06-4384-cv

To Be Argued By:
LISA E. PERKINS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4384-cv

JOSEPH MATHIRAMPUZHA,
Plaintiff-Appellant,

-vs-

U.S. POSTAL SERVICE,
JOHN POTTER, POSTMASTER,
Defendant-Appellee,

RON SACCO,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF AND APPENDIX FOR THE DEFENDANT-APPELLEE

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STATEMENT OF JURISDICTION

The district court (Janet Bond Arterton, J.) had subject matter jurisdiction over the plaintiff's two civil actions under 28 U.S.C. § 1331. After those actions were consolidated, in an opinion dated August 21, 2006, the district court granted the defendant's motion to dismiss and motion for summary judgment, thereby resolving all pending claims in favor of the defendant. Final judgments entered on August 23 and August 30, 2006. The plaintiff filed a timely notice of appeal on September 19, 2006, pursuant to Fed. R. App. P. 4(a). This Court has appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court correctly granted summary judgment in favor of the defendant on Mathirampuzha's claim of national origin discrimination, where Mathirampuzha failed to establish he suffered an adverse employment action?

II. Whether Mathirampuzha's failure to exhaust required administrative remedies as to his hostile work environment and retaliation claims mandated dismissal of those claims by the district court?

III. Whether the district court properly dismissed Mathirampuzha's Federal Tort Claims Act claim for lack of jurisdiction, where the claim was preempted by the Federal Employees Compensation Act ("FECA") and Mathirampuzha failed to present his claim first to the Secretary of Labor under the FECA?

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BRIEF AND APPENDIX FOR THE DEFENDANT-APPELLEE

Preliminary Statement

In this employment case, Joseph Mathirampuzha (hereinafter "plaintiff" or "Mathirampuzha"), appeals from a district court ruling granting summary judgment for the defendant-appellee, John Potter, Postmaster General, United States Postal Service (hereinafter "defendant" or "USPS"), on his Title VII claims of national origin discrimination, hostile work environment, and retaliation,

and dismissing his claim under the Federal Tort Claims Act ("FTCA") for lack of subject matter jurisdiction. *See* Joint Appendix ("JA") 767-86. Plaintiff's Title VII and FTCA claims arise primarily from a single encounter with a supervisor in the USPS's mail processing and distribution center in Wallingford, Connecticut, where plaintiff is employed as a mail handler.

In his district court complaint, plaintiff alleged that while at work on September 29, 2003, he was verbally harassed and physically assaulted by a USPS supervisor (Ron Sacco), due to his national origin (India). Plaintiff additionally claimed this same incident amounted to retaliation and a hostile work environment because in 1999, Sacco allegedly had denied him two lunch breaks and had denied him assistance in the performance of his duties as a mail handler while helping other unspecified employees who are Caucasian.

After careful review of an extensive factual record, the district court properly dismissed plaintiff's hostile work environment and retaliation claims because plaintiff failed to include these claims in his administrative Equal Employment Opportunity ("EEO") complaint and they are not reasonably related to his EEO complaint, which identified only the September 29, 2003 encounter with Sacco and charged discrimination based on color, race and national origin. In addition, the district court correctly granted the defendant summary judgment on the remaining Title VII claim because plaintiff failed to establish a *prima facie* case of national origin discrimination, since he could not demonstrate that he suffered an adverse employment action.

Finally, the district court properly dismissed plaintiff's FTCA claim for lack of subject matter jurisdiction, concluding that plaintiff was required under the Federal Employees Compensation Act ("FECA") to first seek redress from the Secretary of Labor for his alleged physical and emotional injuries, which he failed to do. Because the district court correctly concluded that no genuine issues remained for trial and correctly dismissed plaintiff's FTCA claim, this Court should affirm the district court's ruling.

Statement of the Case

This is an appeal from a ruling of the United States District Court for the District of Connecticut (Janet Bond Arterton, J.) granting the defendant summary judgment on plaintiff's complaint under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq*., and dismissing plaintiff's complaint under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq*., for lack of subject matter jurisdiction. JA 767-86.

Plaintiff commenced this action on May 20, 2004, by filing a six-count complaint in the district court against the USPS and its employee, Ron Sacco (in his individual capacity), alleging national origin discrimination, hostile work environment and retaliation under Title VII, negligent supervision, and various pendant state law tort claims. JA 12-23. On October 18, 2004, the United States filed a notice under the Westfall Act, codified at 28 U.S.C. § 2679, to substitute the United States in place of defendant Sacco as to the pendant state law tort claims alleged in plaintiff's complaint. JA 35-36.

At approximately the same time, plaintiff amended his complaint against the USPS, eliminating the state law tort claims but adding a claim under the Connecticut Fair Employment Practices Act ("CFEPA"), Conn. Gen. Stat. § 46a-60(1), (4) and (8). JA 28-34. The caption of the amended complaint again named Sacco as a defendant (in his individual and "ethical" capacities) and in his prayer for relief, plaintiff stated he would seek full satisfaction of any judgment from Sacco's personal assets, though plaintiff did not allege any specific count against Sacco. *Id*.[1]

On November 12, 2004, the USPS and Sacco filed a motion to partially dismiss the amended complaint and to strike plaintiff's prayer for punitive damages. JA 41-42. Their motion argued that Sacco was not a proper party under Title VII, the CFEPA claim was preempted by Title VII, and punitive damages are not available against the Postmaster General. JA 43-51. The district court agreed and granted the motion on June 7, 2005. JA 78-87. *See Mathirampuzha v. Potter*, 371 F. Supp. 2d 159 (D. Conn. 2005).

On October 25, 2005, the USPS filed a motion under Fed. R. Civ. P. 56, seeking summary judgment as to plaintiff's remaining Title VII claims. JA 94-355.

Thereafter, on November 22, 2005, plaintiff initiated a second action in district court by filing another two-count

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[1] The district court granted the notice of substitution on November 1, 2004, after the plaintiff had filed his amended complaint eliminating the pendant state tort claims.

complaint against the USPS and Ron Sacco (in his individual capacity only), alleging violations of the FTCA based on the same incident alleged in the first suit – Sacco's purported verbal harassment and physical assault of plaintiff on September 29, 2003. JA 356-69; Government's Appendix ("GA") 1.[2]

On February 24, 2006, the USPS and Sacco filed a motion to dismiss the FTCA complaint. JA 736-50.[3] The FTCA case thereafter was transferred to U.S. District Judge Janet B. Arterton, who consolidated it with plaintiff's pending Title VII action under docket no. 3:04cv841. JA 751-54.

On August 21, 2006, the district court issued a ruling granting the motions for dismissal and summary judgment. JA 767-86. Final judgment entered in favor of the Government defendants on August 23, 2006 and August 30, 2006. JA 10, 787-88.

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[2] Because the docket entries for the FTCA action (before it was consolidated with the Title VII case) were not included in the Joint Appendix, the Government is submitting with this brief a proposed supplemental appendix ("GA") to include those docket entries.

[3] On February 21, 2006, the United States filed a notice of substitution under the Westfall Act in the FTCA action (3:05cv1802) to replace the Postmaster General and Sacco. Plaintiff agreed in his opposition memorandum to withdraw his claims against Potter and Sacco in light of the notice of substitution. *See* JA 755.

On September 19, 2006, plaintiff timely appealed the district court's ruling. JA 789-90.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. Plaintiff's Employment with the USPS

Plaintiff Joseph Mathirapuzha is a permanent resident alien of the United States, who immigrated to the United States from his native India in approximately 1989. JA 134-35. Since 1997, plaintiff has been employed as a mail handler with the USPS. JA 136. Until approximately 2000, plaintiff was a part-time flexible employee, at which time plaintiff was designated a full-time mail handler, a position which he holds to date. JA 137.

Throughout his employment with the USPS, plaintiff has worked in the Southern Connecticut Processing and Distribution Center in Wallingford, Connecticut. *Id*. Between 1998 and 2002, plaintiff sought to transfer to the USPS Processing and Distribution Center in Hartford, Connecticut on several occasions. JA 156-79; 214-20. Plaintiff sought the transfers for convenience, as his family lived closer to the Hartford facility. JA 166. Each of his transfer requests, made to the Hartford facility per standard procedure, were denied on account of plaintiff's accident history at the Wallingford facility. JA 159-60, 169, 174-75, 458.

Employee shifts at the Wallingford USPS facility are broken down into three tours: tour one begins at approximately 11:00 p.m. and ends at around 7:30 a.m.;

tour two begins at approximately 8:00 a.m. and ends at around 4:30 p.m.; and tour three begins at approximately 4:30 p.m. and ends at around 1:00 a.m. JA 139, 144, 296-97. From 1997 until 2000, during his employment as a part-time flexible mail handler, plaintiff worked the tour one shift from approximately 10:00 p.m. to 6:30 a.m. JA 143-44. Since becoming a full-time mail handler in 2000 and to date, plaintiff's regularly scheduled work hours are on the tour three shift. JA 139-40.

During his tenure as a part-time flexible mail handler on tour one, plaintiff was occasionally supervised by Ron Sacco, a Manager of Distribution Operations ("MDO") on tour one. JA 145, 300. However, since his change to a full-time mail handler on tour three, plaintiff has seen Sacco rarely and only when their respective shifts overlap. JA 186-88. According to plaintiff, when he would see Mr. Sacco occasionally pass by his work area, they would exchange hellos. JA187-88. In addition, plaintiff testified that one time during 2000 he told Sacco about his desire to transfer to the Hartford facility, but Sacco did not respond to him. JA 189-91.

B. September 29, 2003

According to plaintiff, on September 29, 2003, he was working at the direction of his supervisor, MDO Curtis Parente, on non-scheduled overtime in the flat sorter operation, on his normal shift – tour three – from approximately 3:30 p.m. to 12 midnight. JA 196-97. Sacco also was working on that date in his usual capacity as a tour one MDO. JA 304. At approximately 11:30 p.m. plaintiff observed MDO Sacco, who had just started his

shift, at a pole marked E12 across from the flat sorter area. JA 191. Sacco first observed plaintiff near machine #22 in the flat sorter area, an area in which Sacco did not normally see plaintiff working. JA 197, 304, 306, 315.

Plaintiff claims Sacco then asked him in a loud voice, "Joe, where are you going?" JA 191-92, 200; *see also* JA 267, 269, 285, 315-16. Plaintiff replied that he was picking up 120 reject mail from machine #22, at the request of his direct supervisor, acting Supervisor of Distribution Operations ("SDO") Claudio Scirocco. *Id.* Plaintiff claims Sacco immediately yelled at him to go to section 117 or "punch out and go home." JA 192. Sacco claims he asked plaintiff if he was working overtime, and when plaintiff replied affirmatively, he instructed plaintiff to report to section 117 of the facility along with other overtime mail handlers. JA 308, 310.

Plaintiff admits he did not respond to Sacco's request to report to section 117 and continued with his work. JA 203-04, 311-12. Plaintiff claims, however, that as he tried to continue pushing his postcon to go pick up the 120 reject mail, Sacco grabbed his arm, poked him in the eye four or five times, punched him in the chest and shoulder four or five times, spit in his face and told him "Joe, I never let you go to Hartford plant." 191-93, 200-01.

C. Plaintiff's Statements & EEO Complaint

Plaintiff immediately reported this exchange with Sacco to his direct supervisor, Claudio Scirocco, who was working nearby, JA194, and two MDOs, Curtis Parente and Don Kulak, who in turn called a union representative,

Courtney Clarke. JA 469. At no time thereafter did plaintiff receive any discipline for his refusal to obey Sacco's directive. JA 322.

Plaintiff's version of the encounter with Sacco on September 29, 2003, is increasingly embellished with each report. According to his initial, handwritten statement completed shortly after the incident on September 29, 2003, Sacco "pushed [plaintiff] on the shoulder got in [his] face and started yelling at [him]." JA 224, 267. In addition, plaintiff's statement relates that after he refused to comply with Sacco's directive, Sacco called another supervisor (Dale Mayne) to the area. Plaintiff stated his eyes teared up, and that he "never see (sic) this type off (sic) behavior from a supervisor or MDO before." *Id*.

On October 1, 2003, plaintiff sought pre-complaint counseling with the EEO office at the USPS. *See* JA 274-91. In the pre-complaint information form received by the EEO office on October 10, 2003, plaintiff alleged only the September 29, 2003 incident with Sacco as a basis for his allegation of discrimination based on national origin ("East Indian"). JA 284-85. For comparison, he stated Sacco spoke with three white male employees (supervisors Scirocco, Parente and Mayne) after the incident and did not yell at them or get in their faces. JA 286. In a typewritten statement dated October 9, 2003 and submitted with his pre-complaint information form, plaintiff for the first time claimed that during the encounter Sacco not only yelled at him and got in his face, but:

> rushed to me like a football player[,] hit my chest and shoulder with his full body. I fell onto the

> yellow rails[,] I tried to hold on the rails not to fall down. He sequced (sic) me hand with his arm. While holding he sequeced (sic) side rails he continued this for almost three to five minutes stating that he never let me go to Hartford[.] [H]e spit on my face (water come from mouth) as as tears coming out of my face and my eyes. . . .

JA 225-26, 285. Plaintiff listed two witnesses to this incident: his supervisor at the time, Claudio Scirocco, and a mail clerk Sharese Harrington. *Id*.

Plaintiff elected to remain anonymous during the counseling process and so the EEO counselor was unable to contact management, investigate and try to resolve this matter at the pre-complaint stage. JA 287, 277.

On November 4, 2003, plaintiff filed a formal EEO complaint with the USPS alleging discrimination on the basis of race, color and national origin (Asian Pacific), again identifying only the September 29th exchange with Sacco as the basis for his claims. JA 666-67; 268-73. Plaintiff attached to his EEO complaint a statement dated October 9, 2003 very similar to the October 9 statement submitted with his pre-complaint information form. This statement, however, alleged – for the first time – that Sacco had not only spit in his face but also "poked [his] left eye." JA 269.

In his deposition taken on April 29, 2005, plaintiff claimed that Sacco poked him in the left eye several times, punched him in the left shoulder and chest four or five

times and leaned into him, spitting on his face as he told him, "Joe, I never let you go to Hartford plant." JA 192.

D. District Court Proceedings

On May 20, 2004, plaintiff filed a six-count complaint in the district court against the USPS and Ron Sacco (in his individual capacity), alleging national origin discrimination, hostile work environment and retaliation under Title VII, negligent supervision, and various pendant state law tort claims, based solely on the encounter with Sacco on September 29, 2003. JA 12-23. On October 18, 2004, the United States filed a notice under the Westfall Act, 28 U.S.C. § 2679, seeking to substitute the United States in place of individual defendant Sacco as to the pendant state law tort claims alleged in plaintiff's complaint.[4] JA 35-36.

At about the same time, plaintiff amended his complaint against the USPS, eliminating the state law tort claims but adding a claim under the Connecticut Fair Employment Practices Act. JA 28-34. The caption of the amended complaint again named Sacco as a defendant (in his individual and "ethical" capacities) and in his prayer for relief, plaintiff stated he would seek full satisfaction of any judgment from Sacco's personal assets, though plaintiff did not allege any specific count against Sacco. *Id*. In addition, the amended complaint newly alleged that "[s]ince October 1999, Sacco has verbally harassed the

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[4] The district court granted the notice of substitution on November 1, 2004, after plaintiff had filed the amended complaint eliminating the pendant state tort claims.

plaintiff; subjected to (sic) him to disparate treatment by denying him approved lunch breaks and assistance in performing work duties." JA 30-31. *Compare* JA 14 (Compl. ¶ 12).

On November 12, 2004, the USPS and Sacco filed a motion to partially dismiss the amended complaint and to strike plaintiff's prayer for punitive damages. JA 41-42. Their motion argued that Sacco was not a proper party under Title VII, the CFEPA claim was preempted by Title VII, and punitive damages are not available against the Postmaster General. JA 43-51. The district court agreed and granted the motion on June 7, 2005. JA 78-87. *See Mathirampuzha*, 371 F. Supp. 2d 159 (D. Conn. 2005).

On October 25, 2005, after the close of discovery, the USPS filed a motion under Fed. R. Civ. P. 56, seeking summary judgment as to plaintiff's remaining Title VII claims. In the motion, defendant argued that plaintiff's hostile work environment and retaliation claims were subject to dismissal for failure to exhaust administrative remedies and that plaintiff could not establish a *prima facie* case of discrimination because he did not suffer an adverse employment action and could not in any event prove discriminatory intent. JA 94-355.

Thereafter, on November 22, 2005, plaintiff initiated a second action in district court by filing another two-count complaint against the USPS and Ron Sacco (in his individual capacity only), alleging violations of the Federal Tort Claims Act arising from the same incident alleged in the first suit – Sacco's purported verbal

harassment and physical assault of plaintiff on September 29, 2003. JA 356-69; GA 2.

On February 24, 2006, the USPS and Sacco filed a motion to dismiss the FTCA complaint on the ground that plaintiff's FTCA claim was preempted by the FECA. JA 736-50. The FTCA case thereafter was transferred to U.S. District Judge Janet B. Arterton, who consolidated it with plaintiff's pending Title VII action under docket number 3:04cv841. JA 751-54.

On August 21, 2006, the district court issued a ruling granting the motions for dismissal and summary judgment. JA 767-86. First, the district court held it did not have jurisdiction to review plaintiff's hostile work environment and retaliation claims because plaintiff failed to exhaust these claims administratively. The court further held that the claims did not meet any exception to the exhaustion requirement as they were not reasonably related to the only claim alleged in his administrative complaint – national origin discrimination based on the incident involving Ron Sacco on September 29, 2003 – such that the conduct would fall within the scope an administrative investigation of that claim. JA 775-80.

Second, the court ruled that plaintiff did not meet his burden of demonstrating a *prima facie* case of discrimination on account of national origin because he failed to show he had suffered an adverse employment action. JA 780-84. In this regard, the district court explained:

> Here, plaintiff seeks a lateral transfer, with no change in salary, benefits, or job responsibilities. He has been frustrated at the denial of his repeated transfer requests and the stress that commuting places on his family life, but these frustrations are the type of "subjective, personal disappointments" that do not qualify as adverse employment actions as a matter of law, ...

JA 783 (footnote omitted).

The court further explained:

> plaintiff's asserted treatment at the hands of Ron Sacco on September 29 – while unprofessional and boorish – and the initially dismissive attitude of other supervisors when Sacco's behavior was brought to their attention, does not amount to an "adverse employment action" because it did not materially affect the terms and conditions of [plaintiff's] employment.

Id.

Finally, the court dismissed plaintiff's FTCA claim, for his alleged physical and emotional injuries stemming from the encounter with Sacco on September 29, 2003, finding that as a federal employee plaintiff should have presented his claim to the Secretary of Labor under FECA. JA 786. Plaintiff argued that because his claim included alleged emotional injury, FECA did not apply. While the district court noted a division of authority as to whether FECA

covers emotional distress claims, the court nonetheless held:

> Given FECA's exclusivity provisions, this Court lacks jurisdiction to entertain plaintiff's FTCA claim absent a determination from the Secretary of Labor that FECA does not apply to his emotional distress claims.

Id.

Final judgment entered in favor of the Government defendants on August 23 and August 30, 2006. JA 10, 787-88. On September 19, 2006, plaintiff filed a timely notice of appeal. JA 789-90.

SUMMARY OF ARGUMENT

I. Because plaintiff could not make out a *prima facie* case of national origin discrimination under Title VII, the district court properly granted summary judgment in favor of the defendant. Plaintiff could not establish that he suffered any adverse employment action the circumstances of which give rise to an inference of discrimination based on his national origin. Consequently, this Court should affirm the district court's ruling.

II. Because plaintiff did not include his hostile work environment and retaliation claims in his administrative EEO complaint, the district court correctly granted summary judgment in favor of defendant on these claims. The district court properly concluded that plaintiff's allegations, that sometime during 1999, Sacco denied him

one or two lunch breaks and once denied him assistance in the performance of his work duties, are not reasonably related to the only claim raised in his administrative complaint – the encounter with Sacco on September 29, 2003. The court also correctly held that plaintiff's retaliation claim did not merit exception to the exhaustion requirement because he does not claim retaliation for engaging in protected activity. Moreover, even if this Court finds that the district court could have reviewed the claims despite plaintiff's failure to exhaust, plaintiff failed to establish a *prima facie* case of retaliation and/or hostile work environment. Accordingly, this Court should affirm the judgment in favor of the defendant on these claims.

III. The district court correctly dismissed plaintiff's FTCA claim because it is preempted by the Federal Employees Compensation Act, 5 U.S.C. § 8102 *et seq.*, ("FECA"). Though the district court noted a division of authority as to whether emotional damages are covered under FECA, since a substantial question was raised as to that coverage, the district court correctly concluded that the exclusivity provisions of FECA required plaintiff to first present his claim of physical and emotional injuries stemming from the encounter with Sacco to the Secretary of Labor for a determination of coverage under FECA. Accordingly, this Court should affirm the dismissal of plaintiff's FTCA claim.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ON PLAINTIFF'S TITLE VII CLAIM ALLEGING NATIONAL ORIGIN DISCRIMINATION.

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

1. Summary Judgment Under Rule 56

This Court reviews *de novo* a district court's grant of summary judgment. *See Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004).

Summary judgment is appropriate "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); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986) (discussing summary judgment standard).

"Genuineness runs to whether disputed factual issues could reasonably be resolved in favor of either party, while materiality runs to whether the dispute concerns facts that

can affect the outcome under the applicable substantive law." *Peralta v. Cendant Corp.*, 123 F. Supp. 2d 65, 75 (D. Conn. 2000) (citing *Bickerstaff v. Vassar College*, 196 F.3d 435, 445 (2d Cir. 1999) (quoting *Graham v. Henderson,* 89 F.3d 75, 79 (2d Cir. 1996))). Thus, not every doubt about a material fact will defeat a motion for summary judgment. Only those factual disputes that make the outcome of a trial uncertain under the governing law should bar the success of a motion for summary judgment. *Anderson*, 477 U.S. at 252.

It is well-settled that "summary judgment may be appropriate even in the fact-intensive context of discrimination cases." *Feingold v. New York*, 366 F.3d 138, 149 (2d Cir. 2004) (quoting *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir. 2001)); *See Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 40 (2d Cir. 1994) ("summary judgment remains available to reject discrimination claims in cases lacking genuine issues of material fact."). Nevertheless, this Court has cautioned that "we affirm a grant of summary judgment in favor of an employer sparingly because 'careful scrutiny of the factual allegations may reveal circumstantial evidence to support the required inference of discrimination.'" *Feingold*, 366 F.3d at 149 (quoting *Mandell v. County of Suffolk*, 316 F.3d 368, 377 (2d Cir. 2003) (internal quotations omitted)).

When ruling on a motion for summary judgment, the court must construe the facts in a light most favorable to the nonmovant, and must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Williams*, 368 F.3d at 126. However, once the moving

party establishes "an absence of a genuine issue of material fact, a limited burden of production shifts to the nonmovant, who must 'demonstrate more than some metaphysical doubt as to the material facts,' and come forward with 'specific facts showing that there is a genuine issue for trial.'" *Powell v. National Board of Med. Examiners*, 364 F.3d 79, 84 (2d Cir. 2004) (quoting *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993)). The responding party "must show the existence of a disputed material fact in light of the substantive law." *Peer Int'l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 564 (S.D.N.Y. 1995) (citations omitted).

Moreover, a party seeking to defeat a summary judgment motion cannot rely upon conclusory allegations or denials, but instead must set forth "concrete particulars" showing that a trial is needed. *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 77 (2d Cir. 1984); *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998) ("The non-moving party may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful.") (citations omitted). "Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment." *Bickerstaff,* 196 F.3d at 452. *See also Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995) ("'[M]ere speculation or conjecture as to the true nature of the facts [cannot] overcome a motion for summary judgment.'") (quoting *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986)).

This Court may affirm summary judgment in a Title VII case "on any ground with support in the record, even if it was not the ground relied on by the [d]istrict [c]ourt." *Palmer v. Occidental Chemical Corp.*, 356 F.3d 235, 236 (2d Cir. 2004) (citing *Headley v. Tilghman*, 53 F.3d 472, 476 (2d Cir.1995) (internal citation omitted)). *See also Abdu-Brisson*, 239 F.3d at 466 ("[I]t is axiomatic that an appellate court may affirm the judgment of the district court on any ground fairly supported by the record.") (citing *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 63 (2d Cir.1997) (citations omitted)).

2. Standard Governing Title VII Claims

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, prohibits discrimination against federal employees "based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Such claims of discrimination are subject to the familiar burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-08 (1993). *See Terry v. Ashcroft*, 336 F.3d 128, 138-41 (2d Cir. 2003) (applying *McDonnell-Douglas* burden shifting framework in federal employment discrimination case).

A plaintiff bears the initial burden of proving by a preponderance of the evidence a *prima facie* case of discrimination. In this regard, the plaintiff must show (1) he was a member of a protected group; (2) he was otherwise qualified for his position; (3) he suffered an

"adverse employment action"; and (4) the employment action gave rise to an inference of discrimination based on his protected status. *See, e.g.*, *McDonnell Douglas Corp.,* 411 U.S. at 802; *Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000); *R.H. Donnelley, Corp.*, 368 F.3d at 126 (setting forth standard for plaintiff's *prima facie* case and noting that "[a]lthough '[a] plaintiff's burden of establishing a *prima facie* case is *de minimis*,' a Title VII plaintiff's claims nevertheless fail if [h]e cannot make out a prima facie case of discrimination.") (quoting *Abdu-Brisson*, 239 F.3d at 466).

With respect to the third prong of this standard, this Court has defined "an adverse employment action as a 'materially adverse change' in the terms and conditions of employment." *Sanders v. New York City Human Resources Admin.*, 361 F.3d 749, 755 (2d Cir. 2004) (quoting *Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999)). As this Court has explained, "'[a] materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation.'" *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000) (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993)).

If the plaintiff can establish a *prima facie* case of discrimination, this "'creates a presumption that the employer unlawfully discriminated,' and thus places the burden of production on the employer to proffer a

nondiscriminatory reason for its action." *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 77 (2d Cir. 2001) (quoting *James v. New York Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000)). The employer's explanation "must, if taken as true, '*permit* the conclusion that there was a nondiscriminatory reason for the adverse action.'" *Back v. Hastings On Hudson Union Free School Dist.*, 365 F.3d 107, 123 (2d Cir. 2004) (emphasis in original) (quoting *St. Mary's Honor Ctr.*, 509 U.S. at 509).

Once the employer sets forth a legitimate, nondiscriminatory reason for its action, the burden of persuasion then shifts back to the plaintiff. "If the defendant has stated a neutral reason for the adverse action, 'to defeat summary judgment . . . the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination.'" *Feingold*, 366 F.3d at 152 (quoting *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305, 312 (2d Cir. 1997)); *see also Back*, 365 F.3d at 123 (same).

C. Discussion

The district court properly granted summary judgment for the government with respect to plaintiff's claim of national origin discrimination since plaintiff failed to make out a *prima facie* case under Title VII of the Civil Rights Act. While there is no dispute that plaintiff can establish the first two factors (he is in a protected class and is qualified for his job), plaintiff cannot prove through any facts in the record that he suffered an adverse employment

action or, consequently, that an inference of discrimination can be drawn from an adverse employment action. Without satisfying the third and fourth components, plaintiff cannot make out a *prima facie* claim. Therefore, this Court should affirm the grant of summary judgment in favor of the defendant.

Plaintiff argues that his "discriminatory treatment by his supervisors, both Sacco and Mary Welborn, among others, as well as the continual denial of his transfer requests, are qualifying adverse employment actions." *Pl. Brief* at 26. Yet, none of the acts complained of constitute "a 'materially adverse change' in the terms and conditions of [his] employment." *Sanders*, 361 F.3d at 755.

First, plaintiff's frustration with the Hartford USPS facility's denials of his repeated requests to transfer there does not satisfy his burden of proving an adverse employment action. The denials have not had a negative impact on plaintiff as an employee, as he has maintained the same position, on the same shift, and even received regular pay *increases* throughout the period during which his transfers were denied. JA at 137-40. Nor did the denials of transfer affect his desire for promotion, as his stated purpose in seeking transfer was for convenience (to be closer to his home) rather than opportunity. JA 166-67, 215. *See Galabya,* 202 F.3d at 640 ("To be materially adverse[,] a change in working conditions must be more disruptive than a mere inconvenience. . . .") (internal quotations omitted). And although it is apparent plaintiff has a strong desire to work closer to his family, his subjective, personal disappointment in not receiving a transfer does not rise to the level of an adverse

employment action under Title VII. *See R.H. Donnelley, Corp.*, 368 F.3d at 128 ("subjective, personal disappointments do not meet the objective indicia of an adverse employment action.").[5]

Plaintiff correctly notes that the Supreme Court has mentioned in *dicta* that denial of a transfer might constitute an adverse employment action. *See National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). However, this Court and others have since held that denial of a lateral transfer, like forced lateral transfer, without any accompanying material change in working conditions, does not constitute an adverse employment action for purposes of Title VII. *See, e.g., R.H. Donnelley, Corp.*, 368 F.3d at 128 (holding that denial of transfer request to Las Vegas, where plaintiff maintained a home, did "not meet the objective indicia of an adverse employment action" and in fact would have resulted in less pay and a demotion); *Dunphy v. Delta Airlines, Inc.*, 290 F. Supp. 2d 311, 315-16 (E.D.N.Y. 2003) (failure to transfer was not adverse employment action unless the

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[5] Notably, plaintiff's requests to transfer to Hartford continued only until 2002, prior to the confrontation with Sacco in 2003. JA 179, 218-19. Thus, the transfer denials are completely unrelated to the only event alleged in plaintiff's EEO complaint – the September 29, 2003 encounter with Sacco. Plaintiff additionally concedes that the Hartford facility has repeatedly denied his transfer requests due to his admitted accident record at the Wallingford facility, though he claims without any substantiation that this reason is a pretext for discrimination. JA 159-60, 169, 174-75, 458. *See Pl. Brief* at 28.

desired location offered an increased likelihood of advancement); *see also Duncan v. Shalala*, No. 97-3607, 2000 WL 1772655 at *4 (E.D.N.Y. Nov. 29, 2000) (denial of lateral transfer not materially adverse where only difference in working conditions was location). Thus, the district court correctly ruled that the denials of plaintiff's requests for a lateral transfer do not qualify as adverse employment actions. JA 783 ("continuation in his current position does not change plaintiff's terms or conditions of employment").

Plaintiff's additional claim that the alleged confrontation with Sacco and the dismissive treatment of him by other supervisors at the USPS constitute adverse employment actions likewise should be rejected. Assuming *arguendo* plaintiff could prove Sacco physically confronted plaintiff and chastised him in an unduly harsh manner on September 29, 2003, such a reprimand from a supervisor, especially one who believed at the time that plaintiff was being insubordinate, *see* JA 534-35, does not rise to the level of a "materially adverse change in working conditions" actionable under Title VII. Plaintiff has suffered no change in his employment conditions, responsibilities or benefits. JA 137-38. Nor was he disciplined in any way for failing to follow instruction from a superior supervisor. JA 322. He has received yearly raises on his hourly wages. JA 140. Thus, the district court correctly concluded that

> plaintiff's asserted treatment at the hands of Ron Sacco on September 29 – while unprofessional and boorish – and the initially dismissive attitude of other supervisors when Sacco's behavior was

> brought to their attention, does not amount to an "adverse employment action" because it did not materially affect the terms and conditions of [plaintiff's] employment.

JA 783.

Plaintiff's reliance on *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) for the proposition that he does not need to prove an adverse employment action, but only discriminatory animus, is misplaced. Although the Court in *Ellerth* acknowledged that proof of tangible employment action was not needed for claimant Ellerth to proceed with her suit, the ruling spoke specifically to the evidence necessary to prove *quid pro quo* sexual harassment and hostile work environment for purposes of vicarious liability. *Id*. at 753. Other rulings subsequent to *Ellerth* have refused to extend that definition of proof beyond the scope of an employer's vicarious liability for sexual harassment and have noted that *Ellerth* "did not purport to define the term 'adverse employment action' for all employment discrimination claims." *Hillig v. Rumsfeld*, 381 F.3d 1028, 1031 (10th Cir. 2004). *See also Pennsylvania State Police v. Suders*, 542 U.S. 129, 144-145 (2004) (limiting *Ellerth* to claims of vicarious liability of an employer where an affirmative defense may be asserted); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (applies *Ellerth* discretely to vicarious liability for hostile work environment where the employer raises affirmative defenses). Thus, plaintiff's attempt to extend *Ellerth* to national origin discrimination is unsupported and unpersuasive given the limited application of that precedent.

Moreover, even assuming *arguendo* plaintiff could prove he suffered a materially adverse employment action, he has failed to raise a genuine issue of material fact as to discriminatory intent with respect to any such action. Plaintiff cannot point to any actions or remarks of Sacco, or any other USPS agent or employee, that could be construed as reflecting a discriminatory animus toward employees of Indian origin. Rather, plaintiff claims an inference of discriminatory animus arises in the simple fact that he is of Indian ethnicity and Sacco has had several grievances filed against him by mail handlers. Plaintiff has offered only the testimony of William Hylton, past president of the mail handlers' union in the Wallingford USPS facility, to support this claim. *See* JA 331-51. But, at most, Hylton's testimony establishes that the grievances filed against Sacco over the course of a decade were made by mail handlers of various ethnic backgrounds, including Italian Caucasians, Blacks, and Caucasians of unknown ethnic origin. JA 331-51.[6] Moreover, the grievances alleged an unprofessional management style not discrimination against the complainants based on their race, national origin or any other protected factor. *See id.*

The only other person of Asian Pacific origin identified by plaintiff as having been purportedly harassed by Sacco is his brother, Senjin Abraham. Yet, Abraham's testimony establishes only that Sacco recommended or threatened to discipline Abraham for two incidents of admitted

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[6] All of the grievances cited were filed under the union presidency of Hylton, who admitted in his deposition that he has a negative history with Sacco. *See* JA 337, 353-54.

employee misconduct – going to Dunkin' Donuts without punching out and pulling four post-cons at one time in violation of safety rules. *See* JA 640-51, 730-34. He offers no specifics, stating these actions maybe took place in 2001 or 2002. JA 730. He offers no evidence that he complained to the USPS about these incidents, but only that he lodged verbal complaints with his union. And, there are no witnesses to any of these supposed incidents, though hundreds of employees work on the Wallingford Processing and Distribution Center floor on any given shift. JA 731. Abraham's additional testimony that Sacco once told him he did not like him as a worker also does not support an inference of discriminatory animus on account of ethnic origin or race. JA 647-48.

In short, based on the record in this case, the district court correctly concluded that plaintiff failed to establish a genuine issue of material fact to support a *prima facie* case of national origin discrimination. Therefore, this Court should affirm the grant of summary judgment in favor of the defendant.

II. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S HOSTILE WORK ENVIRONMENT AND RETALIATION CLAIMS BECAUSE PLAINTIFF FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES WITH RESPECT TO THESE CLAIMS AND NO EXCEPTION TO THE EXHAUSTION REQUIREMENT EXCUSES HIS FAILURE.

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

1. Exhaustion of Administrative Remedies

Prior to filing a Title VII complaint in federal court, a plaintiff must timely exhaust administrative remedies by means of the prescribed EEO complaint process. *See* 42 U.S.C. § 2000e-16(c); *Belgrave v. Pena*, 254 F.3d 384, 386 (2d Cir. 2001) (per curiam) (describing administrative timeline requirements). *See also Loeffler v. Frank*, 486 U.S. 549, 559 (1988) (Title VII contains a limited waiver of the sovereign immunity of the United States, which is confined to aggrieved federal employees who have exhausted their administrative remedies).

This Court has held that the exhaustion requirement in § 2000e-16(c) is not jurisdictional. *Terry*, 336 F.3d at 150 (citing *Boos v. Runyon*, 201 F.3d 178, 183 (2d Cir.

2000))(exhaustion requirements in Title VII are in the nature of statutes of limitations, subject to equitable tolling). This Court has identified three situations where "claims not alleged in [the administrative] charge are 'sufficiently related to the allegations in the charge that it would be unfair to civil rights plaintiffs to bar such claims in a civil action.'" *Terry*, 336 F.3d at 151 (quoting *Butts v. City of N.Y. Dep't of Housing*, 990 F.2d 1397, 1402 (2d Cir. 1993)). First, "where the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Id.* (internal quotations omitted). Second, when the exhaustion requirement should be relaxed for claims of retaliation for filing the underlying charge based on the close connection of the retaliatory act to the initial discrimination and the filing of the charge. *Id.* Third, when further incidents of discrimination are alleged to have been carried out in precisely the same manner as alleged in the administrative charge. *Id.* (citing *Butts*, 990 F.2d at 1402-03. *See also Morgan*, 536 U.S. at 113 (time period for filing a charge of discrimination or retaliation with the EEOC is subject to equitable tolling and estoppel doctrines, but such principles should be applied sparingly) (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (other citations omitted)).

2. Hostile Work Environment Claims

To survive a motion for summary judgment on a claim of hostile work environment, plaintiff must produce evidence showing harassment based on a protected factor that is "'sufficiently severe or pervasive to alter the

conditions of the victim's employment and create an abusive working environment . . .' [and] a specific basis for imputing the conduct creating the hostile work environment to the employer." *Feingold*, 366 F.3d at 149 (quoting *Alfano v. Costello*, 294 F.3d 365, 373 (2d Cir. 2002)); *Mormol v. Costco Wholesale Corp.*, 364 F.3d 54, 58 (2d Cir. 2004). *See also Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (plaintiff must show "discriminatory intimidation, ridicule, and insult" to defeat a summary judgment motion).

"Isolated instances of harassment ordinarily do not rise to this level." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000). "Rather, the plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were 'sufficiently continuous and concerted' to have altered the conditions of her working environment." *Id.* (quoting *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997)); *see also Feingold*, 366 F.3d at 150 (noting that "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive") (internal quotations omitted). *But see Richardson*, 180 F.3d at 437 (noting that a single instance can give rise to an abusive environment when that incident is a sexual assault).

A "hostile work environment" claim requires a nexus to discriminatory behavior and may not be premised simply on conduct by his supervisors that a plaintiff may find burdensome or unpleasant. *See Alfano*, 294 F.3d at 377 ("Everyone can be characterized by sex, race, ethnicity, or (real or perceived) disability; and many bosses are harsh, unjust, and rude."). As the Supreme

Court has emphasized, "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discriminat[ion]* . . . because of. . . [a protected factor].'" *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) (quoting Title VII)). The Court has further explained that Title VII is not a "general civility code" to be used by the Court to police a work environment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (Title VII standards when "[p]roperly applied, . . will filter out complaints attacking the ordinary tribulations of the workplace, such as sporadic use of abusive language, gender-related jokes and occasional teasing.") (quoting *Oncale*, 523 U.S. at 80) (internal citation and quotation omitted).

"[I]n order to be actionable under the statute, a [hostile work] environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so." *Id.* at 787; *Mormol*, 364 F.3d at 58 (same).

3. Retaliation Claims

Title VII not only prohibits discrimination against employees but also proscribes retaliating against an employee for having alleged discriminatory conduct. *See Sanders*, 361 F.3d at 755 (citing 42 U.S.C. § 2000e-2(a), 2000e-3(a)). "Title VII is violated when 'a retaliatory motive plays a part in adverse employment actions toward an employee, whether or not it was the sole cause.'" *Terry*, 336 F.3d at 140-41 (quoting *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1039 (2d Cir. 1993)).

This Court has held that in order to make out a prima facie case of retaliation, an employee must show "'[1] participation in a protected activity known to the defendant; [2] an employment action disadvantaging the plaintiff; and [3] a causal connection between the protected activity and the adverse employment action.'" *Feingold*, 366 F.3d at 156 (quoting *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir. 1998)); *Terry*, 336 F.3d at 140 (same). However, the Supreme Court recently clarified that "the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington Northern & Santa Fe R.R. Co. v. White*, 126 S. Ct. 2405, 2412-13 (2006). Thus, to establish retaliation, a plaintiff must demonstrate that "a reasonable employee would have found the challenged action materially adverse, 'which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 2415 (citing *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006) (other citations and internal quotations omitted).

The Court in *White* further reiterated that "Title VII . . . does not set forth 'a general civility code for the American workplace.'" *Id.* at 2415 (quoting *Oncale*, 523 U.S. at 80). Thus, "petty slights, minor annoyances, and simple lack of good manners" are not actionable because they typically will not deter the filing of administrative EEO complaints. *Id.*

A claim of retaliation under Title VII is otherwise evaluated under the same *McDonnell Douglas* burden-

shifting rules as set forth above for a substantive discrimination claim. *See Terry*, 336 F.3d at 157.

C. Discussion

1. The District Court Properly Dismissed Plaintiff's Claims of Retaliation and Hostile Work Environment Because Plaintiff Did Not Raise Them in His EEO Complaint and They are Not Reasonably Related to His EEO Charge.

The district court properly dismissed plaintiff's retaliation and hostile work environment claims, based on allegations of additional harassment by Sacco in 1999, since plaintiff failed to include them in his administrative complaint and the claims are not reasonably related to the single claim asserted by plaintiff at the administrative level – national origin discrimination based on Sacco's alleged conduct on September 29, 2003.

First, even if Title VII's exhaustion requirement for federal employees is not considered jurisdictional, plaintiff's hostile work environment and retaliation claims are time barred. In *Morgan*, the Supreme Court held that a charge "alleging a hostile work environment . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the [applicable] time period" for filing such claim. 536 U.S. at 122. The Court also held unanimously, however, that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed

charges." *Id.* at 113. The few 1999 acts alleged by the plaintiff in this case – one or two lunch break denials and denial of help with a work assignment once – are precisely the type of discrete acts that the *Morgan* Court held are barred if not timely included in an EEO charge. *See id.*

Plaintiff's reliance on *Morgan* to excuse his failure to exhaust is misplaced. Unlike in this case, in *Morgan*, the plaintiff had at least included in his timely filed EEO complaint allegations of previous conduct occurring outside of the 300 day time period in 42 U.S.C. § 2000e-5(e)(1) applicable in that case. The Court nonetheless held that plaintiff was precluded from recovering for discrete claims of discrimination which occurred outside the applicable statutory period. *Id.* at 105, 114-15. However, the Court concluded that Morgan's hostile work environment claim could include acts outside the applicable 300-day statutory filing period based on the finding by the Court of Appeals that "the pre-and post-limitations period incidents involve[d] the *same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers*." *Id.* at 120 (emphasis added) (citation omitted).[7] The isolated incidents alleged by plaintiff herein are not the same type of actions, did not occur frequently, and while supposedly

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[7] The Court additionally cited as support for its holding Morgan's "evidence from a number of other employees that managers made racial jokes, performed racially derogatory acts, made negative comments regarding the capacity of blacks to be supervisors, and used various racial epithets." *Id.*

carried out by the same manager (Sacco), plaintiff has admitted he did not see Sacco on a regular basis. JA187-88. *Compare Terry*, 336 F.3d at 149 ("plaintiff is not complaining merely about sporadic and isolated events, but rather about his daily working conditions.").

Nor do plaintiff's claims of hostile work environment and retaliation satisfy any of the three exceptions to the exhaustion requirement recognized by this Court in *Butts*. *See* 990 F.2d at 1402-03. First, as the district court correctly concluded, plaintiff's hostile work environment and retaliation claims are not reasonably related to his administrative claim of national origin discrimination. *See* JA 778-80. Plaintiff's EEO charge describes only the alleged conduct of Sacco on September 29, 2003 and makes no mention of any ongoing or prior discriminatory conduct by Sacco or any other USPS employee. JA 274-91, 268-73, 666-67. *See Deravin v. Kerik*, 335 F.3d 195, 201 (2d. Cir. 2003) (the factual allegations in the administrative complaint should be the focus of any determination of whether previously unfiled charges are reasonably related to the administrative charge). Consequently, as the district court properly concluded, "[c]ontrary to plaintiff's argument, had the EEO Office conducted a full investigation into his administrative complaint, the investigation would not reasonably have been expected to encompass any other incidents or any pattern of nationality-based harassment by Sacco." JA 778-79.[8] Thus, plaintiff's single incident EEO complaint

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[8] As noted previously, the EEO office could not conduct a thorough investigation because plaintiff wished to remain (continued...)

was "insufficient to place the [USPS] on notice of a broader hostile work environment claim." *Id.* at 779.

Second, plaintiff's claim of retaliation is not so closely connected to the filing of the underlying charge so as to warrant excusing his failure to exhaust. *See Butts*, 990 F.2d at 1402. Generally, exhaustion is not required where a plaintiff claims retaliation based on his underlying discrimination claim. *Terry*, 336 F.3d at 151. As this Court explained in *Terry*, the purpose of this exception is to avoid rewarding employers who successfully intimidate complaining employees into not filing discrimination claims. *Id.* In this case, however, plaintiff does not allege retaliation for filing his EEO charge in November 2003, but instead claims that Sacco's conduct on September 29, 2003, was in retaliation for his purported verbal complaints to his union about the denial of a lunch break four years earlier in 1999. *See Pl. Brief* at 35; JA 779-80. Thus, the district court correctly ruled these alleged events are not so reasonably related that the plaintiff's failure to exhaust his retaliation claim should be excused. *See Butts*, 990 F.2d at 1402; JA 779-80.

Finally, the third exception to the exhaustion requirement set forth in *Butts*, when further incidents of discrimination are alleged to have been carried out in precisely the same manner as alleged in the administrative charge, simply is inapplicable in this case. *See Butts* at 1402-1403. Plaintiff's EEO complaint is specific to an encounter with Sacco in which plaintiff claims he was

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[8] (...continued)
anonymous in his complaint. *See* JA 277, 287.

yelled at and assaulted. JA 666-67. As discussed above, no where in his amended complaint or in testimony does plaintiff allege incidences of retaliation or ongoing harassment which in any way resemble the incident of September 29, 2003. *See* JA 28-32.

For the foregoing reasons, the district court properly concluded that plaintiff's failure to exhaust his retaliation and hostile work environment claims precludes judicial review of them. Thus, this Court should affirm the district court's ruling granting summary judgment in favor of defendant.

2. Plaintiff Has Not Demonstrated a *Prima Facie* Case of Hostile Work Environment.

Likewise, plaintiff did not and cannot demonstrate a *prima facie* case of hostile work environment. Even if plaintiff's representations regarding the alleged denial of lunch breaks, the denial of assistance, and his encounter with Sacco on September 29, 2003, is credited, these isolated incidents do not rise to the level of a hostile work environment as defined by the courts. Thus, should this Court reach the issue despite plaintiff's failure to include this claim in his EEO complaint, the district court's grant of summary judgment should be affirmed.

None of the conduct described by the plaintiff in this case satisfies the minimum criteria for a hostile work environment claim under Title VII. By plaintiff's own admission, he rarely saw or worked for Sacco over the time period in question, making it unlikely that any continued or repeated harassment could have been

perpetrated. JA 186-88. Additionally, the cumulative effect of allegedly having been denied two lunch breaks and assistance with a task on one occasion in 1999, having an encounter with Sacco in 2003, and being "watched" on one or two occasions subsequent to that one encounter, all spanning a lengthy four-year period, hardly amounts to "pervasive" harassment. *See Feingold*, 366 F.3d at 150 (harassment "must be more than episodic; [it] must be sufficiently continuous and concerted in order to be deemed pervasive") (internal quotations omitted); *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2d Cir. 1992) (incidents of harassment must be "repeated and continuous" and that "isolated acts or occasional episodes will not merit relief."); *Yarde v. Good Samaritan Hospital*, 360 F. Supp. 2d 552, 566-67 (S.D.N.Y 2005) (explaining that "isolated incidents ordinarily will not rise to the level of a hostile work environment."). Simply put, plaintiff has not provided a sufficient evidence to raise a triable issue of fact regarding his hostile work environment claim, and the district court's grant of summary judgment therefore was appropriate.

3. Plaintiff Has Not Established a *Prima Facie* Case of Retaliation

As well, plaintiff has failed to raise a triable issue of fact with respect to the merits of his retaliation claim. Thus, should this Court reach the issue despite plaintiff's failure to exhaust his administrative remedies, the Court can affirm the district court's grant of summary judgment on this ground.

As explained above, to establish a *prima facie* case of discriminatory retaliation, a plaintiff must show an objectively materially adverse action, i.e., an action that "a reasonable employee would have found . . . materially adverse, 'which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *White*, 126 S. Ct. at 2415 (citations and internal quotations omitted). *See also Feingold*, 366 F.3d at 156.

Here, plaintiff claims that Sacco verbally and physically harassed him on September 29, 2003, in retaliation for plaintiff's supposed verbal complaints to his union four years earlier, in 1999, regarding the denial of one or two lunch breaks. JA 154-55. However, there is no evidence whatsoever that defendant or Sacco knew that plaintiff had complained to his union in 1999 about the supposed denial of one or two lunch breaks. *See Feingold*, 366 F.3d at 156 (plaintiff must show he participated in a protected activity *known* to the defendant). Still, plaintiff claims Sacco "must have known" of his verbal complaints. JA 402. Sacco had no access to plaintiff's union files, JA 323, and there is no allegation that plaintiff's complaint was reduced to writing in any event. Accordingly, plaintiff's unsupported conclusory statement does not raise a genuine issue of material fact for trial.

Plaintiff further alleges in his statement of facts and his deposition that Sacco "watched" him occasionally after he filed his EEO complaint in November, 2003. *See* JA 256. Yet, plaintiff has failed to argue this point in his brief and therefore has waived it. *Thomas v. Roach*, 165 F.3d 137,145-46 (2d Cir. 1999). In addition, even if credited,

the alleged "watching" is not enough to establish a *prima facie* case of retaliation. *See Weisman v. New York City Dept. Of Educ.*, No. 03CIV9299PKC, 2005 WL 1813030 at *10 (S.D.N.Y. Aug. 1, 2005) ("increased monitoring, . . . without more, does not constitute an adverse employment action."); *Ifill v. United Parcel Service*, No. 04-5963LTSDFE, 2005 WL 736151 at *3 (S.D.N.Y. Mar. 29, 2005)("allegedly excessive employer oversight" insufficient to constitute adverse employment action) (citations omitted); *Castro v. City of New York Bd. of Educ.*, No. 96-6314MBM, 1998 WL 108004 at *7 (S.D.N.Y. Mar. 12, 1998) ("although reprimands and close monitoring may cause an employee embarrassment or anxiety, such intangible consequences are not materially adverse alterations of employment conditions"). The Supreme Court's holding in *White*, *supra,* does not change this result. The plaintiff in this case cannot demonstrate a *materially* adverse action, regardless of whether or not it affected the terms and conditions of his employment. *See White*, 126 S. Ct. at 2415 (the injury or harm resulting from the retaliation must be so "materially adverse" as to have prevented the employee from following through with a discrimination complaint.). Indeed, he has not even alleged that any act of the USPS or its employees prevented him from complaining about Sacco's alleged conduct.

Since plaintiff cannot overcome the minimum hurdle of establishing a *prima facie* case of retaliation, this Court should affirm the grant of summary judgment in favor of the defendant.

III. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFF'S FTCA COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION.

A. Relevant Facts

Plaintiff commenced this litigation against the defendant by filing a complaint in the district court on May 20, 2004, alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and various state statutes. JA 12-23. He later amended his complaint and withdrew the state law tort claims. JA 28-34.

Thereafter, on April 18, 2005, plaintiff filed an administrative claim with the USPS under the FTCA, seeking compensation for injuries to his eye, lumbar spine, chest, post-traumatic headaches, loss of sleep and appetite, and post-traumatic anxiety. JA 364-67. The sole basis for his claim was the alleged assault by Sacco on September 29, 2003. JA 366.

In a letter dated June 7, 2005, the USPS denied plaintiff's FTCA claim for several reasons. As relevant here, the USPS noted that plaintiff's claim is precluded by FECA.

On November 22, 2005, after the defendant had filed a motion for summary judgment in the Title VII case, plaintiff initiated a second action in the district court against the USPS and Sacco seeking compensatory damages under the FTCA for alleged physical and

emotional injuries arising from Sacco's purported physical assault of plaintiff on September 29, 2003. JA 356-70; GA 2.

On February 24, 2006, the USPS and Sacco filed a motion to dismiss the FTCA complaint on the ground that plaintiff's FTCA claim is preempted by the FECA. JA 736-50. The FTCA case thereafter was transferred to U.S. District Judge Janet B. Arterton, who consolidated it with plaintiff's pending Title VII action under docket no. 3:04cv841. JA 751-52.

On August 21, 2006, the district court issued a ruling granting the government's motions for dismissal and summary judgment. JA 767-86. While the district court noted a division of authority as to whether FECA covers emotional distress claims, the court nonetheless held:

> Given FECA's exclusivity provisions, this Court lacks jurisdiction to entertain plaintiff's FTCA claim absent a determination from the Secretary of Labor that FECA does not apply to his emotional distress claims.

Id. Accordingly, the court dismissed the claim for lack of subject matter jurisdiction.

Final judgment entered in favor of the Government defendants on August 23 and August 30, 2006. JA 787-88. On September 19, 2006, plaintiff filed a timely notice of appeal as to the district court's ruling. JA 789-90.

B. Governing Law and Standard of Review

1. FECA

With FECA, Congress established a comprehensive workers' compensation program for government workers that requires the United States to provide benefits for death or disability where an employee sustains personal injury in the performance of duty. 5 U.S.C. § 8102. FECA "is essentially an act of justice or of grace on the part of the United States, elaborately and carefully worked out, and designed to compensate, promptly, without litigation or expense, all employees injured while in discharge of duty. . . ." *Dahn v. Davis*, 258 U.S. 421, 431 (1922); *see also Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 194 (1983) (FECA provides "immediate, fixed benefits, regardless of fault").

In addition to disability benefits, *see* 5 U.S.C. §§ 8105-8106, FECA provides the exclusive liability of the United States with respect to the injury or death of an employee. In this regard, FECA provides, in pertinent part:

> The liability of the United States . . . under this subchapter . . . with respect to the injury or death of an employee *is exclusive and instead of all other liability of the United States* . . . to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States . . . because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a

> workmen's compensation statute or under a Federal tort liability statute. . . .

5 U.S.C. § 8116(c) (emphasis added).

The Supreme Court has explained this provision as follows:

> In enacting this provision, Congress adopted the principal compromise – the "quid pro quo" – commonly found in workers' compensation legislation: employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government.

Lockheed Aircraft Corp., 460 U.S. at 194. *See also Votteler v. United States,* 904 F.2d 128, 130 (2d Cir. 1990) (holding that FECA is the exclusive remedy for federal employees who sustain injuries or aggravate pre-existing injuries within the scope of their employment).

Further cementing the exclusivity of the federal employees' compensation scheme, three years after enactment of the FTCA, Congress amended Section 7 of the FECA, codified at 5 U.S.C. § 8116(c), to close a gap under the law that permitted federal employees to receive double recovery under both the FECA and the FTCA for the same injuries. According to the Senate Report on the bill, Congress adopted the language codified in § 8116(c)

> to make it clear that the right to compensation benefits under the act is exclusive in place of any and all other legal liability of the United States or

> its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute.

S. Rep. No. 81-836, 1st Sess. (1949), reprinted in 1949 U.S. Code Cong. & Ad. News 2125, 2135.[9]

FECA vests the Secretary of Labor with exclusive authority to "administer, and decide all questions arising under" FECA, 5 U.S.C. § 8145, and to "prescribe rules and regulations necessary for the administration of [the program] including rules and regulations for the conduct of hearings." *Id.* § 8149. Pursuant to § 8145 of the statute, the Secretary has delegated the administration and implementation of FECA to the Director, Office of Workers' Compensation Programs ("OWCP"). 20 C.F.R. § 1.2.

The statute provides that the Secretary's decision to allow or deny payment under FECA is "final and conclusive for all purposes and with respect to all questions of law and fact." 5 U.S.C. § 8128(b)(1). Further, the Secretary's decision is "not subject to review by another official of the United States or by a court by

[9] The Senate Report further notes that federal employees had increasingly been seeking relief under the FECA as well under other liability acts, including the FTCA, and that the amendment sought to eliminate the duplicative claims which were "unnecessary" and had become "uneconomical." *Id.* at 2136.

mandamus or otherwise." *Id.* § 8128(b)(2); 20 C.F.R. § 501.6(c). *See Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 90 (1991) ("FECA contains an 'unambiguous and comprehensive' provision barring any judicial review of the Secretary of Labor's determination of FECA coverage.") (citing *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 780 and n. 13 (1985)). *But see Senerchia v. United States*, 235 F.3d 129, 131-32 (2d Cir. 2000) (assuming an exception applies to the FECA's preclusion of judicial review of benefits determinations, exception does not apply if government's FECA interpretation does not violate clear statutory mandate); *United States v. Sforza*, 326 F.3d 107, 111-12 (2d Cir. 2003) (explaining in *dicta* that judicial review might be permitted when a plaintiff raises a constitutional challenge or argues that the Secretary violated a clear statutory mandate).

2. Standard of Review Under Rule 12(b)(1)

In evaluating the dismissal of a claim for lack of subject matter jurisdiction, this Court "reviews the district court's factual findings. . . for clear error and its legal conclusion as to whether subject matter jurisdiction exists *de novo*." *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 193 (2d Cir. 2003). *See also Binder & Binder PC v. Barnhart*, 481 F.3d 141, 148-49 (2d Cir. 2007).

Rule 12(b)(1) of the Federal Rules of Civil Procedure requires dismissal of a case for lack of subject matter jurisdiction "when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). In resolving a

motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court may consider evidence beyond the pleadings. *Id*. Further, although under Rule 12(b)(1) a court must accept as true all material factual allegations in the complaint, the court will not draw inferences favorable to the party asserting jurisdiction. *Shipping Fin. Servs. Corp. v. Drakos,* 140 F.3d 129, 131 (2d Cir. 1998); *see also Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993). At all times, "[t]he burden of proving jurisdiction is on the party asserting it." *Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996) (citation omitted).

C. Discussion

Plaintiff's second action seeks damages under the FTCA for alleged physical and emotional injuries resulting from the same physical assault by Sacco on September 29, 2003, asserted in his Title VII complaint. However, plaintiff's claim based on injuries allegedly sustained during the course of his federal employment are exclusively cognizable under a different federal statutory scheme, FECA.

In FECA, Congress has unambiguously provided the sole remedy for federal employees who sustain personal injury in the course of their employment. Not surprisingly then, courts have strictly construed the exclusivity provisions of the FECA. Thus, a federal employee who is injured at work cannot sue the United States in court on any claim arising from the injury. 5 U.S.C. § 8116(c) ("The liability of the United States . . . under this subchapter . . . with respect to the injury . . . of an

employee *is exclusive and instead of all other liability of the United States . . .*") (emphasis added). *Lockheed Aircraft Corp*., 460 U.S. at 194 (in return for no-fault, fixed, immediate benefits under FECA, federal employees give up their right to sue the Government).

Importantly, USPS employees qualify as federal employees for purposes of the FECA. 39 U.S.C. § 1005(c) ("Officers and employees of the Postal Service shall be covered by subchapter I of chapter 81 of title 5, relating to compensation for work injuries."). Therefore, plaintiff in the instant case, a USPS employee who claims injury during the course of his employment, is covered under the FECA and therefore is barred from seeking recovery under any other statutory scheme, including the FTCA.

Plaintiff argues that FECA is not adequate to address his claim because he is seeking damages for emotional as well as physical injury. *See Pl. Brief* at 21-22. Yet, plaintiff does not allege that he first presented his claim to the Secretary of Labor – the statute-specified authority – or his delegate, the Director, OWCP, for a determination of coverage under FECA, and that it was denied. Plaintiff is correct that there exists support in the case law for the proposition that emotional injuries are not covered by FECA. *See Pl. Brief* at 22 (citing *O'Donnell v. United States*, No. 04-00101, 2006 WL 166531, at *5-6 (E.D. Pa. Jan 20, 2006) (noting that "some courts have held that emotional distress injuries are not covered by FECA, [while] other courts have declared that FECA encompasses emotional distress claims."). However, this case law is not dispositive of the issue, since the Secretary of Labor is granted the authority to decide all matters arising under FECA, including the scope of coverage. *See* 5 U.S.C. § 8124 (a) ("The Secretary of Labor shall determine and make a finding of facts and make an award

for or against payment of compensation under this subchapter . . . ."). Moreover, as did the district court in *O'Donnell*, the majority of courts have held that when there is a "substantial question of FECA coverage" the Secretary of Labor, and not the courts, must determine whether or not a particular injury is compensable under FECA. *See O'Donnell*, 2006 WL 166531, at *6 (staying FTCA action pending determination by Secretary of Labor regarding whether plaintiff's claim for emotional distress is covered by FECA).

Indeed, this Court and every other circuit to address the question has held that the federal courts lack jurisdiction over an FTCA claim when a substantial question exists as to whether FECA applies to a claimed injury. *See Votteler,* 904 F.2d at 130-31 (affirming district court's dismissal of FTCA action because plaintiff's exclusive remedy is under FECA, "notwithstanding that the work-related injuries were an aggravation of injuries originally sustained in a non-work-related accident."); *White v. United States*, 143 F.3d 232, 234 (5th Cir. 1998) (FTCA claim cannot be considered unless court is "certain" that FECA does not apply); *Tippetts v. United States*, 308 F.3d 1091, 1094-95 (10th Cir. 2002) ("The Secretary [of Labor] must determine, as an initial matter, whether a claim falls within the purview of the FECA" even when that claim includes damages for emotional distress); *Noble v. United States*, 216 F.3d 1229, 1235 (11th Cir. 2000) (FTCA action cannot be entertained when there is a substantial question as to FECA coverage); *Gill v. United States*, 471 F.3d 204, 208-09 (1st Cir. 2006) (affirming district court's dismissal of plaintiff's FTCA claim for lack of jurisdiction because it is not certain that the Secretary of Labor would deny coverage under FECA for plaintiff's claim for emotional distress damages); *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993)(affirming dismissal of FTCA action since plaintiff

must first allow Secretary of Labor to determine whether or not plaintiff's emotional distress claims are covered by FECA). *See also DiPappa v. United States,* 687 F.2d 14, 20 (3d Cir. 1982) (holding Secretary of Labor must first determine if plaintiff's injury is covered by FECA, but remanding with instructions to stay FTCA claim pending outcome of determination of FECA coverage).

In this case, no credible argument can be made that the Secretary or OWCP certainly would deny FECA coverage for plaintiff's claim for alleged physical and emotional injuries. Indeed, as the district court noted in *O'Donnell*, the Employees' Compensation Appeals Board ("ECAB") "has hedl explicitly that the FECA covers emotional injuries under certain circumstances." 2006 WL1656531, at *6 (citing ECAB deciisions). *See also McDaniel v. United States*, 970 F.2d 194, 197 (6th cir. 1992)(holding FECA prrempted plaintiff's FTCA claim where Secretary fo labor determined plaintiff's claim for emotional damages is covered by FECA); *Bennett v. Barnett*, 210 F.3d 272, 277 (5th Cir. 2000) reversing award of damages under FTCA because plaintiff's claims were preempted by FECA and noting that although the Secretary dismissed the claimant's petition under FECA for lack of sufficient proof of injury, he did recognize that coverage existed for emotional distress).

Given this authority, there exists in this case a substantial question as to whether or not FECA covers plaintiff's alleged injuries sustainted in the course of his federal employment, a question which must be answered by the Secretary of Labor and his delegates. Accordingly, the district court properly held that it lacked jurisdiction to

review plaintiff's FTCA claim because plaintiff were required to first present his claim to the Secretary of Labor for determination of coverage under FECA. JA 785-86.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: July 11, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

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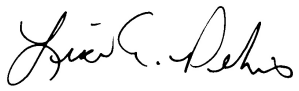
CORINNE R. SEIBERT
LAW STUDENT INTERN (on the brief)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,626 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



LISA E. PERKINS
ASSISTANT U.S. ATTORNEY

ADDENDUM

5 U.S.C. § 8116(c)

The 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 and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

5 U.S.C. § 8128(b)

The action of the Secretary or his designee in allowing or denying a payment under this subchapter is--

(1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

42 U.S.C. § 2000e-16

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

* * *

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days

from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

GOVERNMENT'S APPENDIX

CLOSED, MEMBER

U.S. District Court
United States District Court for the District of Connecticut (New Haven)
CIVIL DOCKET FOR CASE #: 3:05-cv-01802-JBA

Mathirampuzha v. Postal Service
Assigned to: Judge Janet Bond Arterton
Demand: $500,000
Lead case: 3:04-cv-00841-JBA
Member case: (View Member Case)
Cause: 28:2671 Federal Tort Claims Act

Date Filed: 11/22/2005
Date Terminated: 03/03/2006
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

Plaintiff

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Defendant

Ron Sacco
in his individual capacity only

represented by **Lisa E. Perkins**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

William A. Collier
(See above for address)
TERMINATED: 02/02/2006
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
11/22/2005	1	COMPLAINT against U.S. Postal Service, Ron Sacco (Filing fee $ 250 receipt number N017056), filed by Joseph Mathirampuzha. (Attachments: # 1 Exhibits)(Inferrera, L.) (Entered: 11/23/2005)
11/22/2005	2	Order on Pretrial Deadlines: Amended Pleadings due by 1/21/2006. Discovery due by 5/24/2006.. Signed by Clerk on 11/22/05. (Inferrera, L.) (Entered: 11/23/2005)
11/22/2005	3	NOTICE of Appearance by W. Martyn Philpot, Jr on behalf of Joseph Mathirampuzha (Inferrera, L.) (Entered: 11/23/2005)
11/23/2005		Summons Issued as to U.S. Postal Service, Ron Sacco, U.S. Attorney and U.S. Attorney General (Inferrera, L.) (Entered: 11/23/2005)
12/02/2005	4	SUMMONS Returned Executed by Joseph Mathirampuzha. U.S. Postal Service served on 11/30/2005, answer due 12/20/2005. (Philpot, W.) (Entered: 12/02/2005)
12/02/2005	5	SUMMONS Returned Executed by Joseph Mathirampuzha. Ron Sacco served on 12/2/2005, answer due 12/22/2005. (Philpot, W.) (Entered: 12/02/2005)
12/06/2005		Answer deadline updated for U.S. Postal Service to 1/20/2006; Ron Sacco to 1/22/2006. (Blue, A.) (Entered: 12/06/2005)
12/14/2005	6	SUMMONS Returned Executed by Joseph Mathirampuzha. (Philpot, W.) (Entered: 12/14/2005)
01/17/2006		Answer deadline updated for Ron Sacco to 1/31/2006. (Blue, A.) (Entered: 01/17/2006)
01/19/2006	7	NOTICE of Appearance by William A. Collier on behalf of U.S. Postal Service, Ron Sacco (Blue, A.) (Entered: 01/19/2006)
01/19/2006	8	MOTION for Extension of Time until 2/20/06 to respond to complaint by U.S. Postal Service, Ron Sacco. (Blue, A.) (Entered: 01/19/2006)
01/19/2006	9	ORDER granting 8 MOTION for Extension of Time until 2/20/06 to

GA 2

		respond to complaint, Signed by Clerk on 1/19/06. (Blue, A.) (Entered: 01/19/2006)
01/19/2006		Answer deadline updated for U.S. Postal Service to 2/20/2006; Ron Sacco to 2/20/2006. (Blue, A.) (Entered: 01/19/2006)
01/31/2006	10	NOTICE of Appearance by Lisa E. Perkins on behalf of U.S. Postal Service, Ron Sacco (Blue, A.) (Entered: 02/01/2006)
01/31/2006	11	MOTION for William A. Collier to Withdraw as Attorney by U.S. Postal Service, Ron Sacco. (Blue, A.) (Entered: 02/01/2006)
02/02/2006	12	ORDER granting 11 Motion for William A. Collier to Withdraw as Attorney. . Signed by Judge Robert N. Chatigny on 2/2/06. (Bauer, J.) (Entered: 02/03/2006)
02/21/2006	13	MOTION for Extension of Time until 3/24/06 to file an answer by U.S. Postal Service, Ron Sacco. (Blue, A.) (Entered: 02/22/2006)
02/21/2006	14	NOTICE of Substitution by U.S. Postal Service, Ron Sacco (Attachments: # 1 Text of Proposed Order)(Blue, A.) (Entered: 02/22/2006)
02/24/2006	15	REDOCKETED ON LEAD CASE: MOTION to Dismiss by U.S. Postal Service, Ron Sacco.Responses due by 3/17/2006 (Blue, A.) Modified on 3/7/2006 (Brown, S.). (Entered: 02/27/2006)
02/24/2006	16	Memorandum in Support re 15 MOTION to Dismiss filed by U.S. Postal Service, Ron Sacco. (Blue, A.) (Entered: 02/27/2006)
02/27/2006	17	ENDORSEMENT ORDER denying 13 MOTION for Extension of Time until 3/24/06 to file an answer, Signed by Judge Robert N. Chatigny on 2/27/06. (Blue, A.) (Entered: 02/27/2006)
03/02/2006	18	ORDER OF TRANSFER. Case reassigned to Judge Janet Bond Arterton for all further proceedings. Signed by Judge Robert N. Chatigny on 3/2/06. (D'Onofrio, B.) (Entered: 03/02/2006)
03/03/2006	19	ORDER Consolidating case with 4cv841JBA. Signed by Judge Janet Bond Arterton on 3/3/06. (Brown, S.) (Entered: 03/06/2006)
03/03/2006		Cases associated. (Brown, S.) (Entered: 03/06/2006)
08/23/2006	20	JUDGMENT for United States Postal Svc and Ron Sacco . Signed by Clerk on 8/23/06. (Brown, S.) (Entered: 08/23/2006)
08/23/2006	21	JUDGMENT for United States Postal Service and Ron Sacco . Signed by Clerk on 8/23/06. (Brown, S.) (Entered: 08/30/2006)

PACER Service Center
Transaction Receipt

ANTI-VIRUS CERTIFICATION

Case Name: Mathirampuzha v. U.S. Postal Service

Docket Number: 06-4384-cv

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 7/11/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: July 11, 2007