup>14</sup> Inasmuch as neither Shaw nor the defendants make any argument that state law differs from federal law with respect to her retaliation (*continued on next page*)

or local agency, within the prescribed time limits.” *Bonilla v. Muebles J.J. Alvarez, Inc.*, 194 F.3d 275, 278 (1st Cir. 1999). A failure to do either, “if unexcused, bars the courthouse door[.]” *Id.* The defendants contend that, by failing to check a box marked “retaliation” on her EEOC complaint form, Shaw failed to exhaust administrative remedies. Defendants’ Reply at 2-3. However, the record reveals that Shaw asserted in narrative accompanying the EEOC charge form that she had been subject to retaliation. This sufficiently placed the EEOC on notice of her retaliation claim. *See, e.g., Duggins v. Steak ‘N Shake, Inc.*, 195 F.3d 828, 831-33 (6th Cir. 1999) (holding that, although defendants made much of fact that plaintiff omitted to check box marked “retaliation” on one-page EEOC charge form, “[w]here the plaintiff alleged facts to the EEOC which clearly included retaliation allegations, even though those facts were relayed through an affidavit, and where that plaintiff was not represented by legal counsel in writing her one-page EEOC charge, such a plaintiff should not be precluded from bringing a retaliation claim in the complaint.”); *Auston v. Schubnell*, 116 F.3d 251, 254 (7th Cir. 1997) (when plaintiff neither checked box marked “retaliation” nor included any reference to retaliatory conduct in his account of facts, claims were not fairly included within EEOC charge); *see also White v. New Hampshire Dep’t of Corr.*, 221 F.3d 254, 263 (1st Cir. 2000) (“[T]he exact wording of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow . . . . Rather, the critical question is whether the claims set forth in the civil complaint come within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.”) (citation and internal quotation marks omitted).

I turn to the merits. Title VII proscribes an employer from discriminating against an employee “because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation,

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claim, I shall likewise assume that federal analysis controls the outcome as to both.

proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a). A plaintiff alleging retaliation “must first prove, by a preponderance of the evidence, a *prima facie* case of retaliation.” *Provencher v. CVS Pharmacy, Div. of Melville Corp.*, 145 F.3d 5, 10 (1st Cir. 1998). Such a *prima facie* case consists of “a showing that: (1) the employee engaged in conduct that Title VII protects; (2) the employee suffered an adverse employment action; and (3) the adverse action is causally connected to the protected activity.” *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000). “If the plaintiff succeeds, the defendant has a burden of production to articulate a legitimate, non-discriminatory reason for its challenged actions.” *Provencher*, 145 F.3d at 10. “Then by a preponderance of the evidence, the plaintiff must show that the proffered reason is pretextual.” *Id.* “At all times, however, the plaintiff retains the ultimate burden to show that he has been the victim of intentional discrimination.” *Id.* “[A] *prima facie* case and sufficient evidence to reject the employer’s explanation may permit a finding of liability[.]” *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2109 (2000).

The defendants contend and I agree that Shaw does not even make out a *prima facie* case. See Defendants’ Motion at 9. Shaw’s claim in a nutshell is that on July 1, 1997 she told Brown that she had been harassed by Towle, and that various acts of retaliation, including ultimately the elimination of her position, flowed from this event. Plaintiff’s Opposition at 1. However, no fact cognizable on summary judgment (*i.e.*, admitted or properly supported in accordance with Loc. R. 56) supports a finding that, per the first prong of the *prima facie* test, she engaged in protected conduct in the sense that she complained of “sexual harassment,” as opposed simply to harassment in its generic sense.<sup>15</sup> Both Shaw and Brown referred to or perceived Shaw’s July 1st complaint as one of “harassment”; however, semantics aside, the only concrete evidence is that on July 1st Shaw

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<sup>15</sup> “Harassment” is defined in relevant part as “the act or an instance of harassing: VEXATION, ANNOYANCE[.]” Webster’s Third (*continued on next page*)

complained that Towle had yelled at and threatened her. Although Shaw avers that she was in fact concerned about sexual or gender-based behavior on Towle's part (*i.e.*, standing too close, making comments about his sex life and treating men and women differently), there is no evidence that these concerns were relayed to Brown on July 1, 1997 or at any other relevant time.

Shaw apparently subjectively perceived her July 1st complaint as a protest against unlawful as opposed simply to vexatious behavior. However, an employee must have harbored "a reasonable belief that [her] activity was protected by Title VII"; she "cannot avoid scrutiny of [her] claims merely by claiming such a belief." *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997) (citation and internal quotation marks omitted). There being no evidence that Shaw complained to Brown that Towle's behavior was gender-based, she cannot reasonably be perceived as having complained against conduct proscribed by Title VII. *See, e.g., Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 706 (7th Cir. 2000) (plaintiff's grievance which included complaints that supervisor mocked his homosexuality, screamed and refused to communicate in professional manner "did not involve sexual harassment . . . because it did not assert that Edwards treated Hammer differently because he is a man.").

Even assuming *arguendo* that Shaw made out a *prima facie* case, she still would fail to raise a triable issue of pretext. MSAD #61 evinces evidence that the school board terminated Shaw's position for a legitimate, nondiscriminatory reason. In response, Shaw offers merely a bald assertion that this reason was pretextual.<sup>16</sup> Such conclusory statements cannot forestall summary judgment. *See, e.g., Burns v. State Police Ass'n of Mass.*, 230 F.3d 8, 9 (1st Cir. 2000) (opposing party may not rely

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New International Dictionary 1031 (1981).

<sup>16</sup> In her statement of material facts, Shaw cites to documents containing details of her allegation of pretext. *See* Plaintiff's Opposing SMF ¶ 19; Affidavit of Susan Shaw, attached to Plaintiff's Opposing SMF, & Exh. A thereto. Details omitted from a statement of material facts do not form a part of the summary-judgment record. *See, e.g., CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 888 F. Supp. 192, 201 n.7 (D. Me. 1995), *aff'd*, 97 F.3d 1504 (1st Cir. 1996) ("Under [Local Rule 56], it is not the court's duty to (continued on next page)

on conclusory allegations, unsupported speculation to defeat summary judgment). MSAD #61 accordingly is entitled to summary judgment in its favor as to Count I.

In view of the recommended dismissal of Shaw’s foundational federal claim, I further recommend that the court refrain from exercising its supplemental jurisdiction over her two remaining state-law claims as against MSAD #61, Count II (asserting breach of contract) and Count III (asserting violation of 26 M.R.S.A. § 626). See Complaint ¶¶ 25-28; *Camelio v. American Fed’n*, 137 F.3d 666, 672 (1st Cir. 1998) (“[T]he balance of competing factors ordinarily will weigh strongly in favor of declining jurisdiction over state law claims where the foundational federal claims have been dismissed at an early stage in the litigation.”).<sup>17</sup>

#### IV. Conclusion

For the foregoing reasons, I recommend that the Defendants’ Motion be **GRANTED** as to Brown on Counts I-III; **GRANTED** as to MSAD #61 on Count I, and that Counts II and III as to MSAD #61 be **DISMISSED** on the basis of a declination to exercise supplemental jurisdiction.

#### 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.*

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go beyond the parties’ statements of material facts. . . . The parties are bound by their [Local Rule 56] Statements of Fact and the court’s summary judgment decision will be based solely upon facts properly presented therein.”).

<sup>17</sup> Shaw’s state-law claim of retaliation, which is disposed of on the same basis as her Title VII retaliation claim, properly is reached on the merits. See *Van Harken v. City of Chicago*, 103 F.3d 1346, 1354 (1st Cir. 1997) (noting appropriateness of exercise of supplemental jurisdiction to adjudicate state-law claim that is coterminous on merits with federal claim); *Bishop v. Bell Atlantic Corp.*, No. 99-189-B, 2001 WL 40910, \*3 (D. Me. Jan. 11, 2001) (claim of unlawful retaliation under Maine Human Rights Act analyzed in same manner as claim of Title VII discrimination).

*Dated this 22nd day of January, 2001.*

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*David M. Cohen*  
*United States Magistrate Judge*

TRLIST STNDRD

U.S. District Court  
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-217

SHAW v. MSAD 61, et al  
Assigned to: JUDGE GENE CARTER  
Demand: \$0,000  
Lead Docket: None  
Dkt# in other court: None

Filed: 07/24/00  
Jury demand: Plaintiff  
Nature of Suit: 442  
Jurisdiction: Federal Question

Cause: 28:1331 Fed. Question: Employment Discrimination

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plaintiff

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v.

MSAD 61  
defendant

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[term 09/28/00]

MELISSA A. HEWEY  
[term 09/28/00]  
(See above)  
[COR LD NTC]

CANDACE BROWN  
defendant

MELISSA A. HEWEY  
(See above)  
[COR LD NTC]

