

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

CONSTANCE GARY,	)	
	)	C.A. No. 11C-12-208 FSS
Plaintiff,	)	
	)	
v.	)	
	)	
R.C. FABRICATORS, INC.,	)	
	)	
Defendant.	)	

Date Submitted: April 30, 2014

Date Decided: July 30, 2014

**COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED AND PLAINTIFF'S  
CROSS-MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED**

Constance Gary, *pro se*, Plaintiff.

Joseph H. Huston, Jr., Stevens & Lee, P.C., Attorneys for Defendant.

PARKER, Commissioner

## **INTRODUCTION**

Plaintiff Constance Gary worked as a receptionist for Defendant R.C. Fabricators, Inc. (“RCF”), a steel fabrication and erection company, for 11 months, from June 4, 2008 until her termination on May 8, 2009.

Plaintiff Gary filed the subject action alleging three claims of discrimination: 1) religious/spiritual harassment; 2) sexual harassment; and 3) retaliation.

Both RCF and the Plaintiff filed cross-motions for summary judgment on these claims.

For the reasons discussed below, RCF’s motion for summary judgment should be granted on all claims and Plaintiff’s complaint dismissed in its entirety, with prejudice.

## **PROCEDURAL HISTORY**

On June 22, 2009, Plaintiff Gary filed a Charge of Discrimination with the Delaware Department of Labor.<sup>1</sup> On September 30, 2011, the Delaware Department of Labor issued a no cause determination and corresponding right to sue notice.<sup>2</sup>

Plaintiff Gary filed her original complaint in the Superior Court on December 22, 2011. Because she included federal causes of action in her complaint, RCF removed the case to federal court. Plaintiff Gary then advised the federal court that she was withdrawing all of her federal causes of action. By Order dated June 13, 2012, the United States District Court for the District of Delaware dismissed all of plaintiff’s federal claims with prejudice and remanded the case back to the Superior Court.

When the case was remanded back to the Superior Court, RCF moved to dismiss Plaintiff’s state common law causes of action. The court granted RCF’s motion on January 29,

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<sup>1</sup> Davis Affidavit, Exhibit B; Amended Complaint filed September 20, 2012, ¶133.

<sup>2</sup> Amended Complaint filed September 20, 2012, ¶169.

2013, leaving only Plaintiff Gary's claims under the Delaware Discrimination Employment Act (DDEA)<sup>3</sup> of religious/spiritual harassment, sexual harassment and retaliation remaining.

Plaintiff filed a motion to suppress her deposition based on typographical and other errors she perceived with the deposition transcript. The court held a hearing on the motion on April 30, 2014, addressed the concerns of which Plaintiff complained, and corrected those errors on the record which were typographical of nature.

The parties have now filed cross-motions for summary judgment as to all of Plaintiff Gary's claims.

### **FACTS**

The facts are set out below in the light most favorable to the Plaintiff, noting any discrepancies along the way.

Plaintiff Gary was hired by RCF as a receptionist from June 4, 2008 until her termination on May 8, 2009.

Following her termination, on June 22, 2009, Plaintiff filed a Charge of Discrimination with the Delaware Department of Labor.<sup>4</sup> On September 30, 2011, the Delaware Department of Labor issued a no cause determination and corresponding right to sue notice.<sup>5</sup>

Plaintiff alleges three claims of discrimination in the subject action.

First, Plaintiff alleges a claim of religious/spiritual harassment. This claim stems from a series of religious themed e-mails shared by a small group of employees with each other.

Second, Plaintiff alleges a claim of sexual harassment related to a single isolated act by a co-worker. On September 16, 2008, a Field Supervisor at RCF, Mark Shanor, hit Plaintiff on the

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<sup>3</sup> 19 *Del.C.* § 710 *et seq.*

<sup>4</sup> Amended Complaint filed September 20, 2012, ¶ 133.

<sup>5</sup> Amended Complaint filed September 20, 2012, ¶ 169.

buttocks with a set of blueprints. It is this incident which forms the basis of Plaintiff's sexual harassment claim.

Third, Plaintiff alleges a retaliation claim. She claims that when she complained about the religious harassment, she was retaliated against by RCF.

The facts which form the basis of each of Plaintiff's claims are discussed below. Plaintiff's first claim of religious/spiritual harassment is based on a series of religious themed e-mails. The court will first discuss the e-mails and Plaintiff's communications and conduct which she conveyed to the others with whom she was sharing the e-mails. After that recitation is completed, the court will then discuss Plaintiff's private thoughts and impressions about those e-mails.

#### **CLAIM ONE: SPIRITUAL/RELIGIOUS THEMED E-MAILS**

RCF is a steel fabrication and erection company located in Wilmington, Delaware. Plaintiff Gary was hired as a receptionist on June 4, 2008. She directly reported to Sue Dooling, RCF's Human Resources Professional.<sup>6</sup>

#### **Religious Themed E-Mails**

Plaintiff Gary claims that on her first day of work, June 4, 2008, Sue Dooling asked her if she was a Christian. Plaintiff Gary explained to Sue Dooling that she was spiritual but did not believe in Christianity as a religion. She explained that she read the Bible and prayed.<sup>7</sup> Sue Dooling said to Plaintiff Gary: "Well, you a Christian, honey."<sup>8</sup> Plaintiff Gary just looked at Sue Dooling and shook her head.<sup>9</sup>

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<sup>6</sup> Gary Deposition Transcript, at pg. 41.

<sup>7</sup> Gary Deposition Transcript, at pg. 50.

<sup>8</sup> Gary Deposition Transcript, at pg. 50.

<sup>9</sup> Gary Deposition Transcript, at pgs. 50-51.

During this conversation, Sue Dooling told Plaintiff Gary that she and another RCF employee, Javier Paula, the retail clerk for RCF, often sent inspirational e-mails to each other.

It is undisputed that Plaintiff Gary told Sue Dooling that she “had no problem with that” and that as a result of this conversation Plaintiff Gary understood she would be receiving inspirational e-mails.<sup>10</sup> In fact, Plaintiff Gary admits that she had no problem with receiving inspirational e-mails because she thought Sue Dooling was attempting to be friendly.<sup>11</sup>

Sue Dooling’s recollection differs from Plaintiff Gary’s as to the conversation in which Plaintiff Gary was invited to receive the inspirational e-mails. Sue Dooling does not recall ever asking Plaintiff Gary if she was a Christian. Sue Dooling recalls that several days after Plaintiff began working at RCF, Sue Dooling heard Plaintiff listening to a Christian sermon from a well known preacher on her computer. Sue Dooling told Plaintiff that she also liked that preacher’s sermons. During that conversation, Plaintiff Gary told Sue Dooling that she was very spiritual. Sue Dooling believed that she and Plaintiff Gary shared the same religious beliefs.<sup>12</sup>

Since Sue Dooling and a small group of RCF employees shared inspirational e-mails with each other, following the conversation about the well known preacher, Sue Dooling believed that Plaintiff Gary would enjoy receiving inspirational e-mails and asked her if she would like to receive them.<sup>13</sup>

For the purposes of this motion for summary judgment, the court will accept Plaintiff Gary’s version as true as to how she came about receiving the inspirational e-mails. The court

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<sup>10</sup> Gary Deposition Transcript, at pg. 51.

<sup>11</sup> Amended Complaint filed September 20, 2012, ¶ 9.

<sup>12</sup> Sue Dooling Affidavit, at ¶¶ 4-5.

<sup>13</sup> Sue Dooling Affidavit, at ¶¶ 6-7.

notes, however, that it is undisputed that Plaintiff Gary did, in fact, listen to gospel music on her computer during the work day.<sup>14</sup>

It is undisputed that on June 10, 2008, Sue Dooling sent an inspirational e-mail to four RCF employees plus an additional two recipients. The four RCF employees included: Plaintiff Gary, Javier Paula- the retail clerk, Carl Bouldin- the shop supervisor, and Stuart Sherbal- the bookkeeper.<sup>15</sup> The two other recipients were Sue Dooling's daughter, and Susan Reamer- the former RCF receptionist that had preceded Plaintiff Gary.<sup>16</sup>

Of the six recipients, Plaintiff Gary was listed first in the e-mail chain.

The e-mail stated: "BE ENCOURAGE (sic) AND HAVE A BLESSED DAY!!!" The text of the e-mail included language: "The road to success is not straight. There is a curve called Failure, a loop called Confusion, speed bumps called Friends. . ."

The e-mail was not written by Sue Dooling but merely forwarded by her.<sup>17</sup> The text of the e-mail instructed the reader to forward the e-mail to 10 people, but Sue Dooling sent it to 6 recipients noted above.<sup>18</sup>

Upon receiving Sue Dooling's inspirational e-mail on June 10, 2008, Plaintiff Gary responded: "VERY ENCOURAGING AND TRUE AS WELL. WITH GOD IN THE DRIVER'S SEAT, WE CAN NEVER BE STEERED IN THE WRONG DIRECTION! U HAVE A BLESSED DAY AS WELL!"<sup>19</sup>

On June 12, 2008, Ms. Dooling sent another inspirational e-mail to Plaintiff Gary. Sue Dooling included Javier Paula and Carl Bouldin- the shop supervisor, on this e-mail as well. The

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<sup>14</sup> See, Gary Deposition Transcript, at pgs. 272-280.

<sup>15</sup> Gary Deposition Transcript Exhibit 7; Gary Deposition Transcript, at pg. 64.

<sup>16</sup> Gary Deposition Transcript, pgs. 52-53.

<sup>17</sup> Gary Deposition Transcript, pg. 55.

<sup>18</sup> Amended Complaint filed September 20, 2012, at ¶ 10.

<sup>19</sup> Gary Deposition Exhibit 7.

e-mail forwarded a passage from Kenneth Copeland Ministries- Faith to Faith. The passage was entitled “Play to Win.”<sup>20</sup> Ms. Dooling added the affirmation “Halelujah! (sic)” before forwarding it. Plaintiff Gary’s name was listed first among the three co-workers.<sup>21</sup>

In response to the e-mail sent by Sue Dooling, on the same date, June 12, 2008, Plaintiff Gary replied: “AMEN! THE DEVIL ALWAYS TRIES TO BRING US DOWN. . . THANK U FOR THE INSPIRATIONAL MESSAGES AND SCRIPTURES. **KEEP ‘EM COMING.** HAVE A BLESSED DAY.”<sup>22</sup> (emphasis added).

On July 1, 2008, Plaintiff Gary forwarded an e-mail titled “What’s Wrong With Gossip?” to four RCF employees. These four RCF employees included: Sue Dooling, Javier Paula, Carl Bouldin and Stuart Sherbal. This e-mail, like the e-mails sent by Ms. Dooling, began with a passage from the Bible and then was followed by commentary.<sup>23</sup>

Javier Paula had up to this point not sent any inspirational e-mails to Plaintiff Gary. After receiving Plaintiff Gary’s inspirational e-mail, on July 1, 2008, Javier Paula sent to Plaintiff Gary an e-mail from a website “Sisters Building Sisters.”<sup>24</sup> Javier Paula sent this e-mail to Plaintiff Gary because she believed, based on the e-mail she had just received from Plaintiff Gary and the e-mails they both received from Sue Dooling, that Plaintiff Gary would enjoy the e-mail.<sup>25</sup>

Upon receipt of Javier Paula’s e-mail, Plaintiff Gary replied that: “I ALWAYS ENJOY FOOD FOR THE SOUL. VERY ENCOURAGING. THANK YOU. I WILL PASS THIS ONE ON!”<sup>26</sup>

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<sup>20</sup> Gary Deposition Exhibit 8.

<sup>21</sup> Gary Deposition Exhibit 8.

<sup>22</sup> Gary Deposition Exhibit 8.

<sup>23</sup> Gary Deposition Exhibit 9.

<sup>24</sup> Gary Deposition Exhibit 10.

<sup>25</sup> Affidavit of Javier Paula, at ¶¶ 7-10.

<sup>26</sup> Gary Deposition Exhibit 10.

On July 2, 2008, Plaintiff Gary received a religious themed e-mail from her mother which, on July 3, 2008, she forwarded to the group of four coworkers-Sue Dooling, Javier Paul, Carl Bouldin, and Stuart Sherbal, along with four other individuals- Plaintiff's mother, two of her sisters, and her brother's girlfriend.<sup>27</sup> The subject of the e-mail was "Message From God." The text included: "This is God. Today I will be handling All of your problems for you. I do Not need your help (all *sic*). . ."<sup>28</sup>

The recipients of the e-mail are not listed in alphabetical order. Plaintiff does not recall how the recipients' names came to appear in the order in which they appear on the email.<sup>29</sup> The text of the e-mail instructed the reader to forward it to 10 people. Plaintiff forwarded it to only 8.<sup>30</sup>

Upon receipt of this e-mail from Plaintiff Gary, Sue Dooling responded: "Thank you. I really needed that today."<sup>31</sup>

Plaintiff Gary replied to Sue Dooling's response: "YOU ARE VERY WELCOME. MY MOM SENT THAT TO ME! PUT IT IN GOD'S HANDS AND THEN WE CAN BREATHE! AHFFF! HAVE A LOVELY DAY AND HOLIDAY AND WEEKEND!"<sup>32</sup>

On July 8, 2008, and again on July 11, 2008, Javier Paula sent religious themed e-mails to the same four RCF co-workers, including Plaintiff Gary. On these e-mails, Plaintiff Gary's name was listed out of alphabetical order.<sup>33</sup>

On July 29, 2008, Plaintiff Gary sent an e-mail to the same group of four RCF co-workers, including Sue Dooling and Javier Paula. The subject of the e-mail was "GOD BLESS

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<sup>27</sup> Gary Deposition Exhibit 11; Gary Deposition Transcript, pgs. 95-96.

<sup>28</sup> Gary Deposition Exhibit 11.

<sup>29</sup> Constance Gary Deposition Transcript, at pgs. 96-97.

<sup>30</sup> Gary Deposition Transcript, pgs. 102-103.

<sup>31</sup> Gary Deposition Exhibit 11.

<sup>32</sup> Gary Deposition Exhibit 11.

<sup>33</sup> Amended Complaint, ¶¶ 15-16.

YOU ALL!”<sup>34</sup> The passage was titled: “What Does the Bible Say About Forgiveness?” In the e-mail, Plaintiff expressed her personal opinion of the passages she enjoyed the best. She wrote: “I PARTICULARLY LIKE COLOSSIANS 3, PHILIPPIANS 1, MATTHEW 18 AND MARK 11!”<sup>35</sup>

On July 31, 2008, Javier Paula sent another e-mail to the same group of four co-workers. The subject of the email was “Word of the Day Happy Thursday!”<sup>36</sup> The passage was entitled: “The Believer’s Wall.”<sup>37</sup> Ms. Gary’s name is listed third of the four recipients.<sup>38</sup>

On August 1, 2008, Javier Paula sent an e-mail to the same group of four co-workers.<sup>39</sup> The e-mail read: “Instead of trying to defend yourself. . . Let God defend you. If you give back kindness for unkindness. . . If you will repent of attempting to make others treat you right . . .”<sup>40</sup>

That same day, August 1, 2008, Plaintiff Gary responded positively to the e-mail she had received from Javier Paula. Plaintiff Gary wrote: “AMEN TO THAT! DO UNTO OTHERS AS YOU WOULD HAVE THEM DO UNTO YOU! TGIF!”<sup>41</sup>

On August 6, 2008, Ms. Dooling sent an email to the same group of four co-workers, as well as her own daughter. The e-mail was a forward of an inspirational prayer. The text stated: “Name it and Claim It, Believe It and Receive It!!!!!! It’s a Powerful Prayer! When you are down to nothing . . . God is Up to something. . .”<sup>42</sup>

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<sup>34</sup> Gary Deposition Exhibit 12.

<sup>35</sup> Gary Deposition Exhibit 12.

<sup>36</sup> Gary Deposition Exhibit 13.

<sup>37</sup> Gary Deposition Exhibit 13.

<sup>38</sup> Gary Deposition Exhibit 13.

<sup>39</sup> Gary Deposition Exhibit 14.

<sup>40</sup> Gary Deposition Exhibit 14.

<sup>41</sup> Gary Deposition Exhibit 14.

<sup>42</sup> Gary Deposition Exhibit 15.

Plaintiff Gary responded positively to the e-mail. She responded: “AMEN! LET’S CONTINUE TO TRUST IN GOD AND HUMBLE OURSELVES IN PRAYER. HAVE A BLESSED DAY.”<sup>43</sup> Plaintiff Gary copied her own mother and sister on her reply.<sup>44</sup>

On August 6, 2008, Javier Paula sent an e-mail to the same four co-workers (Plaintiff, Sue Dooling, Carl Bouldin and Stuart Sherbal). The subject line of the e-mail was: “Word for the day!” and the e-mail contained a passage entitled: “Sweet Reminders of God’s Good Provision: Manna from Heaven.”<sup>45</sup>

Plaintiff Gary responded positively to Javier Paula’s e-mail by writing: “THAT’S THE WORD! MAY NOT COME WHEN YOU WANT EM, BUT HE’S ALWAYS ON TIME AND IT’S ALWAYS ALL GOOD. YA KNOW? HAVE A GREAT EVENING!”<sup>46</sup>

On August 6, 2008, Sue Dooling sent an e-mail to three coworkers including Plaintiff Gary and Javier Paula containing a poem.<sup>47</sup> On August 8, 2008, Plaintiff Gary responded to Sue Dooling’s e-mail: “AMEN! THANK YOU JESUS CHRIST FOR SALVATION.”<sup>48</sup>

On August 13, 2008, Javier Paula sent an e-mail to the same four coworkers (Plaintiff, Sue Dooling, Carl Bouldin and Stuart Sherbal).<sup>49</sup> The subject line of the e-mail was “Daily Devotional Happy Wednesday!” and contained a passage followed by commentary.<sup>50</sup>

On August 15, 2008, Javier Paula sent an e-mail to the same four coworkers.<sup>51</sup> The subject line of the e-mail was “Daily Devotional” and the e-mail contained a passage entitled “Product Testing.” The passage states: “Testing allows one to discover how well a product is

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<sup>43</sup> Gary Deposition Exhibit 15.

<sup>44</sup> Gary Deposition Exhibit 15.

<sup>45</sup> Gary Deposition Exhibit 16.

<sup>46</sup> Gary Deposition Exhibit 16.

<sup>47</sup> Gary Deposition Exhibit 17.

<sup>48</sup> Gary Deposition Exhibit 17.

<sup>49</sup> Gary Deposition Exhibit 18.

<sup>50</sup> Gary Deposition Exhibit 18.

<sup>51</sup> Gary Deposition Exhibit 19.

made when placed under extreme stress. Increasing the pulling pressure between two objects reveals the amount of tension that can be withstood in a chain link. . . At what point will the athlete lose concentration and collapse under the pressure? It is under these stressful times that we discover how well we have been trained to withstand the pressure and make right decisions regardless of outside influences. . .”<sup>52</sup>

On August 20, 2008, Javier Paula sent another religious themed e-mail called “A Question of Ownership” to the same four co-workers. Plaintiff’s name was listed last on the e-mail.<sup>53</sup>

On September 24, 2008, Sue Dooling forwarded an e-mail to the usual four co-workers. She also included the former receptionist (Susan Reamer) and her daughter as recipients.<sup>54</sup> The subject of the email was “Daddy’s Empty Chair,” and the e-mail contained a passage with the same title.<sup>55</sup>

On October 2, 2008, Javier Paula sent yet another e-mail to the same group of four co-workers, including Plaintiff Gary.<sup>56</sup> The subject of the e-mail was “Devotional” and the e-mail contained a passage entitled “Coming Out of the Stronghold.”<sup>57</sup> The e-mail contained a scriptural reference, 1 Samuel 22:5 which read, “Do not stay in the stronghold, Go into the land of Judah.” The e-mail content reads: “When life beats down on us, we get to the place where we want to hide in a cave. Retreat to a cave and forget pressing on. Not only must we keep moving we must move into a new realm.”<sup>58</sup>

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<sup>52</sup> Gary Deposition Exhibit 19.

<sup>53</sup> Amended Complaint filed September 20, 2012, at ¶ 22.

<sup>54</sup> Gary Deposition Exhibit 26; Gary Deposition Transcript, at pgs. 175- 176.

<sup>55</sup> Gary Deposition Exhibit 26.

<sup>56</sup> Gary Deposition Exhibit 27.

<sup>57</sup> Gary Deposition Exhibit 27.

<sup>58</sup> Amended Complaint filed September 20, 2012, ¶31.

On October 9, 2008, Javier Paula sent two more e-mails to the usual four co-workers. The commentary to one of those e-mails read: “Make sure your first line of defense against theological error is a thorough knowledge of the truth.”<sup>59</sup>

On October 15, 2008, Javier Paula sent an e-mail to the same four co-workers.<sup>60</sup> The subject of the e-mail was “Devotions” and the e-mail contained two passages. One was entitled “Recognizing Our Source” and the other was entitled “Move On!”<sup>61</sup>

On October 16, 2008, Javier Paula sent an e-mail to the same four co-workers. The e-mail was titled, “It Could Be Today.” The commentary read: “If you lived today as if it were your last day. . . what would you do differently?”<sup>62</sup>

On October 23, 2008, Javier Paula again e-mailed the same group of four co-workers.<sup>63</sup> The subject of the e-mail was “Daily Devotional- Happy Thursday!” and the e-mail contained two passages. One was entitled “Horizontal Versus Vertical” and the other was entitled “Thermometer or Thermostat?”<sup>64</sup>

The first devotional, “Horizontal Versus Vertical” contained a line from the Bible- “Exodus 2:12 Glancing this way and that and seeing no one, he killed the Egyptian and hid him in the sand.”<sup>65</sup> The commentary then explained: “Moses saw the pain of his people. He saw the bondage and the injustice. His heart was enraged, and he decided he would do something. He would take matters into his own hands. The result was murder. The motive was right, but the

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<sup>59</sup> Amended Complaint filed September 20, 2012, ¶35.

<sup>60</sup> Gary Deposition Exhibit 33.

<sup>61</sup> Gary Deposition Exhibit 33.

<sup>62</sup> Amended Complaint filed September 20, 2012, ¶39.

<sup>63</sup> Gary Deposition Exhibit 37.

<sup>64</sup> Gary Deposition Exhibit 37.

<sup>65</sup> Gary Deposition Exhibit 37.

action was wrong. He went horizontal instead of vertical with God. The action was wrong. Moses fled to the desert . . .”<sup>66</sup>

More religious themed e-mails were sent by Javier Paula to the same group of four co-workers on November 12, 2008, December 10, 2008, and January 7, 2009.<sup>67</sup> Plaintiff Gary, in turn, sent an inspirational e-mail on January 7, 2009 to Sue Dooling and Javier Paula.<sup>68</sup>

On January 8, 2009, Javier Paula sent an email to the same group of four co-workers.<sup>69</sup> The subject of the e-mail was “Daily Devotion” and the e-mail contained two passages. One was entitled “Investing in the Most Important” and the second was entitled “Jesus Was a Workplace Minister.”<sup>70</sup> In the second passage, it starts with a Bible verse: “Isn’t this the carpenter? Isn’t this Mary’s son and brother of James, Joseph, Judas and Simon? Aren’t his sisters here with us? And they took offense at him (Mark 6:3).”<sup>71</sup> The commentary begins: “In 2005, a movie entitled *The Passion* was released that chronicled the last twenty-four hours of Jesus’ life. During a flashback scene, Jesus was seen in the carpentry shop making a table. . .”<sup>72</sup>

On that same day, January 8, 2009, Plaintiff Gary sent an e-mail to Javier Paula forwarding a Bible passage.<sup>73</sup> Plaintiff Gary stated: “STRAIGHT FROM THE SOURCE-WITHOUT MAN’S COMMENTARY ENJOY THE WORD!”<sup>74</sup>

On January 15, 2009, Sue Dooling sent an e-mail to Plaintiff Gary along with four other recipients.<sup>75</sup> One of the other recipients was a RCF employee, Dan Edelen, who had been a field

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<sup>66</sup> Gary Deposition Exhibit 37.

<sup>67</sup> Gary Deposition Exhibits 45, 51, 53.

<sup>68</sup> Gary Deposition Transcript, pgs. 245-246; Amended Complaint filed September 20, 2012, ¶67.

<sup>69</sup> Gary Deposition Exhibit 55.

<sup>70</sup> Gary Deposition Exhibit 55.

<sup>71</sup> Gary Deposition Exhibit 55.

<sup>72</sup> Gary Deposition Exhibit 55.

<sup>73</sup> Gary Deposition Exhibit 56.

<sup>74</sup> Gary Deposition Exhibit 56.

<sup>75</sup> Gary Deposition Exhibit 57.

foreman, who had gotten hurt and had recently returned to RCF to work in the office.<sup>76</sup> Another recipient was Sue Dooling's daughter. The subject of the e-mail was "You Took My Place". The e-mail contains a passage entitled, "You Took My Parking Space at Church."<sup>77</sup>

On January 19, 2009, Javier Paula sent an e-mail to the usual group of four co-workers including Plaintiff Gary.<sup>78</sup> The subject of the email was "Daily Devotion" and the e-mail contained two passages.<sup>79</sup>

On or about January 19, 2009, Plaintiff Gary responded to the e-mail she received from Javier Paul by forwarding to Javier Paula an e-mail containing the thought of the day from ethought.com that Plaintiff had received on that date.<sup>80</sup>

On January 23, 2009, Javier Paula sent an e-mail to the usual group of four co-workers.<sup>81</sup> The subject of the e-mail was "Daily Devotion" and the e-mail contained a passage entitled: "Called to Someone versus Something."<sup>82</sup>

On February 2, 2009, Javier Paula sent an e-mail to the usual four co-workers. The subject of the e-mail was "Daily Devotion" and the e-mail contained a passage entitled: "Why Work?"<sup>83</sup>

On February 17, 2009, Phil Bandy, a detailer at RCF, forwarded an e-mail to 20 RCF employees.<sup>84</sup> The e-mail had been forwarded from one person to another and then eventually made its way to Mr. Bandy's wife who in turn forwarded it to her husband, Mr. Bandy.<sup>85</sup> Mr.

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<sup>76</sup> Gary Deposition Transcript, pg. 256.

<sup>77</sup> Gary Deposition Exhibit 57.

<sup>78</sup> Gary Deposition Exhibit 58.

<sup>79</sup> Gary Deposition Exhibit 58.

<sup>80</sup> Amended Complaint filed September 20, 2012, ¶73.

<sup>81</sup> Gary Deposition Exhibit 61.

<sup>82</sup> Gary Deposition Exhibit 61.

<sup>83</sup> Gary Deposition Exhibit 63.

<sup>84</sup> Gary Deposition Exhibit 65.

<sup>85</sup> Gary Deposition Transcript, at pgs. 283-284.

Bandy then forwarded the e-mail to 20 of his RCF co-workers.<sup>86</sup> The e-mail had the subject line: “I need to pray at work,” and contained a long chain of forwards, with 10 notes that discussed situations in which someone would need to pray at work.<sup>87</sup>

Three of the 10 notes in the e-mail sent by Mr. Bandy provided as follows: One note read: “When your computer is mysteriously turned off and you. . . want to say which one of you turned off my computer? You need to pray at work.” A second note read: “When you hear a coworker call your name and the first thing that crosses your mind is ‘What the . . . does she want now?’ You need to pray at work.” The third note read: “If you have ever thought about poisoning, choking, punching or slapping someone that you work with- you need to pray at work.”<sup>88</sup>

On that same date, February 17, 2009, another RCF employee, Joe Nicotra, sent Plaintiff a YouTube link where the lyrics included “whipping somebody’s butt.”<sup>89</sup> The e-mail was entitled “How to Deal With Workplace Harassment” and the song contained the lyrics “I’m about to whip somebody.”<sup>90</sup>

Stuart Sherbal, another RCF employee, saw Plaintiff viewing the YouTube video and told Plaintiff he had received the same YouTube video e-mail before and they laughed.<sup>91</sup>

On April 17, 2009, Javier Paula sent an e-mail to the usual four co-workers, including Plaintiff Gary. The subject of the email was “Daily Devotional’ and the e-mail contained a passage entitled “A Job Versus a Calling.”<sup>92</sup>

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<sup>86</sup> Gary Deposition Exhibit 65.

<sup>87</sup> Gary Deposition Exhibit 65.

<sup>88</sup> Gary Deposition Exhibit 65; Amended Complaint ¶ 81.

<sup>89</sup> Gary Deposition Transcript, pgs. 292-293.

<sup>90</sup> Gary Deposition Transcript, pgs. 302-303.

<sup>91</sup> Amended Complaint filed September 20, 2012, ¶84.

<sup>92</sup> Gary Deposition Exhibit 72.

Up until the receipt of this e-mail, it is undisputed that Plaintiff Gary never complained about the inspirational e-mails she was receiving nor did she ever tell any of her co-workers that she did not want to receive them.<sup>93</sup> In fact, on numerous occasions as noted above, Plaintiff Gary responded favorably to the e-mails she had been receiving over a period of months.

Plaintiff Gary responded to Javier Paula's April 17, 2009 e-mail by phone and e-mail.<sup>94</sup> On the phone, Plaintiff Gary told Javier Paula that she did not want to receive the inspirational e-mails.<sup>95</sup>

Plaintiff Gary copied Bob Suppe, the owner of RCF<sup>96</sup>, and Sue Dooling in her e-mail response to Javier Paula. In her response, Plaintiff Gary stated:

I HAVE JUST SPOKEN WITH YOU ABOUT REFRAINING FROM SENDING ME RELIGIOUS EMAILS. I HOPE THAT THIS IS THE LAST TIME IT HAPPENS AS IT IS EXTREMELY DISTRACTING/IE. NOT WORK RELATED. FURTHERMORE, WE RARELY COMMUNICATE ON A DAILY BASIS AND I FEEL THAT THIS EMAIL ALONG WITH THE MANY OTHERS YOU HAVE BEEN SENDING ARE COVERTLY AIMED AT ATTACKING BOTH MY PROFESSIONAL AND PERSONAL CHARACTER, BOTH OF WHICH YOU KNOW VERY LITTLE ABOUT.<sup>97</sup>

Plaintiff Gary also copied and pasted RCF's e-mail policy in her e-mail to Paula Javier.<sup>98</sup>

On April 17, 2009, Javier Paula came into Plaintiff Gary's office, apologized for offending Plaintiff Gary in any way, told her that she was not attempting to harass her, agreed not to send any more e-mails, and told Plaintiff Gary that if she did not want to receive the e-mails she should have said something sooner.<sup>99</sup>

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<sup>93</sup> Gary Deposition Transcript, pgs. 180-181, 325-326.

<sup>94</sup> Gary Deposition Transcript, pg. 325.

<sup>95</sup> Amended Complaint ¶ 93.

<sup>96</sup> Gary Deposition Transcript, pg. 41.

<sup>97</sup> Gary Deposition Exhibit 72.

<sup>98</sup> Gary Deposition Exhibit 72.

<sup>99</sup> Gary Deposition Transcript, pgs. 335-338.

It is undisputed that this is the first time Plaintiff told Javier Paula, or any other RCF co-worker, to stop sending the inspirational e-mails.<sup>100</sup> It is further undisputed that after she said stop, Plaintiff Gary never received another inspirational e-mail again from any co-worker.<sup>101</sup>

April 17, 2009, the day Plaintiff Gary first asked any RCF co-worker to stop sending her inspirational e-mails is the last day she alleges that she experienced religious harassment at RCF.<sup>102</sup>

In the subject action, Plaintiff Gary is seeking to recover a minimum of \$100,000 for each and every religious themed e-mail she received from Sue Dooling and/or Javier Paula.<sup>103</sup>

#### **Additional Incidents Which Impact Plaintiff's Religious/Spiritual Harassment Claim**

One day, a RCF employee, Stuart Sherbal was relieving Plaintiff Gary at the receptionist desk. When she returned, there was a crumbled up piece of paper next to the trash can. She picked it and read it, and it had a scriptural reference on it. She went to Stuart and asked him if it was meant for her. He said it was not, he was just jotting something down and tried to throw it away.<sup>104</sup>

Another incident occurred in January 2009. Routinely, Plaintiff Gary would place lunch orders for the entire office. Sue Dooling would choose the place where the office would order lunch. One day in January 2009, Sue Dooling brought in a menu and told Plaintiff Gary that they were going to try someplace new, the Hollywood Grill. Plaintiff Gary wrote down her lunch order on the list.<sup>105</sup>

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<sup>100</sup> Gary Deposition Transcript, pg. 326.

<sup>101</sup> Gary Deposition Transcript, pgs. 336-337, 341.

<sup>102</sup> Gary Deposition Transcript, pg. 341.

<sup>103</sup> Gary Deposition Transcript, at pgs. 514-516.

<sup>104</sup> Gary Deposition Transcript, pgs. 117-118.

<sup>105</sup> Gary Deposition Transcript, pg. 296.

Later, Plaintiff Gary learned that Sue Dooling's daughter worked at the place from which RCF was to order lunch that day. She also was aware that the Hollywood Grill was not "new", since the restaurant had been around for some time. Plaintiff Gary then scratched her name off the list and did not order lunch from the restaurant.<sup>106</sup>

### **Plaintiff's Private Interpretations of the E-mails**

Plaintiff Gary interpreted the statement by Sue Dooling that "she was Christian", which occurred on the first day of her employment, as degrading and an offensive slight, and Plaintiff believed that every inspirational e-mail that she received from Sue Dooling was sent with bad intentions.<sup>107</sup>

Plaintiff claims she interpreted each and every inspirational e-mail that was sent to her by either Sue Dooling or Javier Paula as harassing and offensive.<sup>108</sup> It did not matter what the content of the e-mail said, Plaintiff Gary interpreted it negatively.<sup>109</sup>

Every time Plaintiff's name appeared on the e-mail recipient list alphabetically "out of order", Plaintiff believes it further supported her claim that Sue Dooling and Javier Paula were attempting to harass her.<sup>110</sup> When Plaintiff's name appeared on the e-mail list first, Plaintiff believes it was done intending to harass her.<sup>111</sup> When Plaintiff's name appeared on the e-mail list last, Plaintiff believes it was done intending to harass her.<sup>112</sup> If she was not listed first, and not listed last, but still listed out of order, the e-mail was intended to harass her.<sup>113</sup>

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<sup>106</sup> Gary Deposition Transcript, pgs. 296-98.

<sup>107</sup> Gary Deposition Transcript, at pgs. 105-107.

<sup>108</sup> Gary Deposition Transcript, at pgs. 142, 193-194.

<sup>109</sup> Gary Deposition Transcript, at pgs. 141- 142.

<sup>110</sup> Gary Deposition Transcript, at pgs. 52-56, 72, 107-109, 131.

<sup>111</sup> Gary Deposition Transcript, at pgs. 53-57, 72.

<sup>112</sup> Gary Deposition Transcript, at pg. 108.

<sup>113</sup> Gary Deposition Transcript, at pgs. 131-132.

Even though the placement of Plaintiff Gary's name on the e-mail "out of order" would also mean that everybody else's name was also out of order, Plaintiff Gary believes that the e-mails were meant solely to harass her, and not anybody else.<sup>114</sup>

Yet, even if the recipient names were in the correct order, the e-mails were still sent to harass her.<sup>115</sup> In summary, it does not matter in what order Plaintiff's name appeared on an e-mail as she states they were all meant to harass her.

When Plaintiff Gary, herself, sent inspirational e-mails with recipient names out of order alphabetically, she did not mean anything by it. It was just a coincidence.<sup>116</sup>

Plaintiff Gary concedes that she does not know whether Sue Dooling or Javier Paula imparted any significance to the order in which they listed the recipients' names, and she admits she is just speculating that they did so in an attempt to harass her.<sup>117</sup> Every time an e-mail sent to her included other recipients, non-RCF co-workers, Plaintiff Gary believes that this was an additional attempt to harass her.<sup>118</sup> E-mails that included other recipients that were RCF co-workers were also interpreted by Plaintiff as being done to "heighten the offensiveness of the e-mail to Plaintiff."<sup>119</sup>

Yet, when Plaintiff Gary, herself, sent inspirational e-mails that included other recipients, non-RCF co-workers, her actions were meaningless.<sup>120</sup>

All of the e-mails that were sent to Plaintiff she interpreted as harassing, yet none of the e-mails she sent to them were harassing in any way.<sup>121</sup>

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<sup>114</sup> Gary Deposition Transcript, at pgs. 109-110.

<sup>115</sup> Gary Deposition Transcript, at pgs. 111-112.

<sup>116</sup> Gary Deposition Exhibit 11; Gary Deposition Transcript, at pgs. 94-97.

<sup>117</sup> Gary Deposition Transcript, at pg. 57.

<sup>118</sup> Gary Deposition Transcript, at pgs. 175-178; Amended Complaint ¶ 30.

<sup>119</sup> Amended Complaint filed September 20, 2012, ¶71.

<sup>120</sup> Gary Deposition Transcript, at pgs. 178-179.

<sup>121</sup> Gary Deposition Transcript, pgs. 241-242, 253.

Plaintiff claims that during the gaps in time that she stopped sending e-mails of her own, or responding positively to the e-mails sent by the others, Sue Dooling and Javier Paula should have known that her silence constituted some type of objection or protest for the continued receipt of their e-mails.<sup>122</sup> Yet, two of the four RCF co-workers who were also included among the usual group of recipients of the inspirational e-mails (Carl Bouldin and Stuart Sherbal), never responded (either positively or negatively) to any of the e-mails, and Plaintiff took their silence to mean that they did not mind receiving the e-mails.<sup>123</sup>

Plaintiff expected Sue Dooling and Javier Paula to interpret her silence in direct contradiction to the manner in which she, herself, interpreted the silence of other recipients.

Plaintiff attributes a sinister motive to Javier Paula's e-mails, which she claims were not always the devotional from that particular day, because at times Javier Paula retrieved the devotional from the archives of the website from which she acquired her inspirational e-mails. Plaintiff believes that if the e-mails were sent as daily devotionals, the date they were sent should match up with the date that the e-mails were found on the website. Plaintiff alleges that the fact that Javier Paula may have forwarded daily devotionals from archives rather than that day's daily devotional, reinforces her position that the e-mails were sent only to harass her.<sup>124</sup>

Plaintiff contends that even though she responded positively to the inspirational e-mails she received, she did not mean what she said.<sup>125</sup> When Plaintiff said in response to Sue Dooling's June 12, 2008 e-mail, "Keep 'em coming", she did not mean it. She really wanted Sue

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<sup>122</sup> Gary Deposition Transcript, pgs. 129-130, 195-196.

<sup>123</sup> Gary Deposition Transcript, pgs. 128-130.

<sup>124</sup> Plaintiff's Opposition to Defendant's Motion for Summary Judgment filed October 28, 2013, at pg. 11.

<sup>125</sup> See, Gary Deposition Transcript, pgs. 91-92.

Dooling to stop sending the inspirational e-mails. Plaintiff admits, however, that she never told either Sue Dooling or Javier Paula to stop sending the e-mails until April 17, 2009.<sup>126</sup>

Turning to the substance of the inspirational e-mails, not one of the e-mails contained a single reference to Plaintiff Gary. Not one of the e-mails ever referred Plaintiff Gary, yet she interpreted each and every e-mail as being about her and she interpreted all of the e-mails as intending to target her.<sup>127</sup> Plaintiff would pick out certain lines, phrases, or words from the e-mails, and interpret those particular words as threatening, harassing and offensive towards her.<sup>128</sup> Plaintiff read messages in the e-mails that she contends were meant for only her. Plaintiff would read the e-mails focusing only on certain things and would not consider the whole scripture.<sup>129</sup>

Each and every e-mail which contained the word “kill” or poison”, Plaintiff Gary interpreted as a veiled threat to kill or poison her. For instance, Javier Paula’s October 23, 2008 e-mail which contained two passages and contained a line from the Bible- “Exodus 2:12 Glancing this way and that and seeing no one, he killed the Egyptian and hid him in the sand.”, was interpreted by Plaintiff as a threat by Javier Paula to kill her.<sup>130</sup> Plaintiff Gary believed this reference was to her, despite the fact that she was not Egyptian and all of the characters in the passage are male.<sup>131</sup>

Plaintiff Gary also interpreted the lunch incident discussed previously as a desire by Sue Dooling to poison her. As discussed above, one day in January 2009, Sue Dooling decided the office was going to order lunch from a “new” restaurant. Plaintiff Gary had planned on ordering lunch that day until she learned that Sue Dooling’s daughter worked at the place and that the

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<sup>126</sup> Gary Deposition Exhibits 75-77.

<sup>127</sup> Gary Deposition Transcript, pgs. 112-113, 221, 291-292.

<sup>128</sup> Gary Deposition Transcript, pg. 272.

<sup>129</sup> Gary Deposition Transcript, at pg. 272.

<sup>130</sup> Gary Deposition Transcript, pgs. 205-206.

<sup>131</sup> Gary Deposition Transcript, pg. 206.

place was not “new” in the sense that it had just opened.<sup>132</sup> The office, however, had not ordered from the place before.

Plaintiff Gary was the person at the office that placed the lunch orders, and she removed her name for the lunch order that day.<sup>133</sup> The record appears to reflect that nobody from the office even noticed that Plaintiff Gary had not ordered lunch. Nobody mentioned that she did not order lunch.. The topic was not raised by anybody at anytime.

Plaintiff Gary however contends that Sue Dooling chose that particular lunch place with the intent to poison Plaintiff Gary.<sup>134</sup> Plaintiff Gary further contends that the e-mail Phil Bandy sent on February 17, 2009 to 20 RCF employees which had the subject line “I need to pray at work” and then discussed 10 situations in which someone would need to pray at work, is proof that Phil Bandy knew about Sue Dooling’s poison attempt simply because the text of the e-mail contained the word “poisoning.”<sup>135</sup>

Plaintiff believes that this lunch incident taken in conjunction with the Bandy e-mail which referred to “poisoning” supports her belief of the poison attempt on her. Plaintiff points to the temporal proximity between the lunch incident which occurred in January 2009, and the e-mail by Phil Bandy in February 2009, as additional support of proof of the poison plot.

As to the June 10, 2008 inspirational e-mail from Sue Dooling that included the language, “that the road to success is not straight. . . ,” Plaintiff interpreted this e-mail as being meant specifically for her and that the language “the road to success is not straight” was “almost like a slap in the face.” Plaintiff interpreted this e-mail as Sue Dooling rejecting Plaintiff’s spirituality during the conversation the first day and then telling her, personally, through this e-mail that the

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<sup>132</sup> Gary Deposition Transcript, pg. 296.

<sup>133</sup> Gary Deposition Transcript, pgs. 296-298.

<sup>134</sup> Gary Deposition Transcript, pgs. 298-301.

<sup>135</sup> Gary Deposition Transcript, pg. 301.

road to success is not straight.<sup>136</sup> Despite her alleged strong contempt for this e-mail, Plaintiff Gary responded to Sue Dooling, “Very Encouraging and True as Well. . .”<sup>137</sup>

Plaintiff also questioned Sue Dooling’s sincerity of the e-mail because the text of the e-mail instructed the sender to forward the e-mail to 10 people, but Sue Dooling only sent it to 6. It appeared to Plaintiff therefore that Sue Dooling had not fully read the e-mail and was focusing on the “questionable commentary.”<sup>138</sup>

On the other hand, when Plaintiff sent an inspirational e-mail on July 3, 2008, and the e-mail instructed the sender to forward the e-mail to 10 people, but she only sent it to 8, she did not mean anything by it. There was nothing sinister in her decision to send it to only 8 out of 10 people.<sup>139</sup>

The incident in which Plaintiff Gary saw a crumbled up piece of paper next to the trash can after a co-worker Stuart Sherbal had relieved her, and when she asked Stuart if the paper was meant for her, he said it was not, is further support to Plaintiff Gary that she was being harassed.<sup>140</sup>

Plaintiff interpreted Javier Paula’s July 1, 2008 e-mail about “Sisters Building Sisters” as a general attack at Plaintiff and the whole idea that she was not a Christian.<sup>141</sup> Yet, Plaintiff responded to Javier Paula: “Very encouraging. Thank you. I will pass this one on.”<sup>142</sup>

The July 31, 2008 e-mail sent by Javier Paula that included the text “A city with a weak of fallen wall . . .”, Plaintiff interpreted that statement to be directed at her and to mean that her co-workers intended to just walk all over her.<sup>143</sup>

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<sup>136</sup> Gary Deposition Transcript, pgs. 53-67.

<sup>137</sup> Gary Deposition Exhibit 7.

<sup>138</sup> Amended Complaint filed September 20, 2012, at ¶ 10.

<sup>139</sup> Gary Deposition Transcript, pgs. 102-103.

<sup>140</sup> Gary Deposition Transcript, pgs. 117-118.

<sup>141</sup> Gary Deposition Transcript, at pg. 92.

<sup>142</sup> Gary Deposition Exhibit 10.

The August 1, 2008 e-mail sent by Javier Paula that read: “Instead of trying to defend yourself. . . Let God defend you. If you give back kindness for unkindness. . . If you will repent of attempting to make others treat you right . . . “, Plaintiff interpreted as being targeted at her and meaning we are giving back your kindness with our unkindness. We know that we are harassing you.<sup>144</sup>

The August 6, 2008 e-mail sent by Javier Paula included text that read: “Anyone who has ever been stranded in the wilderness sitting has wondered when and how God would meet their needs.” The remainder of the passage talks about God meeting the needs of people stranded in the wilderness.

Plaintiff Gary focuses on four or five words of this e-mail- “stranded in the wilderness”- and interpreted it as Javier Paula saying to her that she believes in the wrong God. You need to come over here with us and stop being stranded in her wilderness.<sup>145</sup> Plaintiff Gary also interpreted this e-mail as saying, you are all alone, they are all against you.<sup>146</sup>

Even though she claims to have found the e-mail to be offensive, Plaintiff Gary responded positively: “That’s the word! May not come when you em, but he’s always on time and it’s always good. . . Have a great evening!”<sup>147</sup>

Javier Paula’s August 15, 2008 e-mail which included the text, “at what point will the athlete lose concentration and collapse under pressure,” was interpreted by Plaintiff as to target her and say at what point will Plaintiff lose concentration and bolt out of here.<sup>148</sup>

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<sup>143</sup> Gary Deposition Transcript, pg. 135.

<sup>144</sup> Gary Deposition Transcript, pgs. 137-138.

<sup>145</sup> Gary Deposition Transcript, pgs. 143-145.

<sup>146</sup> Gary Deposition Transcript, pg. 143.

<sup>147</sup> Gary Deposition Exhibit 16; Gary Deposition Transcript, pgs. 147-148.

<sup>148</sup> Gary Deposition Transcript, pgs. 151-152.

Sue Dooling's September 24, 2008 e-mail about "Daddy's Empty Chair", was interpreted by Plaintiff Gary to mean that Sue Dooling did not like her and wanted her to get up and get out. The e-mail was Sue Dooling's way of saying to Plaintiff that she no longer wanted Plaintiff to work at RCF.<sup>149</sup> This e-mail, although it did not reference Plaintiff in any way, was "indirectly" telling Plaintiff to alter her beliefs and actions or leave the place of employment.<sup>150</sup>

Plaintiff admits that she does not have any evidence to support her contention as to Sue Dooling's intent.<sup>151</sup>

Javier Paula's October 2, 2008 e-mail containing a passage entitled "Coming Out of the Stronghold" and which contained a scriptural reference that read, "Do not stay in the stronghold, Go into the land of Judah. . . .", was interpreted by Plaintiff as Javier Paula's way of saying that Plaintiff must alter her beliefs and actions or leave her place of employment.<sup>152</sup> Javier Paula's October 9, 2008 e-mail that read: "Make sure your first line of defense against theological error is a thorough knowledge of the truth," was also meant as an attack on Plaintiff's spiritual beliefs, by suggesting her beliefs were flawed and that she was in error.<sup>153</sup> Javier Paula's October 15, 2008 e-mail which contained two passages, "Recognizing Our Source" and "Move On!", was also interpreted by Plaintiff to mean that Javier Paula wanted Plaintiff to leave the employ of RCF.<sup>154</sup>

Javier Paula's October 16, 2008 e-mail that read: "If you lived today as if it were your last day. . . what would you do differently?", was interpreted by Plaintiff as a threat that if she did not think, act or respond differently, she would no longer be an employee at RCF.<sup>155</sup> Javier

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<sup>149</sup> Amended Complaint filed September 20, 2012, at ¶ 30.

<sup>150</sup> Gary Deposition Transcript, at pg. 181.

<sup>151</sup> Gary Deposition Transcript, at pgs. 175-178.

<sup>152</sup> Amended Complaint filed September 20, 2012, ¶ 31.

<sup>153</sup> Amended Complaint filed September 20, 2012, ¶35.

<sup>154</sup> Gary Deposition Transcript, pgs. 193.

<sup>155</sup> Amended Complaint filed September 20, 2012, ¶39.

Paula's December 10, 2008 e-mail that contained a passage entitled "Bag of Cement", was interpreted by Plaintiff to mean that Plaintiff was a big bag of cement that just sits there and Javier Paula does not want to have anything to do with her.<sup>156</sup> Javier Paula's January 8, 2009 e-mail that referred to a 2005 movie entitled *The Passion* which chronicled the last twenty-four hours of Jesus' life, was interpreted by Plaintiff as Javier Paula threatening her job. Plaintiff interpreted the 24 hour reference in the e-mail as referencing "Friday as potentially being the day I'm forced to abandoned my job or get fired."<sup>157</sup>

Plaintiff Gary has no evidence that this sentence was intended to be a reference to her having 24 hours before she must abandon her job or get fired, or that the sentence was intended to reference her in any way.<sup>158</sup>

As to the e-mail sent by Philip Bandy on February 17, 2009 to 20 RCF employees, Plaintiff believes that the e-mail was forwarded by Philip Bandy to the 20 RCF employees specifically to harass her.<sup>159</sup> The e-mail had been forwarded from one individual to another and then eventually to Philip Bandy's wife. When Philip Bandy's wife forwarded the e-mail to her husband, Plaintiff believes that Philip's wife forwarded the e-mail to him "potentially" with the intent to target Plaintiff.<sup>160</sup>

Plaintiff's speculations as to the interpretations of these e-mails are not substantiated by any objective facts in the record.

## **CLAIM TWO: SEXUAL HARASSMENT CLAIM**

Plaintiff Gary's claim of sexual harassment stems from an isolated incident that occurred on September 16, 2008. On that date, one of RCF's Field Supervisors, Mark Shanor, "picked up

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<sup>156</sup> Gary Deposition Transcript, pgs. 234-235.

<sup>157</sup> Gary Deposition Transcript, pgs. 246-247.

<sup>158</sup> Gary Deposition Transcript, pgs. 249, 284-285

<sup>159</sup> Gary Deposition Transcript, pg. 289.

<sup>160</sup> Gary Deposition Transcript, pgs. 283-284.

a large set of rolled up blue prints and hit [her] on [her] butt with it.”<sup>161</sup> Plaintiff told Mark Shanor never to touch her again. He never did.<sup>162</sup>

Plaintiff Gary immediately complained to Sue Dooling about Mark Shanor’s conduct.<sup>163</sup> A short time later, Sue Dooling told Plaintiff Gary that she had spoken to Mr. Shanor, that he admitted he hit Plaintiff Gary’s buttocks with rolled up blue prints, that he was given a warning, and that he said he would not do it again.<sup>164</sup>

Soon thereafter, Sue Dooling handed Plaintiff Gary a typed disciplinary document detailing Ms. Gary’s allegations against Mr. Shanor. Ms. Gary signed the document and also wrote on the back of it her recollection of the events.<sup>165</sup> Mr. Shanor signed the document as well. This document dated September 17, 2008 that Mr. Shanor and Ms. Gary signed was placed in Mr. Shanor’s personnel file. The document explained the incident, explained that Mark apologized, and promised never to do it again.<sup>166</sup>

Mark Shanor never did it again.<sup>167</sup>

Plaintiff Gary admits that her sexual harassment claim is time-barred based on the date the harassment allegedly occurred- September 16, 2008, since she did not file her charge of discrimination with the Delaware Department of Labor until June 22, 2009, over 260 days after the incident and well outside the 120 day limitation period.<sup>168</sup> Plaintiff contends that the basis for her sexual harassment complaint stems not from the actual incident itself but from the fact that she subsequently discovered that Mark Shanor’s name was not on the spreadsheet that listed

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<sup>161</sup> Gary Deposition Transcript, at pgs. 157-158, 161.

<sup>162</sup> Gary Deposition Transcript, at pg. 158.

<sup>163</sup> Gary Deposition Transcript, at pgs. 158-159.

<sup>164</sup> Gary Deposition Transcript, at pgs. 167- 168.

<sup>165</sup> Gary Deposition Exhibit 23; Gary Deposition Transcript, pgs. 169, 171.

<sup>166</sup> Gary Deposition Exhibit 23.

<sup>167</sup> Gary Deposition Transcript, pgs. 341-342, 476-479.

<sup>168</sup> Gary Deposition Transcript, pg. 477.

employees that were disciplined.<sup>169</sup> In April 2009, Plaintiff Gary accessed a spreadsheet on RCF's system that detailed employees disciplined and she noticed that Mr. Shanor's name was not on it.<sup>170</sup> Plaintiff claims that because Mr. Shanor's name was not on the spreadsheet, he was not formally disciplined.<sup>171</sup>

Despite Plaintiff Gary's alleged discovery, it is undisputed that RCF had actually disciplined Mr. Shanor in September 2008 for the incident. It is undisputed that Sue Dooling handed Plaintiff Gary a typed disciplinary document detailing her allegations against Mr. Shanor. It is undisputed that Plaintiff Gary signed the document and also wrote on the back of it her recollection of the events. It is undisputed that both Plaintiff and Mr. Shanor signed the document and that it was placed in his personnel file.<sup>172</sup>

### **ADDITIONAL WORKPLACE GRIEVANCES**

The facts set forth above detail the factual predicate for Plaintiff's religious/spiritual harassment claim and her claim of sexual harassment. The remaining recitation sets forth facts impacting Plaintiff's retaliation claim. Some additional facts have been included to provide additional insight into Plaintiff's employment relationship with RCF.

#### **Attendance and Tardiness**

Plaintiff Gary had a tardiness issue and on September 10, 2008, Sue Dooling sent her an e-mail reprimanding her for repeated lateness.<sup>173</sup> Plaintiff Gary agreed to "tighten it up." Specifically, Gary responded: "If possible, may I have a copy of my attendance record thus far. I will hang it on my fridge as a reminder to tighten it up! LOLZ, Thanks, Con."<sup>174</sup>

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<sup>169</sup> Gary Deposition Transcript, pg. 478.

<sup>170</sup> Gary Deposition Transcript, pgs. 474, 478; Gary Deposition Exhibit 82.

<sup>171</sup> Gary Deposition Transcript, at pgs. 478-479.

<sup>172</sup> Gary Deposition Exhibit 23; Gary Deposition Transcript, pgs. 169-171; Sue Dooling Affidavit, at ¶20.

<sup>173</sup> Gary Deposition Exhibit 22; Gary Deposition Transcript, at pgs. 155- 157.

<sup>174</sup> Gary Deposition Transcript, at pg. 156-157.

In January 2009, RCF changed its attendance policy.<sup>175</sup> Sue Dooling e-mailed all the employees in the office and required everyone to sign an acknowledgement form.<sup>176</sup>

In April 2009, Sue Dooling requested that an outside agency review the RCF employee handbook and to make suggestions on changing it. Sue Dooling handed a modified version of the RCF employee handbook on April 22, 2009 with proposed changes to Plaintiff Gary and asked Plaintiff Gary to forward it to the consultant for review.<sup>177</sup>

Sue Dooling told Plaintiff Gary she did not need to make any copies of the April 22, 2009 version of the handbook that was being forwarded to the outside consultant.<sup>178</sup> Nobody ever told Plaintiff Gary that the employee handbook or the lateness policy was being changed on April 22, 2009.<sup>179</sup>

When RCF changed its attendance policy in January 2009, Sue Dooling mailed all the employees and required everyone to sign an acknowledgement form.<sup>180</sup> When Sue Dooling was exploring revisions to the attendance policy in April 2009, she never e-mailed or publicized the policy to the employees, she never asked them to sign any acknowledgement form, and she never intended for the proposed revisions to become effective at that point.<sup>181</sup>

Sue Dooling never intended that the lateness policy be changed after the January 2009 revisions. Yet, Plaintiff Gary believed that Sue Dooling was making permanent changes to the handbook on April 22, 2009 when she sent out the modified handbook to the third party.

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<sup>175</sup> Gary Deposition Exhibit 54.

<sup>176</sup> Gary Deposition Exhibit 54.

<sup>177</sup> Dooling Affidavit, ¶22, 27; Gary Deposition Exhibit 96.

<sup>178</sup> Gary Deposition Transcript, at pg. 348.

<sup>179</sup> Gary Deposition Transcript, at pg. 374.

<sup>180</sup> Gary Deposition Transcript, at pgs. 379-380.

<sup>181</sup> Gary Deposition Transcript, at pg. 380; Dooling Affidavit ¶27.

On March 3, 2009, Plaintiff Gary received a disciplinary verbal warning for violations of RCF's attendance policy.<sup>182</sup> Plaintiff Gary felt that this warning was legitimate.<sup>183</sup>

On April 28, 2009, Plaintiff Gary was called into a meeting with Dan Reutter (RCF's Vice-President who became President)<sup>184</sup> and Sue Dooling for her excessive tardiness.<sup>185</sup> Plaintiff Gary was also told at that meeting that her co-workers found her rude and unapproachable. She was encouraged to make a fresh start.<sup>186</sup> At the meeting, Plaintiff Gary was handed a disciplinary written warning, citing her excessive tardiness.<sup>187</sup> Plaintiff Gary protested the written warning claiming that she deserved only a verbal warning. Sue Dooling agreed to rescind the written warning and instead, to give Plaintiff Gary a verbal warning for tardiness.<sup>188</sup>

Plaintiff Gary protested the verbal warning she received for tardiness. Plaintiff Gary contended that in light of the revisions to the employee handbook of April 2009, she should not have received a verbal warning on April 28, 2009.<sup>189</sup>

### **Other Workplace Grievances**

Plaintiff Gary also complained to Sue Dooling about another co-worker, Marc Klair, who she contended burped in her office without excusing himself.<sup>190</sup> Plaintiff Gary testified at deposition that Mr. Klair's conduct was not part of her claims in this litigation. Although she found his behavior "nasty", she did not find it "illegal".<sup>191</sup>

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<sup>182</sup> Gary Deposition Exhibit 68.

<sup>183</sup> Gary Deposition Transcript, at pgs. 310-311.

<sup>184</sup> Gary Deposition Transcript, at pgs. 41-42.

<sup>185</sup> Amended Complaint ¶100.

<sup>186</sup> Amended Complaint ¶101; Gary Deposition Transcript, pg. 361.

<sup>187</sup> Amended Complaint ¶100.

<sup>188</sup> Amended Complaint ¶100, Gary Deposition Exhibit 75.

<sup>189</sup> Gary Deposition Exhibits 75, 79, 83.

<sup>190</sup> Gary Deposition Transcript, at pg. 167.

<sup>191</sup> Gary Deposition Transcript, at pg 167.

Another grievance that Plaintiff Gary had was with another co-worker, Stuart Sherbal, in that he allegedly passed gas in her office.<sup>192</sup> As previously noted, this was the individual that threw away a crumpled piece of paper that did not quite make the trashcan. Plaintiff contended that passing gas in her office showed that he did not like her spiritual beliefs.<sup>193</sup> She admitted that it is just speculation.<sup>194</sup>

In any event, after a prior complaint or two, Plaintiff complained about Stuart Sherbal's behavior on March 24, 2009, he apologized, and it resolved the issue.<sup>195</sup>

In her summary judgment submissions, Plaintiff clarifies that these complaints of burping and passing gas, are not related to her complaint of sexual or religious discrimination/harassment<sup>196</sup>

#### **RCF ELIMINATED PLAINTIFF GARY'S POSITION**

On May 8, 2009, Plaintiff Gary was called into Dan Reutter's office and told that RCF was eliminating her position.<sup>197</sup> Plaintiff Gary's position was eliminated as part of a larger corporate downsizing that RCF undertook.<sup>198</sup> Plaintiff Gary's position was one of four that RCF eliminated on May 8, 2009. RCF laid off 15 employees between February 15, 2009 and May 8, 2009- 14 of which (all but Plaintiff's position) were held by men.<sup>199</sup>

Mr. Reutter never said anything about connecting the job elimination to Plaintiff Gary's tardiness. In fact, it was clear to Plaintiff Gary that she was not being terminated for performance issues- her attendance record was "absolutely not" the reason that RCF eliminated

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<sup>192</sup> Gary Deposition Transcript, at pgs. 164-165, 359-360.

<sup>193</sup> Gary Deposition Transcript, at pgs. 164-166.

<sup>194</sup> Gary Deposition Transcript, at pgs. 166.

<sup>195</sup> Gary Deposition Transcript, at pgs. 223, 317.

<sup>196</sup> Plaintiff's Opposition to Defendant's Motion for Summary Judgment filed on October 28, 2013, at pgs. 4-5.

<sup>197</sup> Gary Deposition Transcript, at pgs. 483-486.

<sup>198</sup> Dooling Affidavit, at ¶30.

<sup>199</sup> Dooling Affidavit, at ¶31- 35, Dooling Affidavit Exhibit B.

her position.<sup>200</sup> Plaintiff Gary was laid off from RCF as part of a downsizing and not for misconduct or unsatisfactory job performance.<sup>201</sup>

Mr. Reutter told Plaintiff she could file for unemployment benefits.<sup>202</sup>

RCF has not filled Plaintiff Gary's receptionist position since it eliminated Plaintiff Gary's job in May 2009- over four years ago.<sup>203</sup>

### **AFTER PLAINTIFF'S TERMINATION**

Plaintiff Gary alleges that, after RCF eliminated her job, her family members "began acting weird and slandering [her] and [her] fiancé on Facebook." The statements that Plaintiff is referring to, never reference her, but she claims it was "all written in code."<sup>204</sup> She decoded the messages and concluded that her family was conspiring with RCF to sabotage her case.<sup>205</sup>

Plaintiff also believes that her family was not just hacking into her e-mails but also putting an eavesdropping device in her home to monitor her.<sup>206</sup> She has not found any eavesdropping device in her house. She claims to have called the FBI twice but they have not called her back.<sup>207</sup>

Plaintiff Gary also monitored the Facebook pages of former RCF co-workers, and believes that her former co-workers were acting in concert with her family, to slander her.<sup>208</sup> Plaintiff had not received any Facebook messages or posts from any of her former co-workers, but she took it upon herself to go onto their Facebook pages and see what they were writing

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<sup>200</sup> Gary Deposition Transcript, at pgs. 484-486.

<sup>201</sup> Dooling Affidavit, at ¶ 33, Dooling Affidavit Exhibit A.

<sup>202</sup> Amended Complaint, at ¶¶ 130-131.

<sup>203</sup> Dooling Affidavit, at ¶ 34.

<sup>204</sup> Amended Complaint, ¶ 139; Gary Deposition Transcript, at pgs. 525-527.

<sup>205</sup> Gary Deposition Transcript, at pgs. 526-531, 538.

<sup>206</sup> Gary Deposition Transcript, at pg. 530.

<sup>207</sup> Gary Deposition Transcript, at pg. 530.

<sup>208</sup> Gary Deposition Transcript, at pg. 527.

about.<sup>209</sup> These slanderous statements of her former co-workers, like those of her family, are also in code.<sup>210</sup>

One example of a coded message, is a Facebook posting by Mr. Bouldin on September 27, 2010, in which Mr. Bouldin stated: “Someone explain why the good die young. . . Why the bad die slow and outlive everyone?”<sup>211</sup> Plaintiff Gary had not spoken to Mr. Bouldin since she left RCF in May 2009, over a year earlier, but still believed this Facebook reference was to her.<sup>212</sup>

Carl Bouldin also made a number of Facebook postings, which included updates about his activity on Farmville, which Plaintiff interpreted as some of the postings being meant to target her and for her to see.<sup>213</sup>

Plaintiff Gary also believes a September 27, 2010 Facebook posting from Michael Dooling, who Plaintiff believes is Sue Dooling’s nephew, was a reference to her.<sup>214</sup> Plaintiff Gary never met Michael Dooling.<sup>215</sup> Michael Dooling posted on his Facebook page: (all *sic*): “26 months. . . For murder . . . Well I must meet ur lawyer.”<sup>216</sup> A woman who Plaintiff Gary never met, Cindy Martin Scott, commented on Michael Dooling’s post. Plaintiff Gary believes this woman was also referencing Plaintiff Gary in her response to Michael Dooling’s post.<sup>217</sup>

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<sup>209</sup> Gary Deposition Transcript, at pg. 526.

<sup>210</sup> Gary Deposition Transcript, at pg. 529.

<sup>211</sup> Gary Deposition Exhibit 86.

<sup>212</sup> Gary Deposition Transcript, at pg. 532-534.

<sup>213</sup> Gary Deposition Transcript, at pg. 536.

<sup>214</sup> Gary Deposition Exhibit 86; Gary Deposition Transcript, at pg. 536.

<sup>215</sup> Gary Deposition Transcript, at pg. 536.

<sup>216</sup> Gary Deposition Exhibit 86.

<sup>217</sup> Gary Deposition Exhibit 86; Gary Deposition Transcript, at pg. 537.

Plaintiff believes that Michael Dooling's post, whom she never met, and the response to his post by someone else she never met, were meant as threats to her because he used the word "murder."<sup>218</sup>

Plaintiff Gary acknowledges that she cannot prove the posts are about her but cannot help but feel that some of the posts were meant for her eyes to see and become intimidated and fearful.<sup>219</sup>

Plaintiff Gary also alleged that she was being stalked by people "associated in some way with RCF."<sup>220</sup> Plaintiff Gary alleged that a stranger approached her fiancé and asked why he and his girlfriend sit in the house all day. She believes that the person must be associated by RCF because RCF was "the only people that would have anybody watching me and my activity."<sup>221</sup> Plaintiff Gary admits, however, that she had no proof that RCF hired anyone to investigate or follow her.<sup>222</sup>

### **LEGAL STANDARD**

When considering a motion for summary judgment the court is required to examine the record to determine whether genuine issues of material fact exist.<sup>223</sup> Summary judgment will be granted if, after viewing the record in a light most favorable to a non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.<sup>224</sup> The court must view the evidence in the light most favorable to the non-moving party in making this determination.<sup>225</sup>

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<sup>218</sup> Gary Deposition Transcript, at pg. 537.

<sup>219</sup> Gary Deposition Exhibit 87; Gary Deposition Transcript, pgs. 543-544.

<sup>220</sup> Gary Deposition Exhibit 85.

<sup>221</sup> Gary Deposition Transcript, at pgs. 540-541.

<sup>222</sup> Gary Deposition Transcript, at pg. 542.

<sup>223</sup> Super.Ct.Civ.R. 56(c); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del.Super. 1973).

<sup>224</sup> *Id.*

<sup>225</sup> *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

The moving party initially bears the burden of establishing the absence of a genuine issue of material fact. Once the moving party has carried its burden of establishing the absence of a genuine issue of material fact, the non-moving party must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial.<sup>226</sup> The non-moving party must designate specific, material facts in dispute by presenting documentary evidence, depositions or other sworn testimony.<sup>227</sup>

The question on summary judgment is whether any rational finder of fact could find, on the present record, viewed in the light most favorable to the non-moving party, that the substantive evidentiary burden had been satisfied.<sup>228</sup> There is no material fact issue unless the evidence is such that a reasonable jury could return a verdict for the nonmoving party.<sup>229</sup>

The Delaware Supreme Court has explained that a complaining plaintiff's subjective personal judgments or beliefs, without more, will not raise a genuine issue of material fact as to whether she has been discriminated against.<sup>230</sup> A plaintiff's subjective, good faith belief that discrimination occurred is simply insufficient to support a jury verdict in plaintiff's favor. The subjective belief of the plaintiff, however sincere, is not sufficient to defeat a motion for summary judgment.<sup>231</sup>

Moreover, a court should not allow absurd or fanciful speculations to defeat a summary judgment motion.<sup>232</sup> In short, conclusory allegations, speculation and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden.<sup>233</sup>

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<sup>226</sup> *Miller v. State of Delaware*, 2011 WL 1312286, at \*7 (Del.Super. 2011).

<sup>227</sup> *Miller v. State of Delaware*, 2011 WL 1312286, at \*7 (Del.Super. 2011).

<sup>228</sup> *Miller v. State*, 2011 WL 1312286, at \*7 (Del.Super.).

<sup>229</sup> *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1429 (5<sup>th</sup> Cir. 1996).

<sup>230</sup> *Boggerty et al. v. Steward et al.*, 14 A.3d 542, 554 (Del. 2011).

<sup>231</sup> See, *Boggerty et al. v. Steward et al.*, 14 A.3d 542, 554 (Del. 2011).

<sup>232</sup> *Turner v. Association of Owners of Bethany Seaview Condominium*, 2013 WL 1861930, at \*3(Del.Super.).

<sup>233</sup> *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1429 (5<sup>th</sup> Cir. 1996).

## **DISCUSSION**

Plaintiff Gary has alleged claims under the Delaware Discrimination in Employment Act (DDEA)<sup>234</sup> of religious harassment (Claim One), sexual harassment (Claim Two) and retaliation (Claim Three).

The Delaware Discrimination in Employment Act is substantially the same as the federal counterpart.<sup>235</sup> Accordingly, it is appropriate to apply federal case law to discrimination claims raised under the DDEA.<sup>236</sup>

The three claims presented herein will each be discussed in turn.

### **Claim One: Religious/Spiritual Harassment Claim**

In order to establish a *prima facie* claim of religious/spiritual harassment, the plaintiff must establish that: 1) she is a member of a protected class; 2) she was subject to uninvited/unwelcome harassment; 3) the offending conduct was because of her religion; 4) the harassment was severe and pervasive; 5) the offending conduct was both objectively and subjectively offensive; and 6) the existence of *respondeat superior* liability.<sup>237</sup>

RCF makes numerous arguments to support its contention that Plaintiff cannot make out a *prima facie* claim for religious/spiritual harassment. The court need only entertain one.

Before being permitted to impose liability, and thereafter seek damages of at least \$100,000 per e-mail, Plaintiff must establish that she clearly communicated that the e-mails, of which she now complains, were not welcomed. In order to constitute harassment, the conduct

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<sup>234</sup> 19 Del.C. § 710 *et. seq.*

<sup>235</sup> *Spicer v. CADapult, Ltd.*, 2013 WL 6917142, at \*3 (Del.Super.), *aff'd*, 2014 WL 1273980 (Del.).

<sup>236</sup> *Spicer v. CADapult, Ltd.*, 2013 WL 6917142, at \*3 (Del.Super.), *aff'd*, 2014 WL 1273980 (Del.).

<sup>237</sup> *Rivera v. Puerto Rico Aqueduct and Sewers Authority*, 331 F.3d 183, 189-190 (1<sup>st</sup> Cir. 2003); *Neal v. Genesis Properties of Delaware Ltd.*, 870 F.Supp. 2d 369, 376 (D.Del. 2012).

must be unwelcome in the sense that the employee did not incite or solicit it, and in the sense that the employee regarded the conduct as undesirable or offensive.<sup>238</sup> For conduct to be deemed unwelcome for the purpose of establishing liability, the unwelcomeness of the conduct must be communicated.<sup>239</sup>

In this case, it is undisputed that the Plaintiff actively encouraged the receipt of the e-mails, positively responded to them, and sent inspirational/religious themed e-mails of her own. Specifically, in response to the very first religious themed e-mail she received, Plaintiff Gary responded “Very encouraging and true as well. . .U Have a Blessed Day. . .”<sup>240</sup>. Plaintiff actively encouraged the continued receipt of the e-mails- “**Keep ‘em coming.** . . Have a blessed day” was her response to another religious themed e-mail.<sup>241</sup>

In fact, it was Plaintiff Gary that initially sent an inspirational e-mail to Javier Paula before Javier Paula first started sending any inspirational e-mails to Plaintiff Gary.<sup>242</sup>

Plaintiff positively responded to Sue Dooling’s e-mails on multiple occasions, “Very encouraging and true as well,”<sup>243</sup> “Keep ‘em coming,”<sup>244</sup> “Amen! . . Have a Blessed Day,”<sup>245</sup> and “Amen! . . Thank you Jesus Christ for Salvation.”<sup>246</sup> Plaintiff positively responded to Javier Paula’s e-mails on multiple occasions, “Very encouraging. Thank you. I will pass this one on!,”<sup>247</sup> “Amen to That! . . TGIF!,”<sup>248</sup> “That’s the Word! . . Have a Great Evening!,”<sup>249</sup>

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<sup>238</sup> *Clegg v. Falcon Plastics, Inc.*, 174 F. App’x 18, 2006 WL 887937, at \*5 n. 7 (3<sup>rd</sup> Cir. 2006).

<sup>239</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986).

<sup>240</sup> June 10, 2008 e-mail response by Plaintiff Gary, Gary Deposition Exhibit 7.

<sup>241</sup> June 12, 2008 e-mail response by Plaintiff Gary, Gary Deposition Exhibit 8.

<sup>242</sup> Plaintiff’s July 1, 2008 e-mail, Gary Deposition Exhibit 9; Affidavit of Javier Paula, at ¶¶ 7-10.

<sup>243</sup> June 10, 2008 e-mail response by Plaintiff Gary, Gary Deposition Exhibit 7.

<sup>244</sup> June 12, 2008 e-mail response by Plaintiff Gary, Gary Deposition Exhibit 8

<sup>245</sup> August 6, 2008 e-mail response by Plaintiff Gary, Gary Deposition Exhibit 15.

<sup>246</sup> August 6, 2008 e-mail response by Plaintiff Gary, Gary Deposition Exhibit 17.

<sup>247</sup> July 1, 2008 e-mail response by Plaintiff Gary, Gary Deposition Exhibit 10.

<sup>248</sup> August 1, 2008 e-mail response by Plaintiff Gary, Gary Deposition Exhibit 14.

<sup>249</sup> August 6, 2008 e-mail response by Plaintiff Gary, Gary Deposition Exhibit 16.

On multiple occasions, Plaintiff Gary sent her own inspirational, religious themed e-mails-she sent a religious themed e-mail on July 1, 2008,<sup>250</sup> July 3, 2008,<sup>251</sup> July 29, 2008,<sup>252</sup> January 7, 2009,<sup>253</sup> January 8, 2009,<sup>254</sup> and January 19, 2009.<sup>255</sup>

It is also undisputed that not one of the inspirational, religious themed e-mails contained a single reference to Plaintiff Gary. There was nothing about the e-mails that were overtly offensive in any respect. The substance of the e-mails did not reference Plaintiff in any way.

Claims of harassment are very serious allegations. Before a plaintiff is allowed to pursue claims of harassment, it is incumbent upon that plaintiff to first establish that the conduct of which the plaintiff complains was unwelcomed. When Plaintiff said: “Keep ‘em coming,” she should be held at her word. A plaintiff should not be permitted to base a harassment claim on a guessing game as to what was she really thinking when she actively and positively encouraged the continued receipt of the religious themed e-mails. It is inherently inequitable for Plaintiff to actively encourage the continued receipt of inspirational religious themed e-mails, and then turn around and seek \$100,000 for each e-mail that she received.

“Keep ‘em coming” means the exact opposite of “stop.” Plaintiff knew how to say “Keep ‘em coming”<sup>256</sup> and she knew how to say “stop.”<sup>257</sup> When Plaintiff said “Keep ‘em coming”, her co-workers did. And when Plaintiff said “stop”, her co-workers did.

Plaintiff is required to mean what she says, and say what she means. She cannot mislead her co-workers into thinking she is enjoying the sharing of inspirational religious themed e-mails

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<sup>250</sup> Gary Deposition Exhibit 9.

<sup>251</sup> Gary Deposition Exhibit 11.

<sup>252</sup> Gary Deposition Exhibit 12.

<sup>253</sup> Gary Deposition Transcript, pgs. 245-246; Amended Complaint filed September 20, 2012, ¶67.

<sup>254</sup> Gary Deposition Exhibit 56.

<sup>255</sup> Amended Complaint filed September 20, 2012, ¶73.

<sup>256</sup> Gary Deposition Exhibit 8.

<sup>257</sup> Gary Deposition Exhibit 72; Gary Deposition Transcript, pg. 325.

and then be permitted to impose liability because her secret thoughts were not consistent with her words and conduct.

Indeed, prior to April 17, 2009, both Sue Dooling and Javier Paula believed that Plaintiff Gary enjoyed receiving the e-mails and wanted to continue receiving them, based on Plaintiff Gary's positive reactions to the e-mails.<sup>258</sup>

Prior to April 17, 2009, there was nothing about the e-mails themselves, Plaintiff's responses, or Plaintiff's actions, which indicated anything but a positive reaction to receiving them. Both by her words and by her conduct, Plaintiff actively encouraged the continued receipt of the e-mails. The first time she said stop, on April 17, 2009, her co-workers stopped.<sup>259</sup>

On April 17, 2009, the day Plaintiff Gary first communicated to any of her co-workers that the religious themed e-mails were unwelcomed and she wanted to stop receiving them, was the last day she alleges that she experienced religious harassment at RCF.<sup>260</sup> Plaintiff cannot satisfy the element of her claim that she conveyed to her co-workers that their e-mails were unwelcomed prior to April 17, 2009, and therefore summary judgment should be granted to RCF.

The court notes in passing that there are additional elements that need to be met in order to establish a *prima facie* claim of religious/spiritual harassment under the DDEA. Plaintiff would need to establish that the offending conduct was not only subjectively offensive but also objectively offensive as well. If the court had continued its analysis of Plaintiff's claim for religious/spiritual harassment under the DDEA, Plaintiff would also fall short of establishing a *prima facie* showing of meeting this element because there was no objective evidence to support Plaintiff's impression that she was being singled out, belittled and humiliated.

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<sup>258</sup> Sue Dooling Affidavit, at pgs. 1-3; Javier Paula Affidavit, at ¶¶ 13-17.

<sup>259</sup> Gary Deposition Transcript, at pg. 337.

<sup>260</sup> Gary Deposition Transcript, at pg. 341.

For a discrimination claim to survive summary judgment, the law requires more than an assertion of the plaintiff's subjective reaction, there must also be objective proof.<sup>261</sup>

Plaintiff would need to establish that as a result of the receipt of these inspirational, religious themed e-mails her workplace was permeated with discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment.<sup>262</sup> A plaintiff cannot rely on her own conclusory interpretations of e-mails to support her claim of harassment in those instances in which the e-mails do not contain any language that is specifically directed at the plaintiff or that could reasonably be characterized as inflammatory.<sup>263</sup>

Plaintiff cannot make this showing because the e-mails are benign, and no objective observer could find they were intended to intimidate, ridicule or insult her. The e-mails are devoid of any reference to Plaintiff or her spiritual beliefs. They lack even a single reference to her or to her spiritual beliefs, and they fail to attack or show any hostility toward either. No reasonable fact finder could conclude that the content of the religious themed e-mails shared between the RCF co-workers showed antipathy or animosity towards Plaintiff's spiritual or religious convictions.

RCF is entitled to summary judgment on Plaintiff's claim of spiritual/religious harassment.

### **Claim Two: Sexual Harassment Claim**

Plaintiff Gary alleges that she was sexually harassed when on September 16, 2008, Mark Shanor picked up a large set of rolled up blue prints and hit her on the buttocks with the blue

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<sup>261</sup> *Cole v. Delaware Technical and Community College*, 459 F.Supp.2d 296, 307-308 (D.Del. 2006).

<sup>262</sup> *Brook v. CBS Radio, Inc.*, 342 F.App'x 771, 776 (3<sup>rd</sup> Cir. 2009).

<sup>263</sup> See, *Perry v. Gotbaum*, 766 F.Supp.2d 151, 167 (D.C. Dist. 2011); *Idlebird v. Xerox Corp.*, 2005 WL 1959993, at \*5 (S.D. Tex. 2005).

prints.<sup>264</sup> Plaintiff filed her charge of discrimination with the Delaware Department of Labor on June 22, 2009- over 260 days later.<sup>265</sup>

In order to preserve her claim, Plaintiff was required to file a charge of discrimination with the Delaware Department of Labor within 120 days after the incident.<sup>266</sup>

Plaintiff's claim arose on the date of the incident- September 16, 2008. It is undisputed that there is no claim of sexual harassment after that date.<sup>267</sup> It is undisputed that Plaintiff did not file her charge of discrimination with the Delaware Department of Labor until June 22, 2009- over 260 days after the incident. Thus, Plaintiff's claim of sexual harassment is time-barred.<sup>268</sup>

Plaintiff concedes that her claim based on this incident is not timely.<sup>269</sup> She contends, instead, that her claim is based on her subsequent discovery that Mark Shanor's name was omitted from an internal disciplinary spreadsheet that she discovered on or about May 6, 2009.<sup>270</sup> Plaintiff claims that because Mark Shanor's name was not on the internal disciplinary spreadsheet she did not feel he received a sufficient written reprimand.

The undisputed facts establish that Sue Dooling immediately met with Plaintiff and Mark Shanor. Sue Dooling handed Plaintiff a typed disciplinary document detailing her allegations against Mark Shanor. Plaintiff signed the document and also wrote on the back of it her recollection of the events. Mr. Shanor signed the document as well. This document dated September 17, 2008 that Mr. Shanor and Plaintiff signed was placed in Mr. Shanor's personnel

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<sup>264</sup> Amended Complaint, ¶25.

<sup>265</sup> Davis Affidavit, Exhibit B; Amended Complaint filed September 20, 2012, ¶133.

<sup>266</sup> See, 19 *Del. C.* § 712(c)(1); *Miller v. State*, 2011 WL 1312286, at \*9-10 (Del.Super.) (to preserve a claim for hostile work environment based on sex discrimination a complaint must be filed with the Delaware Division of Labor within 120 days of the incident complained of.)

<sup>267</sup> Gary Deposition Transcript, at pg. 158.

<sup>268</sup> See, *Miller*, 2011 WL 1312286, at \*10.

<sup>269</sup> Gary Deposition Transcript, at pg. 477.

<sup>270</sup> Gary Deposition Transcript, at pg. 478.

file. The document explained the incident, explained that Mark Shanor apologized, and promised never to do it again.<sup>271</sup>

It is undisputed that Mark Shanor never did it again.<sup>272</sup>

Plaintiff's claim arose on the date of the incident- September 16, 2008. On that date, she knew the facts which formed the basis of her claim.<sup>273</sup> Plaintiff did not suffer an injury as a result of her alleged subsequent discovery that Mr. Shanor's name was omitted from a spreadsheet showing disciplinary action taken against employees.

Moreover, an employee cannot dictate that the employer select a certain remedial action.<sup>274</sup> When after the employer's intervention, the co-worker never again committed another discriminatory act directed to the plaintiff, the employer's procedure was effective for dealing with the discrimination.<sup>275</sup>

In the subject action, the undisputed facts establish that a written document signed by both parties to the incident was placed in Mark Shanor's personnel file and that he never did it again. It is undisputed that management's actions effectively ended the conduct about which Plaintiff complained.

Plaintiff's claim of sexual harassment is time-barred as a result of Plaintiff's failure to file a charge of discrimination with the Delaware Department of Labor within 120 days after the September 16, 2008 incident.

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<sup>271</sup> Gary Deposition Exhibit 23.

<sup>272</sup> Gary Deposition Transcript, pgs. 341-342, 476-479.

<sup>273</sup> See, *Cooke v. Wood*, 2011 WL 1542825, at \*2 (D.Del. 2011); *Maynard v. Goodwill Industries of Delaware*, 678 F.Supp.2d 243, 250 (D.Del. 2010)(a claim arises upon awareness of an actual injury, not upon awareness that this injury constitutes a legal wrong).

<sup>274</sup> *Knabe v. Boury Corp.*, 114 F.3d 407, 414 (3<sup>rd</sup> Cir. 1997); *Swingle v. Henderson*, 142 F.Supp. 2d 625, 637 (D.N.J. 2001)(an aggrieved employee cannot object to an adequate remedy and dictate instead that the employer take such remedial action as the employee deems appropriate.)

<sup>275</sup> *Neal*, 870 F.Supp.2d at 378.

Even if Plaintiff's sexual harassment claim was not time-barred, Plaintiff would also have fallen short of establishing a *prima facie* cause of action. To establish a *prima facie* cause of action for a sexual harassment claim, the plaintiff must show: 1) she suffered intentional discrimination because of her sex; 2) the discrimination was severe or pervasive; 3) the discrimination detrimentally affected the plaintiff; 4) the discrimination would detrimentally affect an objectively reasonable woman; and 5) the existence of *respondeat superior* liability.<sup>276</sup> In order to survive a motion for summary judgment, plaintiff must establish all five elements.<sup>277</sup>

First, Mr. Shanor's single act, while inappropriate, did not rise to the level of the severity required for a sexual harassment claim. An isolated incident (unless extremely serious) does not rise to the level of severe and pervasive discrimination that is required to establish a *prima facie* sexual harassment claim.<sup>278</sup>

The DDEA, like its federal counterpart, Title VII, does not operate as a general civility code nor mandate a happy workplace.<sup>279</sup> Simple teasing, offhand comments, isolated incidents (unless extremely serious), occasional insults or episodic instances of ridicule are not enough to state a cause of action under the DDEA; they do not permeate the workplace and change the very nature of the plaintiff's employment.<sup>280</sup>

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<sup>276</sup> *Miller v. State of Delaware, Dep't of Pub.Safety*, 2011 WL 1312286, at \*9 (Del.Super.); *Spicer v. CADapult, Ltd.*, 2013 WL 6917142, at \*6 (Del.Super.), *aff'd*, 2014 WL 1273980 (Del.).

<sup>277</sup> *Miller v. State of Delaware, Dep't of Pub.Safety*, 2011 WL 1312286, at \*9 (Del.Super.).

<sup>278</sup> *Cole v. Delaware Technical and Community College*, 459 F.Supp.2d 296, 307-308 (D.Del. 2006); *Spicer v. CADapult, Ltd.*, 2013 WL 6917142, at \*6 (Del.Super.), *aff'd*, 2014 WL 1273980 (Del.); *Lignore v. Hospital Univ. of Pennsylvania*, 2006 WL 1804571, at \*7-8 (E.D. Pa. 2006)(a pinch of the buttocks, while offensive, was insufficiently abusive to be described as severe when it occurred in isolation); *Saidu-Kamara v. Parkway Corp.*, 155 F.Supp. 2d 436, 439-40 (E.D. Pa. 2001)(defendant's repeated suggestive sexual comments, patting plaintiff on the buttocks and breast, and making harassing comments was not sufficient to state a claim for hostile work environment); *McGraw v. Wyeth-Ayerst Labs, Inc.*, 1997 WL 799437, at \*5-6 (E.D. Pa. 1997)(supervisor's repeated requests for a date with the plaintiff, and one incident where he kissed her and touched her face did not rise to the level of the severity required for a hostile work environment claim.)

<sup>279</sup> *Jacques-Scott v. Sears Holding Corp.*, 2013 WL 2897427, at \*10 (D.Del. 2013).

<sup>280</sup> *Jacques-Scott v. Sears Holding Corp.*, 2013 WL 2897427, at \*10 (D.Del. 2013).

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment- an environment that a reasonable person would find hostile or abusive- is beyond the DDEA's purview.<sup>281</sup> The complained about behavior described by Plaintiff Gary involves one isolated incident. Even viewing the facts in the light most favorable to plaintiff, the totality of the circumstances is far from pervasive or severe from which a reasonable person could find her work environment hostile or abusive.<sup>282</sup>

Furthermore, even if Plaintiff could prove that the offending behavior rose to the level of severe and pervasive discriminatory conduct, plaintiff cannot establish employer liability. Mr. Shanor had never hit anyone on the buttocks with blueprints prior to this incident. RCF, upon learning of the incident, immediately disciplined Mr. Shanor and he never did it again. RCF took prompt and effective remedial action to immediately end the offending behavior. These facts indicate that RCF had an effective procedure for dealing with discrimination, that Plaintiff knew of the procedure, and that the system worked to stop harassment in a timely fashion. Even viewing the facts in the light most favorable to plaintiff, RCF is shielded from liability for Mark Shanor's isolated incident on September 16, 2008.<sup>283</sup>

Having found that Plaintiff failed to identify a genuine issue of material fact on two essential elements of her *prima facie* sexual harassment claim, the remaining elements of the claim need not be addressed.

RCF is entitled to summary judgment on Plaintiff's claim of sexual harassment.

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<sup>281</sup> *Jacques-Scott v. Sears Holding Corp.*, 2013 WL 2897427, at \*10 (D.Del. 2013).

<sup>282</sup> See, *Neal v. Genesis Properties of Delaware, Ltd. Partnership, L.P.*, 870 F.Supp.2d 369, 377 (D.Del. 2012); *Jacques-Scott v. Sears Holding Corp.*, 2013 WL 2897427, at \*10 (D.Del. 2013).

<sup>283</sup> *Neal v. Genesis Properties of Delaware, Ltd. Partnership, L.P.*, 870 F.Supp.2d 369, 377- 378 (D.Del. 2012)(plaintiff cannot establish employer liability where plaintiff encountered no trouble in reporting the incidents, and after she made her complaint the conduct never occurred again. This indicates that the employer had an effective procedure for dealing with discrimination, that plaintiff knew of the procedure and that the system worked to stop harassment in a timely fashion.)

### **Claim Three: Retaliation Claim**

Plaintiff's third claim is that RCF retaliated against her for engaging in protected activity.

Plaintiff's position was eliminated on May 8, 2009. The undisputed evidence establishes that RCF eliminated Plaintiff's position due to a company-wide reduction in force. RCF has not hired a new receptionist since it eliminated the position- a period of more than four years.

The undisputed evidence further establishes that between February 18, 2009 and May 8, 2009, RCF eliminated fifteen positions-fourteen of which (all but Plaintiff's position) were held by men. There is no evidence whatsoever that Plaintiff's gender played any role in RCF's decision to eliminate Plaintiff's position. As to Plaintiff's religious or spiritual beliefs, there is a lack of evidence that anyone at RCF held any animosity toward Plaintiff as a result of those beliefs. The court has already held that the sharing of religious themed e-mails did not constitute unlawful religious or spiritual discrimination.

Plaintiff's retaliation claim is subject to the *McDonnell Douglas* burden-shifting analysis.<sup>284</sup> Under this analysis, Plaintiff must first establish a *prima facie* case of retaliation by showing that: 1) she engaged in protected activity; 2) she suffered an adverse employment action; and 3) a causal link existed between the protected activity and the adverse action.<sup>285</sup>

In order to engage in protective activity, Plaintiff must have opposed unlawful discrimination in violation of the DDEA. When there is no objective basis that the complained about behavior constituted discrimination under the DDEA, the plaintiff is unable to establish a *prima facie* case of retaliation.<sup>286</sup> This court has already determined that Plaintiff has not stated a claim for discrimination under the DDEA for either religious or sexual harassment. Furthermore,

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<sup>284</sup> *Miller*, 2011 WL 1312286, at \*12; *Hussein v. UPMC Mercy Hosp.*, 466 F. App'x 108, 112 (3<sup>rd</sup> Cir. 2012).

<sup>285</sup> *Miller v. State*, 2011 WL 1312286, at \*12 (Del.Super.); *Sappan v. Pennsylvania Board of Probation and Parole*, 152 F.App'x 211, 217 (3<sup>rd</sup> Cir. 2005).

<sup>286</sup> *Jacques-Scott v. Sears Holding Corp.*, 2013 WL 2897427, at \*9 (D.Del. 2013).

Plaintiff has failed to establish any causal connection between her alleged protected activity and RCF's elimination of her position.

Plaintiff points to the fact that approximately three weeks after she complained about the religious themed e-mails she was terminated. This timing allegation is not enough to establish a *prima facie* claim of retaliation. The mere temporal proximity of Plaintiff's complaints about the religious themed e-mails, or any of her other complaints, and her termination is not sufficient to create a triable issue as to whether her termination was motivated by retaliatory intent.<sup>287</sup> Timing alone will not suffice to prove retaliatory motive.<sup>288</sup>

The record does not support a *prima facie* claim of retaliation. Although Plaintiff alleged that she engaged in protected activity, she has not established any adverse employment action taken against her because of such alleged activity.

Under the *McDonnell Douglas* framework, the plaintiff-employee must first establish a *prima facie* case of discrimination. If the plaintiff successfully establishes the elements of a *prima facie* case, the burden shifts to the defendant-employer to articulate a legitimate, nondiscriminatory reason for the adverse employment decision. If the employer shows a legitimate reason, the burden shifts back to the employee, who, in order to prevail against a motion for summary judgment, must show that the employer's articulated reason is false and that retaliation was the real reason for the adverse action.<sup>289</sup>

In order to raise an inference of pretext in the face of the defendant's legitimate, nondiscriminatory explanation, the plaintiff must undermine the defendant's credibility to the

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<sup>287</sup> *Walker v. City of Holyoke*, 523 F.Supp.2d 86, 116 (D. Mass. 2007).

<sup>288</sup> *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 501 (3<sup>rd</sup> Cir.), *cert. denied*, 502 U.S. 940 (1991)(timing alone will not suffice to prove retaliatory motive) See, *Stevens v. St. Louis Univ. Med. Ctr.*, 97 F.3d 268, 272 (8<sup>th</sup> Cir. 1996).

<sup>289</sup> *Spicer v. CADapult, Ltd.*, 2013 WL 6917142, at \*3 (Del.Super.), *aff'd*, 2014 WL 1273980 (Del.).

point that a reasonable jury could not find in its favor.<sup>290</sup> The Delaware Supreme Court has explained that the plaintiff must offer specific and significantly probative evidence that the defendant's alleged purpose is a pretext for discrimination.<sup>291</sup> A plaintiff's mere subjective personal judgment, belief or assumption that the defendant's proffered legitimate, nondiscriminatory reasons is pretextual is insufficient to establish pretext.<sup>292</sup> A plaintiff's subjective personal judgments or beliefs, without more, will not raise a genuine issue of material fact as to whether the defendant's non-discriminatory reason for the challenged conduct is pretextual.<sup>293</sup>

In the subject action, there is nothing in the record to suggest that RCF's elimination of Plaintiff's position was pretextual. The uncontroverted evidence establishes that Plaintiff's position was eliminated. Plaintiff offers no evidence, other than her unsupported subjective testimony, to support her claim that RCF retaliated against her. Speculation is insufficient to create a fact issue as to pretext. Nor can pretext be established by mere conclusory statements of a plaintiff who feels that she has been discriminated against.<sup>294</sup>

Moreover, in order to discredit the employer's proffered reason, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer was wise, shrewd, prudent or competent.<sup>295</sup> Rather, the plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered

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<sup>290</sup> *Dover Downs v. Lee*, 2012 WL 2370379, at \*13 (Del.Super. 2012).

<sup>291</sup> *Boggerty v. Stewart*, 14 A.3d 542, 554 (Del. 2011); *Dover Downs v. Lee*, 2012 WL 2370379, at \*13 (Del.Super. 2012).

<sup>292</sup> *Dover Downs v. Lee*, 2012 WL 2370379, at \*13 (Del.Super. 2012).

<sup>293</sup> *Boggerty v. Stewart*, 14 A.3d 542, 554 (Del. 2011).

<sup>294</sup> *Subh v. Wal-Mart Stores East LP*, 2009 WL 866798, at \*19 (D.Del. 2009); *Vasbinder v. Secretary Dep't of Veterans Affairs*, 487 F.App'x 746, 750-51 (3<sup>rd</sup> Cir. 2012)(conclusory statements that employer's justification was pretext were insufficient to defeat summary judgment); *Jacques-Scott v. Sears Holding Corp.*, 2013 WL 2897427, at \*9 (D.Del. 2013).

<sup>295</sup> *Sullivan v. Nationwide Life Insurance Co.*, 720 F.Supp.2d 483, 494-495 (D.Del. 2010).

legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.<sup>296</sup>

Plaintiff has failed to discredit RCF's proffered reasons for her termination. She has not shown that RCF's reason for her termination was pretextual. In fact, there was a total lack of evidence in this regard. Plaintiff has failed to point to any evidence, and there is nothing in the record, to indicate that Plaintiff's termination was motivated in any way by a discriminatory animus. Because Plaintiff is unable to carry her burden under the *McDonnell Douglas* framework, summary judgment should be granted to RCF on the claim of retaliation.

For the sake of completeness, Plaintiff also appears to contend that RCF retaliated against her by giving her a verbal warning for tardiness on April 28, 2009. Aside from the fact that the record shows that the Plaintiff had an attendance problem and the verbal warning was probably justified, Plaintiff admits that the verbal warning had nothing whatsoever to do with RCF's decision to eliminate her position.<sup>297</sup>

Even if the verbal warning was not justified, Plaintiff is not permitted to seek redress from this court for every decision her employer made that she did not believe was justified.<sup>298</sup> The DDEA does not operate as a general civility code and does not permit an employee to seek a court review of any and all business decisions made by the employer that the employee does not agree with.<sup>299</sup> It is not for this court to determine what employee handbook and/or tardiness policy was actually in place at the time Plaintiff Gary was verbally disciplined for tardiness, and to review the correctness of RCF's decision to issue a verbal warning. There is a complete lack

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<sup>296</sup> *Sullivan v. Nationwide Life Insurance Co.*, 720 F.Supp.2d 483, 494-495 (D.Del. 2010).

<sup>297</sup> Gary Deposition Transcript, at pgs. 486-489.

<sup>298</sup> *Sullivan v. Nationwide Life Insurance Co.*, 720 F.Supp.2d 483, 494-495 (D.Del. 2010).

<sup>299</sup> *Jacques-Scott v. Sears Holding Corp.*, 2013 WL 2897427, at \*10 (D.Del. 2013).

of evidence that any discriminatory animus motivated RCF's decision in this regard. Therefore, any challenge to RCF's decision to issue a verbal warning is outside the purview of this Court's review under the DDEA.

The verbal warning issued to Plaintiff on April 28, 2009 was not an adverse employment action because the undisputed facts show that it did not affect the terms and conditions of her employment. The verbal warning only advised Plaintiff that she could be subject to future disciplinary action for violations of the attendance policy.<sup>300</sup> It did not effect her compensation nor did it have any other impact on her employment.

Indeed, Plaintiff admits that the warning had no tangible effect on her.<sup>301</sup> Plaintiff also admits that, even though the verbal warning was issued less than two weeks before her job elimination, the warning had nothing whatsoever to do with RCF's decision to eliminate her position.<sup>302</sup> This verbal warning did not alter the terms and conditions of employment sufficient to constitute an adverse employment action.<sup>303</sup> Plaintiff did not suffer any repercussions. Plaintiff's retaliation claim based on any such verbal warning fails a matter of law.

Viewing the facts in the light most favorable to Plaintiff, the court concludes that Plaintiff has failed to establish a *prima facie* case of retaliation under the Delaware Discrimination in Employment Act.

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<sup>300</sup> Gary Deposition Transcript, at pg. 407.

<sup>301</sup> Gary Deposition Transcript, at pgs. 407-408.

<sup>302</sup> Gary Deposition Transcript, at pgs. 486-489.

<sup>303</sup> See, *Scofienza v. Verizon Pennsylvania Inc.*, 307 F.App'x 619, 621-622, 2008 WL 5102375, at \*2 (3<sup>rd</sup> Cir. 2008)(a warning about future disciplinary action does not constitute adverse employment action where it had no adverse impact on the plaintiff's employment, did not affect her compensation and did not impede her ability to receive a transfer or promotion.); *Kant v. Seton Hall Univ.*, 289 F.App'x 564, 2008 WL 3919367, at \*3 n.6 (3<sup>rd</sup> Cir. 2008)(no adverse employment action where the letter was simply a warning and no adverse action was taken); and *Wichter v. Sodexo, Inc.*, 478 F.Supp.2d 663, 676 (D.Del. 2007)(written warning not adverse action because there was no evidence indicating the plaintiff's conditions of employment were in any way affected by receipt of the written notice.)

## CONCLUSION

For the reasons set forth herein, RCF's motion for summary judgment should be granted in its entirety. All of Plaintiff's claims should be dismissed with prejudice.

Plaintiff cannot state a claim for a religious/spiritual harassment under the DDEA based on her receipt of the religious themed inspirational e-mails because Plaintiff actively encouraged their receipt, sent religious themed e-mails of her own, and the very first time she asked her co-workers to stop sending them to her, they stopped.

Plaintiff cannot state a claim for a sexual harassment claim under the DDEA because her claim stems from one isolated incident that is time-barred. The conduct, although inappropriate, does not rise to the level of severe or pervasive enough to create an objectively hostile or abusive work environment as required by the DDEA in order to establish a *prima facie* cause of action. Moreover, as soon as the matter was brought to RCF's attention, RCF immediately addressed the inappropriate conduct and it never happened again.

Plaintiff cannot state a claim for retaliation because RCF did not engage in any unlawful activity. Plaintiff has not presented any evidence of a causal connection between her complaint and the elimination of her position, or that RCF's company-wide reduction in force was a pretext for retaliation under the DDEA.

Considering the record in the light most favorable to Plaintiff, this court cannot find any evidence or genuine dispute of material fact that would support the inference that Plaintiff was

