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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Lee Kent Hempfling, Plaintiff, vs. L.M. Communications Of South Carolina Inc.,, Kentucky Corporation, , L.M. Communications II Of South Carolina Inc Kentucky Corporation, Defendants	)))))))))))))))	Case No.: **2:04-01373-23BG** **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

STATEMENT OF THE ISSUES PRESENTED 1

TABLE OF AUTHORITIES 3

INDEX OF EXHIBITS 7

STATEMENTS OF FACT 9

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Plaintiff is entitled to summary judgment as a matter of law on all of Plaintiff's claims because of the factual record.

2. Plaintiff Lee Kent Hempfling brought this action against Defendant Corporations alleging retaliation with malice and reckless indifference to the federally protected rights of an aggrieved individual on May 5, 2004 (Document 1), revised May 25, 2004 (Document 4) alleging retaliation against Plaintiff and a hostile work environment, (Document 4, First Cause of Action Paragraph 6). Plaintiff Exhibit 1. Explained in detail in Exhibit 123**.**
3. A Federal question and venue pursuant to 28 U.S.C. §1331, 28 U.S.C. §1332(a)(1), 28 U.S.C. §1331 (c)(1), and 28 U.S.C. §1391(a)(2), is present over issues of damages in cases of intentional discrimination in employment under 42 U.S.C. § 1985(3) and 42 U.S.C. §1981(a), 42 U.S.C. §1981(a)(1), and 42 U.S.C. §1981(b)(1).
4. The matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. §1332(a).
5. Defendants employed fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year (applicable to this case's time frame). Exhibit 121.
6. Plaintiff served as Program Director, a management position. Skinner v. Maritz, Inc., C F.3d C (2001 WL 641556, 8th Cir., 2001 (An at-will employee, employed without a written contract in an at-will relationship, has a "contract" within the meaning of civil rights statutes guaranteeing equal rights to make and enforce contracts.)) Exhibit 160, 165 & 167, (Fed. R. Evidence P. 801 D2D).
7. Following the receipt of a Roseboro Order (Document 17), filed July 23, 2004 from the Court, Plaintiff requested of the Court and was first served by the Court, all filings made by Defendants in this case.
8. Plaintiff filed responses and memoranda, accepted by the Court under the Affidavit, as (Document 20) on August 6, 2004.

TABLE OF AUTHORITIES

1. 28 U.S.C. §1331
2. 28 U.S.C. §1332(a)
3. 28 U.S.C. §1332(a)(1)
4. 28 U.S.C. §1331(c)(1)
5. 28 U.S.C. §1391(a)(2)
6. 29 C.F.R. § 1604.11(d) an employer is liable for harassment by a co-worker or non-employer if management knew or should have known of the misconduct, unless the employer can show that it took immediate and appropriate corrective action.
7. 42 U.S.C. §1981(a)
8. 42 U.S.C. §1981(a)(1)
9. 42 U.S.C. §1981(b)(1)
10. 42 U.S.C. § 1985(3)
11. 42 U.S.C. § 2000e-2(a) (1994)
12. 42 U.S.C. § 2000e-3(a)
13. Federal Rules of Civil Procedure 56
14. Federal Rules of Evidence Procedure. 801 D2D A statement is not hearsay if (it is) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship
15. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1983) The conduct in question must (1) be "severe or pervasive enough to create an objectively hostile or abusive work environment," and (2) be subjectively perceived by the victim to be abusive.
16. Wileman v. Frank , 979 F.2d 30, 33 (4th Cir. 1992). Under Title VII, the plaintiff bears the initial burden of proving a prima facie case of discrimination by raising an inference that the defendant acted with discriminatory intent.
17. McDonnell Douglas Corp. v. Green , 411 U.S. 792, 802 (1973)). the Supreme Court's decision in McDonnell Douglas v. Green required the employer to spell out its "legitimate, non-discriminatory reason" for termination.
18. Ross v. Communications Satellite Corp. , 759 F.2d 355, 365 (4th Cir. 1985). A plaintiff makes out a prima facie case of retaliation by showing that he engaged in a protected activity, that he suffered an adverse employment action, and that the two were causally related.
19. Bryant v. Bell Atlantic Mary-land, Inc., 288 F.3d 124, 133, 133 n.7 (4th Cir. 2002); To establish a prima facie case {plaintiff] must show that: (1) he is a member of a protected class; (2) he was qualified for his job and his job performance was satisfactory; (3) he was fired; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances.
20. Karpel v. InovaHealth Sys. Serv., 134 F.3d 1222, 1228 (4th Cir. 1998). Supports Bryant.
21. Skinner v. Maritz, Inc., C F.3d C (2001 WL 641556, 8th Cir., 2001) An at-will employee, employed without a written contract in an at-will relationship, has a "contract" within the meaning of civil rights statutes guaranteeing equal rights to make and enforce contracts.
22. Spriggs v. Diamond Auto Glass, - F.3d - (1999 WL 34938, 4th Cir.) Appeals court held that although the employment was at-will, the case could proceed.

23. Trent v. Valley Elec. Ass'n, 41 F.3d 524, 526 (9th Cir. 1994) The EEOC and most courts have stated that Title VII's anti-retaliation provision protects opposition to an employment practice, so long as the employee has a 'reasonable and good-faith belief' that the practice opposed constituted conduct unlawful under Title VII.
24. Pettway v. American Cast Iron Pipe Co. , 411 F.2d 998, 1006 n.18 (5th Cir. 1969) those who testify in Title VII proceedings are endowed with "exceptionally broad protection.";
25. Merritt v. Dillard Paper Co. , 120 F.3d 1181, 1186 (11th Cir. 1997) "The word `testi- fied' is not preceded or followed by any restrictive language that lim- its its reach." it is followed by the phrase "in any manner" -- a clear signal that the provision is meant to sweep broadly. Id. ;
26. United States v. Wildes , 120 F.3d 468, 470 (4th Cir. 1997) ("`[A]ny' is a term of great breadth."), cert. denied , 118 S. Ct. 885 (1998). Congress could not have carved out in clearer terms this safe harbor from employer retaliation. A straightforward reading of the statute's unrestrictive language leads inexorably to the conclusion that all testimony in a Title VII proceeding is protected against punitive employer action.
27. Glover v. S.C. Law Enforcement Div., 170 F.3d 411, 412-414 (4th Cir. 1999) Participation activities are interpreted very broadly and are likely to be protected regardless of the reasonableness of the alleged statutory violation.
28. Clover v. Total System Services Inc., 176 F.3d 1346, 1352-1353 (11th Cir. 1999) (rejecting the employer's claim that plaintiff's conduct was not protected activity because she simply participated in an internal investigation of another employee's EEOC charge, and this was not participation in an investigation intended to be covered by Title VII; applying a broad definition of "participation in any manner" under Title VII, the court found that an internal investigation of an employee's EEOC charge is, in effect, an extension of the EEOC investigation itself since the agency often relies on information gleaned from the employer's own internal investigation).
29. Cook v. CSX Trans. Corp. , 988 F.2d 507, 512 (4th Cir. 1993) ("[T]o focus on one piece of the record without considering the whole would distort the permissible inferences to be drawn.").
30. Perry v. Ethan Allen, 115 F.3d 143, 149 (2d Cir. 1997) ("When harassment is perpetrated by the plaintiff's coworkers, an employer will be liable if the plaintiff demonstrates that 'the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it'"), cited in Faragher, 118 S. Ct. at 2289.
31. Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1244-45 (3d Cir. 1978) (affording male standing to sue following discharge because "his actions and advocacy stood in the path of a plan to deprive women of their equal opportunity rights")
32. EEOC v. Bailey, 563 F.2d439, 452 (6th Cir. 1977) (holding that EEOC could bring suit based on white female's charge of discrimination against blacks)
33. Waters v. Hueblein, 547 F.3d 466, 469-70 (9th Cir. 1976) (affording standing to white female to redress discrimination against blacks and Spanish-surnamed employees)
34. Lissau v. Southern Food Services, Inc., 159 F.3d 177, 184 (4th Cir. 1998) (the affirmative defense "is not available in a hostile work environment case when the supervisor takes a tangible employment action against the employee as part of the harassment")

35. Perry v. Ethan Allen, 115 F.3d 143, 149 (2d Cir. 1997) (concluding evidence of harassment directed at women [people] other than plaintiff is relevant to hostile environment analysis)
36. Splunge v. Shoney's, Inc., 97 F.3d 488, 490 (11th Cir. 1996) (where harassment of plaintiffs was so pervasive that higher management could be deemed to have constructive knowledge of it, employer was obligated to undertake corrective action even though plaintiffs did not register complaints)
37. Fall v. Indiana Univ. Bd. of Trustees, 12 F. Supp.2d 870, 882 (N.D. Ind. 1998) (employer has constructive knowledge of harassment by supervisors where it "was so broad in scope and so permeated the workplace that it must have come to the attention of someone authorized to do something about it")
38. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) The Supreme Court holds that Title VII prohibits racial discrimination against whites as well as blacks.
39. Carson v. Veterans Administration, when there is direct evidence of reprisal, the traditional Title VII analysis is inapplicable. EEOC Request No. 01871596 (1988), citing Trans World Airlines, Inc. v. Thurston, 105 S.Ct. 613 (1985); Wilson v. City of Aliceville, 779 F.2d 631 (11th Cir. 1986). Direct evidence of discrimination cannot be overcome merely by introducing a legitimate, nondiscriminatory reason for the adverse action.
40. Williamson v. City of Houston, 148 F.3d 462 (5th Cir., 1998). Fact that supervisor had been informed means that knowledge could be imputed to employer, who failed to act to protect employee.
41. Von Gunten, 2001 WL 273104, at *5 (citing Ross, 759 F.2d at 363). 'ultimate employment decision' is not the standard in [the Fourth] [C]ircuit."
42. Munday v. Waste Management of North America, Inc., 126 F.3d 239 (4th Cir. 1997), cert. denied, 522 U.S. 1116 (1998), the court of appeals recognized that retaliatory conduct affecting "the terms, conditions, or benefits" of employment could be actionable under Title VII.
43. James v. Booz Allen & Hamilton,Inc., 368 F.3d 371 (4th Cir. 2004) (quoting Bristow v. Daily Press,Inc., 770 F.2d 1251, 1255 (4th Cir. 1985)). "a calculated effort to pressure [plaintiff] into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers."
44. Torres v. Pisano, 116 F.3d 625, 633 (2d Cir. 1997) ("The fact that many of [the defendant's] statements were not made in [plaintiff's] presence is, in this case, of no matter; an employee who knows that her boss is saying things of this sort behind her back may reasonably find her working environment hostile.")
45. Hartsell v. Duplex Products, Inc. , 123 F.3d 766, 775 (4th Cir. 1997) (recognizing that discharge is an adverse employment action)
46. Palucki v. Sears, Roe- buck & Co. , 879 F.2d 1568, 1571 (7th Cir. 1989) It is axiomatic that an employer is free to set its own performance standards, provided such standards are not a "mask" for discrimination.
47. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279-81 (3d Cir. 2000). Farrell notes that the test for ‘causal connection’ in the prima facie case and the ultimate determination of whether the employer’s non-discriminatory reasons are pretextual are sometimes ‘conflated.’ The court thus holds that it ‘will not limit the kinds of evidence that can be probative of a causal link any more than the courts have limited the type of evidence that can be used to demonstrate pretext.’

48. Dister v. Continental Group, Inc., 859 F.2d 1108, 1116 (2d Cir. 1988) "The distinction lies between a poor business decision and a reason manufactured to avoid liability. Thus, facts may exist from which a reasonable jury could conclude that the employer's `business decision' was so lacking in merit as to call into question its genuineness."
49. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993) the Supreme Court explained the role of pretext in the following manner: The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination..."
50. Anderson v. G.D.C., Inc. The Fourth Circuit ruled that punitive damages were appropriate where an employer failed to adopt any anti-discrimination policy or conduct any training on the subject of discrimination.
51. Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000) The Supreme Court held that the plaintiff"s evidence of pretext was sufficient to find that the defendant"s asserted justification was false, permitting the jury to conclude that the employer had unlawfully discriminated.
52. Kolstad v. American Dental Assn., 119 S.Ct. 2118 (1999) Decision Reversed. Punitive damages may be imposed in a Title VII action without a showing of egregious or outrageous discrimination, independent of the employer's state of mind. To be liable for punitive damages, the employer must at least discriminate in face of a perceived risk that its actions will violate federal law.
53. Jiminez v. Mary Washington College , 57 F.3d 369, 377-78 (4th Cir.) the burden is on the employer to rebut the presumption of retaliation by articulating a legitimate non retaliatory reason for its actions. Id. The plaintiff must then demonstrate that the employer's reason was mere pretext for retaliation by proving "` both that the reason was false, and that discrimination was the real reason' for the challenged conduct."
54. Fuentes v. Perskie, 32 F. 3d 759, 764-765 (3rd Cir. 1994). plaintiff must demonstrate such weaknesses, implausibility's, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable fact finder could rationally find them "unworthy of credence, and hence infer " that the employer did not act for [the asserted] non discriminatory reasons.
55. Cole v. Ruidoso Mun. Sch. , 43 F.3d 1373, 1381 n.6 (10th Cir. 1994). Pretext can be proven in situations in which an employer's non discriminatory reason for its adverse employment action has not been applied to persons outside the plaintiff's protected group.
56. Pollard v. E.I. du Pont de Nemours & Co., 121 S. Ct. 1946 (2001), Decision Reversed. Front pay is not a part of the damages cap within the meaning of the Civil Rights Act of 1991, so damages in this case were not subject to the $300,000 cap. Front pay awards made in lieu of reinstatement to employment are not subject to statutory caps as the courts were instructed to "order such affirmative action as may be appropriate" in such instances.
57. McCue v. State of Kansas, Dept. of Human Resources, --F.3d-- (1999 WL 5064, 10th Cir.) or 165 F. 3d 784 (10th Cir., 1999) Decision Reversed as to front pay award. Title VII mentions damages for back pay but does not specify damages for front pay. However, courts may award "equitable relief" as they deem appropriate for Title VII violations. The judge may award front

pay for "future pecuniary loss," but it is an equitable relief that should not be submitted to the jury. The trial judge "is best equipped to equitably determine the proper amount for this award."

58. Williams v. Pharmacia, Inc., 1998 WL 81258 (7th Cir.) or 137 F. 3d 944 (7th Cir., 1998) Court of Appeals Decision Affirmed. Title VII allows court "to order such affirmative action as may be appropriate, which may include ... reinstatement ... with or without back pay ..., or any other equitable relief as the court deems appropriate." Reinstatement was not practical; "front pay is the functional equivalent of reinstatement because it is a substitute remedy." "The lost future earnings award ... compensates Williams for a lifetime of diminished earnings resulting from the reputational harms she suffered as a result of ... discrimination."

INDEX OF EXHIBITS

1	Right to Sue from EEOC
7	Thompson complaint letter to Martin invokes EEO (same as 16)
15	Thompson resignation letter
17	Thompson original packet sent to EEOC
19	Email to Consultant, details recent destructions, attacks,
20	Email from Consultant, 'I feel your pain'
26	Complaint letter of Skip St. John about critique
28	"Complaint letter from listener,
29	Logan meeting notes Cohn wanted written addendum
33	Email to Consultant about Majhor salary, Logan complaining and more
34	Email from Consultant, break down the walls, tough days ahead
38	Email to Consultant over 'I know you said to let things roll of my back'
39	Linda 'Logan' complaint letter about critique
40	"Email to Consultant withheld insurance, not permitted to put anything In writing, memos torn up"
41	Suesie Hempfling notes of her words in call FROM martin
42	Email to Consultant refusal to carry out order to violate Martin's 'no contact Trish' order
43	Musso Email
44	Threatening anti-Semitic email
45	Musso Email
46	Musso Email
47	Mussolina Email
48	Cohn email refuses to stop Musso or intimidation
50	Email to John Majhor 'what would you do'
51	Email from Consultant, think you've found a home Mr. Kent
54	Fax to Martin investigation of letter.
55	"Fax cover sheet to Attorney William Allen confirming telephone conversation demanding end to harassment"
56	Musso form mail
57	Email to Cohn demanding 'get this psychopath off my back'

58 Personal notes of phone call with Consultant asking about Trish
59 Email to Consultant plugola continues
60 Notice to Consultant of plugola issue
62 Email from bobby Collins Linda Logan complaint
63 Email from bobby Collins Linda up to something in production room
64 Email to Martin, Cohn, Hallett on plugola and Collins memos
67 Email from Musso to Majhor . 'just like lee'
69 Email to Consultant, Logan being publicized
72 Email from Consultant, hiring held up due to Skip and Trish lawsuits…
73 Email from Consultant, changes in supervisor order
75 "Email to Martin of internal problems Cohn out of town,
76 Email to Consultant "too lilly white for this format"
77 Fax confirmation sheet to Arbitron low power notice
78 Email to Consultant
79 Email from Consultant 'now I'm pissed'
80 Email to Consultant serious problems
81 Email from Consultant 'include Cohn and Martin'
82 Email from John Majhor business cards canceled
84 Forward of email to John Majhor with reply,
85 Claim of 'muddy' sound of station in email
86 Note handed to Collins by Thompson with resume and CD
87 Resume of Patricia Thompson submitted with CD Demo
88 Compact Disk of Thompson's presentation
89 Email to Consultant, Demo from Trish
90 Email from Cohn, processing
93 Email to Consultant, list of serious problems
94 Email From Consultant, response to serious problems
95 Memo from Dwight Lane regarding Musso incident
96 Email to Consultant over Cohn's wanting to change formats 'now'
97 "Fax from Citadel,
98 Memo from Musso refusing engineer contact
99 Email from Consultant copied Cohn
101 "Email from Consultant on 80's music list
102 Email from Consultant on revenue proposal for Martin
104 Email to Consultant more engineer interference
105 Email to Consultant, Cohn, Almond, ratings evaluation,
106 Email from Consultant 'nice job'
107 Meeting notes on traffic lost spots due to computer being down.
108 Email to Consultant, ratings embargoed
109 Email to Consultant, download of sales proposal request of programming
111 Personal notes reason "not happy with performance"
113 Charleston Post & Courier August 10, 2002
114 Email from Denise Moseley, love you and John
115 Email after discharge claiming responsibility included mp3
116 SONG FILE BRUCE's MIXDOWN CD 1
117 Patricia Thompson Original From5 Shows white supervisor discharged.
121 WCOO WYBB Telephone Contact list
123 Case Brief of employment period submitted in EEOC packet
126 Email from Consultant, sorry
128 Email from Dwight Lane, sorry, not deserved
130 John Majhor email and reply

131 Email from Mark Scott Id work with you any time
132 Email from Ken French , 'you're a good man'
133 I know what these people did to Lee ...
136 Dan Williams Reference
137 Email from Musso Charlie Said
138 John Majhor reference letter
139 Denise Moseley Reference
141 Email from Trish Thompson, reference
143 Email to Hallett, Sabotage of music on weekend
144 Email from Musso posing as Gary Lemel
160 Promissory note not dated,
181 Transcript of Meeting between Cohn and Thompson
182 CD audio recording of meeting between Cohn and Thompson
183 Musso public posting
184 Musso public posting
185 Musso public posting

STATEMENT OF FACTS

1. The first element of Plaintiff's prima facie case is proof that he engaged in statutorily protected activity. "Protected activity" is defined in Title VII's anti-retaliation provision, which classifies protected activity as either as opposition or participation. It is unlawful for an employer to discriminate against an employee if (1) he or she has opposed any practice made an unlawful employment practice by [Title VII], (the opposition clause), or (2) has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under [Title VII], (the participation clause). 42 U.S.C. § 2000e-3(a).
2. Plaintiff participated in a protected activity through opposition to discrimination and participation in an investigatory process in a telephone interview with Lynn Martin (Martin) (Exhibit 54, March 21, 2001, Fed. R. Evidence P. 801 D2D) who called Plaintiff's home following receipt of a follow up letter advising of EEO allegations (Exhibit 16, March 9, 2002), and a letter of resignation by Patricia Thompson, (Thompson) (Exhibit 15, February 28, 2002; Fed. R. Evidence P. 801 D2D) a minority employee, reporting to Plaintiff, who had complained about pay and hiring discrimination relevant prior to Plaintiff's arrival.

3. Such telephone call, (Exhibit 54, March 21, 2001; Fed. R. Evidence P. 801 D2D) was an investigation interview regarding the EEO allegations made in the letter of resignation by Thompson and the follow up letter advising of EEO allegations (Exhibit 16, March 9, 2002), wherein Plaintiff, through personal knowledge and belief, supported the allegations made by Thompson as truth.
4. Plaintiff participated in a protected activity through fax (Exhibit 54 March 21, 2002; Fed. R. Evidence P. 801 D2D), wherein Plaintiff faxed Martin a copy of the three page letter of resignation from Thompson, confirming the telephone conversation, wherein Martin had requested such document, in the ongoing investigation of a discrimination complaint filed with Defendants by Thompson.
5. Plaintiff participated in a protected activity through participation in the investigatory process giving testimony to Kentucky legal counsel of L.M. Communications Inc.,: William Allen (Allen) of Gess Mattingly & Atchison, P.S.C. of Lexington Ky. (GMA), over the phone, in a call placed by Allen to Plaintiff's home, (Exhibit 55, March 23, 2002; Fed. R. Evidence P. 801 D2D) to further the investigation of Thompson's complaint after the second letter from Thompson, (Exhibit 16, March 9, 2002).
6. Plaintiff participated in a protected activity through confirmation of that telephone call with Allen in fax (Exhibit 55, March 23, 2002; Fed. R. Evidence P. 801 D2D), wherein Plaintiff informed Allen he considered activity ongoing against him to be harassment, condoned by management and demanded that it be stopped.
7. Plaintiff participated in a protected activity through participation in an investigatory process telephone conference call involving Martin, Charlie Cohn (Cohn) , Consultant Don Hallett (Hallett) and Plaintiff in which Martin ordered no contact was to be made with Thompson until his order permitted. (Exhibit 72, April 16, 2002; Exhibit 42, March 18, 2002; Fed. R. Evidence P. 801 D2D)

8. Plaintiff participated in a protected activity through complaining to anyone about the alleged discrimination against oneself or others: to wit; complaining both verbally and in writing to others about the discrimination and acts of retaliation. (Exhibit 50, March 19, 2002; Exhibit 58, March 25, 2002; Exhibit 64, April 3, 2002; Exhibit 69, April 15, 2002; Exhibit 73, April 16, 2002; Exhibit 75, April 23, 2002; Exhibit 77, May 2, 2002; Exhibit 79, May 2, 2002; Exhibit 80, May 2, 2002; Exhibit 93, June 9, 2002; Exhibit 40, March 11, 2002; Exhibit 38, March 10, 2002; Exhibit 59, March 28, 2002; Exhibit 60, March 28, 2002; Fed. R. Evidence P. 801 D2D).
9. Upon notification in writing, the General Manager (Cohn) refused to stop the harassment. (Exhibit 48, March 16, 2002; Fed. R. Evidence P. 801 D2D)
10. On March 23, 2002 Plaintiff emailed the General Manager and demanded to 'get this psychopath off my back'. (Exhibit 57, March 23, 2002; Fed. R. Evidence P. 801 D2D)
11. Plaintiff participated in a protected activity through repeated pleadings for support in hiring a minority in opposition to discrimination. (Exhibit 76, April 26, 2002; Exhibit 84, May 7, 2002; Exhibit 89, May 17, 2002; Fed. R. Evidence P. 801 D2D)
12. Plaintiff participated in a protected activity through attempts to rectify such discrimination through repeated attempts to hire Thompson to a full time position, including making her audio demonstration presentation for official presentation in the selection process, after her resignation. (Exhibit 86, May 17, 2002; Exhibit 87, May 17, 2002; Exhibit 88, May 17, 2002)
13. Plaintiff participated in a protected activity in opposition to discrimination, through repeated requests for African-American participation on the radio station. (Exhibit 76, April 26, 2002; Exhibit 99 , June 8, 2002; Fed. R. Evidence P. 801 D2D)
14. Plaintiff participated in a protected activity in upholding and supporting the claims made by Thompson in her allegations of EEO violations to Martin, Allen, Cohn, Hallett (each of whom had knowledge that the Plaintiff engaged in a protected activity) and others. (Exhibit 117, August 21, 2002; Exhibit 70, August 1, 2002; Exhibit 17, August 1, 2002;)

15. Plaintiff opposed discrimination in a reasonable manner through the application of the position of program director and the answering of questions posed in investigations: truthfully, and the opposition was based upon a reasonable and good faith belief that there was discrimination occurring and the practices opposed constituted conduct unlawful under Title VII.
16. The second element of Plaintiff's prima facie case is proof that he suffered adverse employment action. The most obvious types of retaliation are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge. Other types of adverse actions include threats, reprimands, negative evaluations, harassment, or other adverse treatment.
17. Suspending or limiting access to an internal grievance procedure also constitutes an "adverse action." (Exhibit 40, March 11, 2002; Exhibit 75, April 23, 2002; Fed. R. Evidence P. 801 D2D) Cohn had prohibited contact with the 'owner' by prohibiting contact to the Lexington KY, area-code even for members of Plaintiff's family. On May 4, 2002 Hallett instructed Plaintiff to include Martin and Cohn in all correspondence, (Exhibit 81, May 4, 2002; Fed. R. Evidence P. 801 D2D), yet the prohibition of contact to the grievance procedure was not rescinded by Cohn.
18. Harassment emails received after discharge. (Exhibits 115 July 24, 2002 claiming responsibility for discharge (CD1); Exhibit 144 April 27, 2004; Exhibit 183, public harassment on April 23, 2004; Exhibit 184, public harassment April 29, 2004; Exhibit 185, public harassment May 3, 2004; Fed. R. Evidence P. 801 D2D).
19. Plaintiff experienced changes in the terms and conditions of employment and prosecution permission of his job duties. (Exhibit 40 March 11, 2002; Exhibit 76, April 26, 2002; Exhibit 69, April 15, 2002; Exhibit 98, June 16, 2002; Fed. R. Evidence P. 801 D2D)
20. Working conditions, through acts of harassment and intimidation were hostile and intolerable in an effort to induce Plaintiff to quit: (Exhibit 43, March 13, 2002; Exhibit 44, March 15, 2002; Exhibit 45, March 15, 2002; Exhibit 46, March 15, 2002; Exhibit 47, March 15, 2002; Exhibit 56, March 23, 2002; Exhibit 16 March 9, 2002; Exhibit 19, March 2, 2002; Exhibit 33, March 8,

2002; Exhibit 34, March 8, 2002; Exhibit 36, March 8, 2002, Exhibit 62, April 3, 2002; Exhibit 63, April 3, 2002; Exhibit 67, April 6, 2002; Exhibit 78, May 2, 2002; Exhibit 82, May 6, 2002; Exhibit 85, May 16, 2002 (similar email address used in Exhibit 144); Exhibit 90, May 17, 2002; Fed. R. Evidence P. 801 D2D)

21. Plaintiff experienced a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers: (Exhibit 26, March 5, 2002; Exhibit 28, March 5, 2002; Exhibit 29, March 6, 2002; Exhibit 39, March 10, 2002; Exhibit 41, March 13, 2002; Exhibit 95, June 9, 2002; Exhibit 96, June 10, 2002; Exhibit 98, June 26, 2002; Exhibit 104, July 4, 2002; Exhibit 107, July 9, 2002; Exhibit 111, July 23, 2002; Exhibit 137, March 28, 2002; Exhibit 143, March 3, 2002; Exhibit 100, June 21, 2002; Exhibit 101, June 28, 2002; Fed. R. Evidence P. 801 D2D)
22. Reference Plaintiff's Exhibit 182 and Exhibit 181 (transcript line 20), in which Cohn, said, "…we just had to do some stuff that I wasn't all that comfortable about…" . (Fed. R. Evidence P. 801 D2D)
23. Reference Plaintiff's Exhibit 182 and Exhibit 181 (transcript line 22), in which Cohn, said, "We just kinda had to do it…" . (Fed. R. Evidence P. 801 D2D)
24. The third element of Plaintiff's prima facie case is proof that there is a causal connection between the first element (protected class) and the second element (adverse action). (Ross v. Communications Satellite Corp. , 759 F.2d 355, 365 (4th Cir. 1985) A plaintiff makes out a prima facie case of retaliation by showing that [s]he engaged in a protected activity, that [s]he suffered an adverse employment action, and that the two were causally related.}
25. The adverse action occurred shortly after each protected activity and the person who undertook the adverse action was aware of the protected activity before taking the action.
26. Plaintiff at no time during employment ever received an unsatisfactory job performance evaluation. Plaintiff did receive (Fed. R. Evidence P. 801 D2D) satisfactory job references from

co-workers, all of whom were still employed by Defendants upon issuing these documents: (Exhibit 128, July 24, 2002, Exhibit 130, August 15, 2002; Exhibit 131, August 17, 2002; Exhibit 132, August 19, 2002; Exhibit 136, July 28, 2002; Exhibit 138, July 28, 2002; Exhibit 139, July 29, 2002; Exhibit 141, August 1, 2002; Fed. R. Evidence P. 801 D2D)**.**

27. At no time during employment was Plaintiff ever presented with any document alleging poor or unsatisfactory job performance. Other than reference to 'management style' (which was the result of receiving contrived complaints from employees after the receipt of honest and forthright job performance evaluations), no reference was ever made to Plaintiff's job performance other than in a complimentary way): (Exhibit 106, July 9, 2002; Exhibit 61, March 28, 2002; Exhibit 51, March 19, 2002; Exhibit 11, February 24, 2002; Exhibit 12, February 24, 2002, Exhibit 13, February 24, 2002; Exhibit 20, March 2, 2002; Exhibit 102, July 2, 2002; Exhibit 126, July 23, 2002; Fed. R. Evidence P. 801 D2D)
28. At no time during employment was Plaintiff ever presented with any document alleging improper conduct, violation of any company policy, tardiness or any other infraction of employment.
29. Plaintiff was never disciplined, nor shown, nor given indication of any pending discipline.
30. Plaintiff was highly qualified for his position. Exhibit 150, December 18, 2001; Exhibit 152, December 21, 2001; Exhibit 153, December 21, 2001; Exhibit 154, December 21, 2001; Exhibit 155, October 1, 2001; Exhibit 156, December 24, 2001; Exhibit 157, December 21, 2001; Exhibit 165, December 19.2001; Exhibit 166, December 19, 2001; Exhibit 169, December 19, 2001; Exhibit 178, January 28, 2001).
31. Under Plaintiff's management WCOO increased ratings to tie with sister station WYBB showing no cause for poor job performance or unsatisfactory job performance. (Exhibit 113, August 10, 2002).

32. The other employee who was not a member of the protected class was retained under similar circumstances: WYBB programmer Mike 'Allen' Almond (Almond) was not discharged. (Exhibit 113, August 10, 2002; Exhibit 97, June 7, 2002).

33. John Majhor (Majhor) walked out and quit upon hearing that Plaintiff was discharged. (Exhibit 114, July 23, 2002; "I want to be able to keep in touch with you so for now I will use email and I will email you with any messages etc from here, same for John. I love you and John dearly if you need anything let me know." Fed. R. Evidence P. 801 D2D)

34. Majhor returned to work and accepted the position Plaintiff held. Under Majhor, ratings of the station reduced below those of Plaintiff. Upon information and belief, Majhor retains the position to this date with lower performance than Plaintiff.

35. Plaintiff shows a causal connection between the protected activity and the adverse action in that following the February 28, 2002 letter of resignation from Thompson (which spoke highly of Plaintiff), adverse action began:

36. (Exhibit 19, March 2, 2002; showing March 1, 2002: interference in on-air traffic report presentation from a call inside the station: Public affairs commercials created by Plaintiff were tampered with: cross promote sweepers were tampered with: batteries drained in Plaintiff's desk: Fed. R. Evidence P. 801 D2D)

37. (Exhibit 143, March 3, 2002; tampering with music scheduling computer system and scheduled music. Fed. R. Evidence P. 801 D2D).

38. (Exhibit 26, March 5, 2002; Employee (Wayne (Skip St John) Morath) (St John), threatens law suit over being critiqued in job performance evaluation aircheck memo. Fed. R. Evidence P. 801 D2D)

39. (Exhibit 28, March 5, 2005; complaint letter about new person (Plaintiff) is shown to sales all staff by Cohn. The letter is not from a real listener.)

40. (Exhibit 29, March 6, 2002; Other employee (Linda 'Logan' Grumbine) (Logan) complains to Cohn about receiving a job performance critique memo. Cohn orders Plaintiff to amend the memo. Plaintiff refuses to change post-submission, an employment disciplinary document. Fed. R. Evidence P. 801 D2D)
41. (Exhibit 33, March 8, 2002; informing Hallett of infractions found in aircheck of Logan, two phone calls from 'listeners' regarding Logan; Fed. R. Evidence P. 801 D2D)
42. (Exhibit 33, March 8, 2002; Engineer Bruce Musso (Musso) calls Plaintiff at home to yell about receiving a memo requesting the moving of a microphone. Cohn instructed Plaintiff to write said memo. Fed. R. Evidence P. 801 D2D)
43. (Exhibit 33, March 8, 2002; property of Plaintiff's department is damaged Fed. R. Evidence P. 801 D2D)
44. (Exhibit 33, March 8, 2002; show prep of Plaintiff is stolen from Plaintiff's desk, Fed. R. Evidence P. 801 D2D)
45. (Exhibit 34, March 8, 2002; Hallett advises Plaintiff "Break down the walls, but don't create, stir or instigate battles. Tough days ahead…. You have my support!" Fed. R. Evidence P. 801 D2D)
46. Following Exhibit 16, March 9, 2002; letter from Thompson to Martin (which again spoke highly of Plaintiff) adverse action escalated:
47. (Exhibit 38, March 10, 2002: Thompson called Plaintiff regarding Logan's comments and attacks on Plaintiff at a station event. (Detailed in Exhibit 16), Fed. R. Evidence P. 801 D2D)
48. (Exhibit 39, March 10, 2002: Logan submits complaint letter over receipt of a bona fide job performance evaluation critique memo, demanding an apology and threatening legal action against Plaintiff. Fed. R. Evidence P. 801 D2D)
49. (Exhibit 40, March 11, 2002: Cohn tears up the critique memo in front of Plaintiff and Logan and orders to 'start from scratch'. Memo indicated 'booking dance parties' which is proven in two later incidents in violation of plugola laws against Logan. Fed. R. Evidence P. 801 D2D)

50. (Exhibit 40, March 11, 2002: Cohn ordered Plaintiff was not to put anything in writing. Fed. R. Evidence P. 801 D2D)

51. (Exhibit 40, March 11, 2002: Three accusations of lying from Cohn to Plaintiff. Fed. R. Evidence P. 801 D2D)

52. (Exhibit 40, March 11, 2002: Plaintiff's medical insurance had been held up. Immediate health insurance (due to Plaintiff's wife's medical condition) was part of the hiring agreement. Medical forms were submitted to Defendants before the starting date. Fed. R. Evidence P. 801 D2D)

53. (Exhibit 41, March 13, 2002: Details in notes of phone call with Martin and Plaintiff's wife advising Martin that an attempt was made by Logan (March 12, 2002) to 'set up' a sexual harassment complaint against Plaintiff. No investigation was ever held of the allegation. No mention was ever made by Martin or management of the allegation. Management repeatedly referred to Plaintiff's wife's phone call to Martin without reference to its contents. Martin placed that call in response to a message left by Plaintiff's wife.)

54. Following the conference call (9AM March 13, 2002) with Martin, Cohn and Hallett, wherein Martin discussed Thompson's complaint and the threatened legal action of Logan and St John and ridiculed Plaintiff for the call 'from' Plaintiff's wife: Martin ordered there to be no contact with Thompson pending her complaint: adverse action escalated:

55. (Exhibit 43, March 13, 2002, 9:29 at night: Musso sends email to Plaintiff "You suck" Fed. R. Evidence P. 801 D2D))

56. (Exhibit 44, March 15, 2002, using the email account of 'Donald Strawn', an engineering associate of Musso, a threatening anti-Semitic email with a photo of Yassar Arafat and two Palestinian gunmen holding AK-47's was sent to Plaintiff saying, "Mr. Morning Dick Jockey, This man would love to kiss yo cheeks!" The image contained, "Lee, Best wish's on the new job, Yassar!" Fed. R. Evidence P. 801 D2D) (The 'job' had started over a month earlier!)

57. (Exhibit 45, March 15, 2002: Plaintiff had written to Musso telling him his emails were not welcome and to stop their transmission. Musso responded, "dream on…" Fed. R. Evidence P. 801 D2D)

58. (Exhibit 46, March 15, 2002; Musso sent email to Plaintiff "you still suck". Fed. R. Evidence P. 801 D2D)

59. (Exhibit 47, March 15, 2002; Plaintiff had filed an official complaint with Comcast to stop the emails from Musso. Musso responded, "Comcast said, if you can't stand the heat get off the web, your's truly Bruce **Mussolina** (bolded in the email) Fed. R. Evidence P. 801 D2D).

60. (Exhibit 48, March 16, 2002; Plaintiff demanded of Cohn that the harassing emails stop. Cohn responded by refusing to stop them. His response showed a concern and fear of reprisal by Musso, indicating something could be done to the 'transmitter'.)

61. (Exhibit 42, March 18, 2002; following the order by Martin of no contact with Thompson, Cohn had ordered Plaintiff to contact Thompson. Plaintiff advised Hallett, "I cannot carry out Friday's order without it backfiring on me, I prefer to remain clean." Fed. R. Evidence P. 801 D2D).

62. (Exhibit 50, March 19, 2002; Plaintiff sought counsel and opinion of Majhor of what to do in the situation where discrimination was alleged; Plaintiff advised and sought counsel over a potential 'set up' from Cohn regarding the order to contact Thompson. Fed. R. Evidence P. 801 D2D).

63. (Exhibit 51, March 19, 2002; Hallett informed Plaintiff, "The aircheck sounds great. My God, I think you found a home, Mr. Kent." Fed. R. Evidence P. 801 D2D).

64. (Exhibit 54, March 21, 2002; Plaintiff faxed Martin a confirmation of the telephone discussion (Martin had called Plaintiff's home) regarding the Thompson EEO allegations. Plaintiff informed Martin of the order to violate Martin's order not to contact Thompson. The original resignation letter of Thompson was attached to the fax as Martin said he had not viewed it and request Plaintiff to forward a copy to him. Fed. R. Evidence P. 801 D2D).

65. (Exhibit 55, March 23, 2002; Plaintiff received a phone call at home from Allen requesting follow up interrogation regarding the information provided to Martin in that investigatory phone call (See Exhibit 54). Allen asked deeper questions than Martin. In both instances Plaintiff told the truth based on knowledge and belief and supported the allegations made by Thompson. Fed. R. Evidence P. 801 D2D).

66. (Exhibit 55, March 23, 2002; Plaintiff advised Allen in both the phone call investigation and the confirmation fax of that investigation phone call of harassment 'condoned by management'; and of 'I am tired of being bullied in an attempt to get me to leave this station'. Fed. R. Evidence P. 801 D2D).

67. (Exhibit 56, March 23, 2002; Musso wrote email asking "you still suck, <u>why are you still here</u>?" Fed. R. Evidence P. 801 D2D).

68. (Exhibit 57, March 23, 2002; Plaintiff forwarded that email to Cohn demanding, "I have had enough of this. Somebody get this psychopath off my back." No response was forthcoming. Fed. R. Evidence P. 801 D2D).

69. (Exhibit 58, March 25, 2002; Hallett called Plaintiff at home asking about info on St John, Logan and Thompson, "asked if I or Charlie (Cohn) have had contact with trish (Thompson)." Fed. R. Evidence P. 801 D2D).

70. (Exhibit 59, March 28, 2002; Plaintiff informed Logan of 'not advertising her own business on the air unless it was a sponsored event'. Fed. R. Evidence P. 801 D2D).

71. (Exhibit 60, March 28, 2002; Defendants did not have anti-payola or anti-plugola forms on file for the air staff. Plaintiff arranged through Hallett to acquire the forms. Fed. R. Evidence P. 801 D2D).

72. (Exhibit 137, March 28, 2002; Musso wrote another email, "Charlie said you don't play enough of the four tops. And I still think you suck." Fed. R. Evidence P. 801 D2D).

73. (Exhibit 62, April 3, 2002; Bobby 'Collins' Stagg (Collins), production director of both stations, informs Plaintiff of Logan and Thompson incident where Logan stated, how 'Trish' (Thompson) was out to get her fired. Fed. R. Evidence P. 801 D2D).

74. (Exhibit 63, April 3, 2002; Collins informs Plaintiff that Logan had attempted to have a part-time air talent violate anti-plugola laws and had been found by that air-talent to be 'doing something' in the on-air computer the past weekend. Fed. R. Evidence P. 801 D2D).

75. (Exhibit 64, April 3, 2002; Plaintiff forwarded both Exhibits 62 and 63 to Martin, Hallett and Cohn as Thompson was mentioned in the messages. Fed. R. Evidence P. 801 D2D).

76. (Exhibit 67, April 6, 2002; Musso had emailed Majhor (who had been hired for afternoon drive) at his personal email address before he left for his new job, "an out of work dick jockey and a looser, sure look a lot a like, just like lee !" The term, "dick jockey" was contained in Exhibit 44. Fed. R. Evidence P. 801 D2D).

77. (Exhibit 69, April 15, 2002; Plaintiff inquired as to why a change had been made in management order, where the position Plaintiff had applied for was then filled by Almond, apparently making the chain of command different for Plaintiff. Fed. R. Evidence P. 801 D2D).

78. (Exhibit 69, April 15, 2002; Plaintiff proposed an interim solution to the 'midday' problem by having Collins fill in while a fulltime air-talent was hired. Fed. R. Evidence P. 801 D2D).

79. (Exhibit 69, April 15, 2002; Plaintiff was attempting to replace Logan with Thompson (to both rectify the allegations of EEO violations and to secure an African American air-talent for the station). Plaintiff had been approached by sales to have Logan featured in a newspaper article. Plaintiff refused to permit the article. Fed. R. Evidence P. 801 D2D).

80. (Exhibit 72, April 16, 2002; Hallett confirms the telephone conference call (protected activity) in: "I believe the team decided not to move until we 1) had a candidate 2)were fairly certain LM didn't have crap pending with Skip's (St John) firing and Trish's (Thompson) resignation." Fed. R. Evidence P. 801 D2D).

81. (Exhibit 73, April 16, 2002; Hallett responded to the question regarding chain of command. "I can see why this would be something you'd think about." "In the event one of you or someone in the future is to step up a rung the title could be Director of Programming." Fed. R. Evidence P. 801 D2D).

82. (Exhibit 103, April 23, 2002; Cohn had left town and did not provide contact information to Plaintiff. Plaintiff, accepting Hallett's opinion that nothing had changed in supervisory order, reported to the next higher member of management: Serious problems were plaguing the station and needed to be dealt with for the good of the ownership: Fed. R. Evidence P. 801 D2D).

83. (Exhibit 103, April 23, 2002; It was learned that Musso had attempted to interfere with the arrival of Majhor (see Exhibit 67), the email was forwarded to Martin. It was not received by Majhor until after his arrival as he had packed his computer. Fed. R. Evidence P. 801 D2D).

84. (Exhibit 103, April 23, 2002; the commercial editing software computer had been tampered with. Operational program files had been purposely deleted. Fed. R. Evidence P. 801 D2D).

85. (Exhibit 103, April 23, 2002; Logan had made claims that Plaintiff was not long for the station. Fed. R. Evidence P. 801 D2D).

86. (Exhibit 103, April 23, 2002; Denise Moseley indicated she was 'scared' as she was the only black employee to talk to anyone but Martin. Fed. R. Evidence P. 801 D2D).

87. (Exhibit 103, April 23, 2002; Plaintiff advised Martin the situation with Logan had reached a point where replacement was necessary. Since "I understand the legal thing continues with Trish (Thompson) and more faxes…" Fed. R. Evidence P. 801 D2D).

88. (Exhibit 103, April 23, 2002; Martin was advised that "Both Denise and Bobby are willing to talk to you about any of this and Bobby is willing to talk to you only about drugs." No contact was ever made to either about any information presented to Martin. Fed. R. Evidence P. 801 D2D).

89. (Exhibit 76, April 26, 2002; Cohn had agreed to allow Logan to be replaced but only if the position was removed from fulltime and made as part-time. "My preference would be a black female (we are far too lilly white for this format!)" Fed. R. Evidence P. 801 D2D).

90. (Exhibit 76, April 26, 2002; Denise Moseley (receptionist) was being given an air-shift on the weekend, after Cohn suggested she could voice track the midday position. Plaintiff worked with Moseley to reduce her 'mic-fright' and stayed with her while she was on the air the first time. Cohn rejected the use of Collins for the midday fill-in. Fed. R. Evidence P. 801 D2D).

91. (Exhibit 77, May 2, 2002; Plaintiff had learned from Logan that Musso had maintained the transmitter of WCOO at 35 to 50 percent of power until May 2, 2002 (See Exhibit 48 March 16, 2002). Plaintiff quickly faxed ratings company Arbitron to advise them of a reduction in power. (See Exhibit 79, May 2, 2002 Hallett learns of low power.) Fed. R. Evidence P. 801 D2D).

92. (Exhibit 80, May 2, 2002; Explaining the low power situation to Hallett: Cohn dismisses a nearby listener complaint as being '50 miles away'. Fed. R. Evidence P. 801 D2D).

93. (Exhibit 80, May 2, 2002; Station employees notice low power affected only the morning show hours (Plaintiff's air-shift) Fed. R. Evidence P. 801 D2D).

94. (Exhibit 80, May 2, 2002; Thompson hears of a midday opening and leaves a message on a voice mail asking about it. Fed. R. Evidence P. 801 D2D).

95. (Exhibit 80, May 2, 2002; "Every single promotion I submitted for spring was killed" Fed. R. Evidence P. 801 D2D).

96. (Exhibit 80, May 2, 2002; "and YES DAMMIT.. I WANT A BLACK FEMALE…" Mentioning Thompson. Fed. R. Evidence P. 801 D2D).

97. (Exhibit 81, May 4, 2002; Hallett advises 'it would be prudent for you to include Charlie on all of your stuff with me and include Lynn as warranted." Fed. R. Evidence P. 801 D2D).

98. (Exhibit 82, May 6, 2002; Majhor advised Plaintiff that business cards (for Plaintiff and air-staff) had not been ordered per Cohn. Fed. R. Evidence P. 801 D2D).

99. (Exhibit 84, May 7, 2002; Ratings evaluation sent to Hallett and Cohn, forwarded to Majhor. "WCOO is missing the opportunity to entice black adults to the station by not super-serving that core with both on air presentation matching the core and promotional efforts matching the core." Fed. R. Evidence P. 801 D2D).

100. (Exhibit 85, May 16, 2002; The 'sound' of the station (WCOO) was not correct and sounded 'bad'. This email was received from 'garylemel2000' using a yahoo address. It was an obvious fake message as 'Gary Lemel' is a jazz artist and not a listener'. A similar email address from yahoo will be used later in harassment of Plaintiff (See Exhibit 144, April 27, 2004). Fed. R. Evidence P. 801 D2D).

101. (Exhibit 90, May 17, 2002; Cohn's response to the 'muddy and mumbling' email comment was, "NOBODY has touched the processing. If there is a problem I WANT TO KNOW ABOUT IT. I am not sure this is a real listener. LISTEN YOURSELVES AND DECIDE." Fed. R. Evidence P. 801 D2D).

102. (Exhibit 86, May 17, 2002; Following Cohn's refusal to hire Thompson, Thompson spoke with Martin. This hand written note was the result of that conversation. Exhibit 87, May 17, 2002; Resume of Patricia Thompson submitted with CD Demo made by Plaintiff; Exhibit 88 (CD 1) Compact Disk of Thompson's presentation; Exhibit 89; May 17, 2002; Plaintiff forwarded the demo to Hallett for his review.).

103. (Exhibit 97, June 7, 2002; . Fed. R. Evidence P. 801 D2D). Fax from Citadel, this is how Cohn got Arbitron ratings after Martin did not buy the service. These are selected breakouts of the ratings, not once was a selected breakout provided by Steve Jason that showed a good rating for Cool WCOO. All ratings provided were breakouts that were purported to show bad ratings for Cool WCOO. The 'Tuesday' 'talk' never happened as Cohn avoided discussing ratings with Plaintiff completely.)

104. (Exhibit 93, June 9, 2002; Audio quality of the station had degraded. Fed. R. Evidence P. 801 D2D)

105. (Exhibit 93, June 9, 2002; Plaintiff was threatened with legal action by Musso. Fed. R. Evidence P. 801 D2D).

106. (Exhibit 93, June 9, 2002; Engineer, (Musso) refused to repair control room phone system. Fed. R. Evidence P. 801 D2D).

107. (Exhibit 93, June 9, 2002; Musso threatened to get his gun and shoot the Cool (WCOO) transmitter. Fed. R. Evidence P. 801 D2D).

108. (Exhibit 93, June 9, 2002; Defective equipment was installed while the correct equipment was locked up or removed from the building. Fed. R. Evidence P. 801 D2D).

109. (Exhibit 93, June 9, 2002; Station was running at low power without FCC notification. Fed. R. Evidence P. 801 D2D).

110. (Exhibit 93, June 9, 2002; Plaintiff was told again not to hire Thompson. Fed. R. Evidence P. 801 D2D).

111. (Exhibit 93, June 9, 2002; Position Plaintiff was attempting to fill with an African American female was reduced to part-time from full-time if Logan was to be replaced. Fed. R. Evidence P. 801 D2D).

112. (Exhibit 95, June 9, 2002; Part-time air-personality Dwight (Lane) Landon advised Plaintiff that he was intimidated by Musso wherein Musso accused Plaintiff of "That fucking Lee Kent probably sabotaged the fucking thing", and referred to Plaintiff as "mumbles, cocksucker, motherfucker." Lane was "appalled by how unprofessional this individual was." Fed. R. Evidence P. 801 D2D).

113. (Exhibit 96, June 10, 2002; Cohn repeatedly undermined the forward movement of the station and Plaintiff's job function by arguing to change the format of the station, after it had just underwent a new direction in its then current format. Fed. R. Evidence P. 801 D2D).

114. (Exhibit 96, June 10, 2002; The first evidence of both stations experiencing transmission problems, where WCOO alone had suffered low transmission previously. Both stations are in the same location and use the same tower. Fed. R. Evidence P. 801 D2D).

115. (Exhibit 98, June 16, 2002; Engineer Musso memo informing Plaintiff that only Plaintiff and Plaintiff's staff was prohibited from requesting engineering assistance, per agreement with Cohn. Fed. R. Evidence P. 801 D2D).

116. (Exhibit 99, June 18, 2002; Thompson; eliminated by Cohn for consideration of employment. Fed. R. Evidence P. 801 D2D).

117. (Exhibit 99, June 18, 2002; Plaintiff still "think I need a staff member that can relate to 50% of my audience). (African American.) Fed. R. Evidence P. 801 D2D).

118. (Exhibit 99, June 18, 2002; Cohn had recommended a white female to take the newly reduced part-time position. Fed. R. Evidence P. 801 D2D).

119. (Exhibit 101, June 18, 2002; Hallett had sent a music file to Cohn for Plaintiff, "about two weeks ago". Cohn had indicated it was the music for the 'new' format to be called 'The Bridge'. Hallett indicates it was for the current format and wonders if Plaintiff 'overlooked' the file. Fed. R. Evidence P. 801 D2D).

120. (Exhibit 102, July 2, 2002; Plaintiff had submitted for review, a proposal to help Cohn, Brooks (Bob Brooks, sales manager) and Martin with a way to increase revenue for the stations. Plaintiff was not going to submit that proposal unless Hallett approved of it. Hallett states, "I've clicked around a bit. It all looks very interesting. I'd recommend you share this with Charlie (Cohn) and Bob (Brooks) soon! I support and commend your efforts." Hallett also asks "How about that 80's list?" Plaintiff had not yet received the music list from Cohn. Fed. R. Evidence P. 801 D2D).

121. (Exhibit 104, July 2, 2002; Musso removed working microphone from control room. Replaced it with defective microphone. Majhor replaced it with the working microphone.

Advising Hallett that Musso entered on a weekend and removed the working microphone again saying "mumbles" can deal with it. Fed. R. Evidence P. 801 D2D).

122. (Exhibit 106, July 9, 2002; Plaintiff's evaluation of available ratings numbers was presented to Hallett and Cohn. Hallett responded by saying, "The teeter tottered? Low cume? Marketing required? In my assessment tracking COOL (WCOO) with its current cume is really hard on any scale, especially in dayparts. But, I admire your take and your detailed work. Nice job." These ratings were the same ratings available to Defendants before discharge. The consultant (Hallett) did not find them poor or unsatisfactory performance. Fed. R. Evidence P. 801 D2D).

123. (Exhibit 107, July 9, 2002; Notes of meeting: on traffic lost spots due to computer being down. Cohn tried to blame Plaintiff for the missed spots, Collins spoke up correcting him that all efforts were made to air all available spots, Cohn cut him off and told him to be quiet. Fed. R. Evidence P. 801 D2D).

124. (Exhibit 108, July 10, 2002; Advising Hallett that ratings were embargoed for the Charleston market and unavailable for review. Fed. R. Evidence P. 801 D2D).

125. (Exhibit 109, July 12, 2002; In a hurried, last minute phone call, Brooks called Plaintiff at home, late in the day, asking Plaintiff to put together a proposal for sales to present to Bell South, using Plaintiff's "Cool Kids" promotion idea (which had been rejected and refused by Cohn for the spring ratings period). Fed. R. Evidence P. 801 D2D).

126. (Exhibit 111, July 23, 2002; After months of rejection of promotions, refusal to advertise and withholding of work tools and repairs, Cohn advised the sales staff (with Plaintiff in the meeting and shocked at the change) that COOL (WCOO) would then begin advertising. Fed. R. Evidence P. 801 D2D).

127. (Exhibit 111, July 23, 2002; Immediately following Cohn's portion of the sales meeting, Cohn invited Plaintiff and Mike (Allen) Almond to immediately meet him in Cohn's office

where Cohn terminated Plaintiff in front of Almond for: "not happy with performance." Fed. R. Evidence P. 801 D2D).

128. A causal connection is directly attributed to each instance of adverse employment action.

129. Harassment and hostile working environment culminated in wrongful discharge and was followed by additional harassment claiming responsibility for the wrongful discharge and hostile working environment. (Exhibit 115 July 24, 2002; Email using the account of "Donald Strawn", (See Exhibit 44), contained a photo of Plaintiff taken from Plaintiff's personal website, with the words "I'm a victim of Musso Madness" written across its face. Fed. R. Evidence P. 801 D2D).

130. (Exhibit 116, July 24, 2002; The email included an attachment (CD1) of "Crying Time Again" in a large audio file. Fed. R. Evidence P. 801 D2D).

131. (Exhibit 183, April 23, 2004; Posting on a public news site, under the email address of Musso, using IP address 69.132.48.212 "Lee kent is one crazy S.O.B. he needs to be committed". Fed. R. Evidence P. 801 D2D).

132. (Exhibit 144, April 27, 2004; Email was sent from the yahoo account of 'garylemel' (see Exhibit 85) from the IP address of 69.132.48.212 containing two files. The image file in the message was of Plaintiff's face, taken from a publication web site, with the words "Fish Face Lee You Sooo Crazy" and pink hearts placed over the eyes. Fed. R. Evidence P. 801 D2D)

133. (Exhibit 144, April 27, 2004; (CD1) The second attached file was the complete song, "They're Coming To Take Me Away". Fed. R. Evidence P. 801 D2D).

134. (Exhibit 184, April 29, 2004; Posting on a public news site, under the email address of Musso, using IP address 69.132.48.212 "Lee Kent is off the wall with his phscyo babble and idea's he needs to be committed to the nearest hospital for an extended stay" [Typos are contained in the original posting.] Fed. R. Evidence P. 801 D2D).

135. (Exhibit 185, May 5, 2004; On the day this Federal civil action was initially filed, posting on a public news site, under the email address of Musso, using IP address 69.132.48.212 "Dream

on leon and Susie Q" (The latter a reference to Plaintiff's wife 'Suesie') Fed. R. Evidence P. 801 D2D).

136. Immediately following discharge most repairs, additions, replacements, advertising, marketing and changes requested by Plaintiff over the previous months were accomplished within days.

137. In the matter of pretext: the reasons advanced by the Defendants, (ANSWER First Defense, Document 11 "unsatisfactory job performance") and (DEFENDANT MOTION TO DISMISS MEMORANDUM IN SUPPORT OF; Document 14, page 2, STATEMENT OF FACTS, "terminated for poor performance") and reference Plaintiff's Exhibit 111, "not happy with performance", none of the reasons are the same reasons and none provided address the fact of:

138. Plaintiff's Exhibit 182 and Exhibit 181 (transcript line 228), in which Cohn, said, "So now, <u>its just a function of exploring the what the possibilities are</u>, <u>although we probably have an issue on everything he does or the way he's done it</u>, I'm not really one to harbor a grudge or kinda just…" and Referenced transcript line 230 "(unintelligible) somebody cause I don't agree, you know what I'm saying," and ;

139. Referenced transcript line 232, "I do, .. I I did appreciate your concern and your passion for Lee even though if it was up to me, if he would have said something to me, <u>I would have asked him to do it differently</u>, he did it the way he thought he needed to do it, that's fine, you know." (Fed. R. Evidence P. 801 D2D)

140. If 'poor job performance' or 'unsatisfactory job performance' was the reason for discharge Cohn would have been unable to candidly state: "with Lee gone it's just a big vacuum", in Plaintiff's Exhibit 182 and Exhibit 181 (transcript line 198). (Fed. R. Evidence P. 801 D2D)

141. Reference Plaintiff's Exhibit 182 and Exhibit 181 (transcript line 226), in which Cohn, said, "<u>We did what we did with Lee for a variety of different reasons</u>, you know what he's a

really good guy and a really bright guy but... there were others…" (Fed. R. Evidence P. 801 D2D)

142. The multiple reasons provided by the Defendants are pretexts designed to hide the true retaliatory motive, and are, in the words of Cohn just, "a function of exploring the what the possibilities are…" (Plaintiff's Exhibit 182 and Exhibit 181 (transcript line 228). (Fed. R. Evidence P. 801 D2D)

143. Documents 1, 4 & 20 and all attachments are included herein in their entirety as if physically attached hereto.

144. In Document 10, Defendants have in the Eleventh Defense asserted the right to rely upon any other defense that may become available during discovery. In open court, (August 31, 2002 see Document 22), Defense counsel attested the sole action in their discovery period to be the deposition of Plaintiff.

145. Defendants prior to and during Plaintiff's employment had no established policy prohibiting abuse or hostile environment;

146. Defendants prior to and during Plaintiff's employment had no established policy of discrimination processes or procedures;

147. Defendants prior to and during Plaintiff's employment had no training process or procedure dealing with equal opportunity or Title VII protections;

148. Defendants prior to and during Plaintiff's employment had no established written employee handbook;

149. The acts contributing to the hostile working environment and harassment and discharge were unwelcome; based on Plaintiff's support of a minority's equal employment violation allegations and the known desire of Plaintiff to hire a minority for the minority targeted music format and sufficiently severe and pervasive to alter the conditions of employment and create an abusive atmosphere.

Dated this 31st day of October, 2004

Lee Kent Hempfling, Pro Se
11329 E. Caballero St.
Mesa, AZ 85207
480-332-1535

PROOF OF SERVICE

The undersigned hereby certifies that he deposited in the United States Mail at Apache Junction, Arizona a true and correct copy of the foregoing in an envelope with First Class postage fully prepaid and plainly addressed to:

Greg Horton

Buist Moore Smythe and McGee

PO Box 999

Charleston, SC 29402

On this 1st day of November, 2004

Lee Kent Hempfling, Pro Se