EFiled: Aug 08 2014 11:19AM EDT
Filing ID 55860265
Case Number 322,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CORINE TERMONIA,	:	
	:	**C.A. 322, 2014**
Plaintiff Below/	:	
Appellant,	:	**On Appeal from the**
	:	**Superior Court of the State**
v.	:	**Delaware in and for New**
	:	**Castle County,**
	:	**C. A. No. 10C-12-174 ALR**
BRANDYWINE SCHOOL DISTRICT,	:	
	:	
Defendant Below/	:	
Appellee.	:	
	:	

APPELLANT'S CORRECTED OPENING BRIEF ON APPEAL FROM THE SUPERIOR COURT IN AND FOR NEW CASTLE COUNTY

JACOBS & CRUMPLAR, P.A.
Raeann Warner, Esq. (#4931)
2 E. 7th Street, Suite 400
Wilmington, DE 19801
(302) 656 5445
Raeann@JCDELaw.com

Attorneys for Plaintiff Below, Appellant

August 8, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions and Statutes

Attachments

NATURE OF THE PROCEEDINGS

This lawsuit, filed on December 20, 2010 by plaintiff Corine Termonia ("Termonia"), alleged retaliation for her opposition to discrimination, as well as national origin and age discrimination, by her employer Brandywine School District ("BSD") under the Delaware Discrimination in Employment Act, ("DDEA"), the state counterpart to Title VII of the 1964 Civil Rights Act.[1] By filing suit, Termonia ("Termonia") exercised her Del. Const. art. I, § 4 right to have a civil jury decide contested facts and engaged in protected activity under the DDEA – opposition to discrimination and retaliation. Four months later, while suit was pending, BSD suspended Termonia without pay and recommended her termination, after 20 years of teaching, claiming it was because she had asked a student to write a statement during class time about an incident that had occurred between the student, Termonia, and the Principal. Termonia amended her complaint to reflect these retaliatory adverse actions. (D.I. 35). No motion to dismiss was ever filed.

On February 14, 2013, BSD filed its first motion for summary judgment. After two rounds of briefing and oral argument, the court below issued its summary judgment opinion on April 16, 2014 dismissing all claims. The court

[1] Title VII and the DDEA were enacted as part of the civil rights movement to protect employees from illegal discrimination and from retaliation for opposing illegal discrimination.

found, *inter alia*, that the recommendation of termination was not adverse action and BSD had recommended Termonia's termination for a non-discriminatory reason. (Ex. A, p.16-17). Plaintiff filed a Motion for Reargument on April 17, 2014, arguing: 1) the court used the wrong standard for adverse action in a retaliation case[2]; 2) using the correct standard, the following, *inter alia*, were retaliatory adverse actions: notice of suspension without pay and notice of recommendation of termination; 3) the court ignored plaintiff's evidence of causation. (A0021-24). Plaintiff's Motion for Reargument was granted. (D.I. 121). On May 22, 2014, the court issued a bench ruling on summary judgment in which it assumed that some adverse actions plaintiff claimed, including the notice of unpaid suspension, and the notice of termination, were adverse actions. (Ex. B, 5/22/14 Hring, p. 37:3-9, 41:3-13). Yet it ignored the law of retaliation and again granted summary judgment merely because the Defendant had offered a non-discriminatory reason for issuing the unpaid suspension and notice of intent to terminate. (Ex. B, 5/22/14 Hring., p. 33:9-41:13).

This is Plaintiff's Opening Brief in Support of her Appeal of the court's summary judgment decision.

[2] Plaintiff cited the correct standard for retaliatory adverse action in both her summary judgment briefing and at oral argument in direct response to the Court's question about what that standard was. (SJAB 1, D.I. 91, SJAB 2, D.I. 114, 1/15/14 Hring p. 32:8-35:1, A0025-29). Yet, in its April 16, 2014 Opinion, the Court analyzed the various adverse actions under a discrimination standard only, which is a higher standard embracing less types of conduct than that for retaliation. (Ex. A, Opin., p.11, 16).

SUMMARY OF THE ARGUMENT

1. The Superior Court erred when it ignored the law of retaliation and usurped the role of the jury by granting summary judgment when there are material facts in dispute as to whether BSD retaliated against plaintiff when it formally notified her of her unpaid suspension and of its intent to terminate her after 20 years of service. The DDEA and Title VII are designed to protect employees from discrimination and from retaliation for engaging in opposition to discrimination and retaliation in the workplace, as Termonia did by filing this lawsuit.

2. The breadth of what constitutes a retaliatory action is defined in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). Title VII and DDEA's opposition clauses recognize that the only way to protect against discrimination in the workplace is to protect even more stringently an employee's right to protest such discrimination through lawful means, i.e. speaking out against discrimination, filing lawsuits, litigation, and testifying in court.[3]

3. No rational employer will ever admit to acting with a discriminatory or retaliatory motive. Therefore, to determine BSD's motive for taking actions against Termonia, the Court must look to the circumstantial evidence in the record of : 1) retaliatory animus by the decision makers[4]; 2) pretext as to the stated

[3] Id. at 64; see Crawford v. Carroll, 529 F.3d 961, 974 (11th Cir. 2008) (Title VII's retaliation provision protects from a wider range of conduct than discrimination).
[4] Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 178 (3d Cir. 1997).

reason(s) for taking the adverse action; 3) retaliatory conduct in the employer's past[5]; and 4) a pattern of antagonism[6], to infer the retaliatory motive, or causal link. Here there is objective evidence in the record that Termonia was treated more harshly than other employees by BSD because she had engaged in the protected activities of filing a lawsuit and litigating. The most striking evidence is the difference in treatment of Termonia when compared to another teacher, Rachel Holt, who had not engaged in protected activity. After 20 years of teaching Termonia took a student out of math class and asked her to write her memory of an event between Termonia and the principal that she had witnessed, and BSD immediately determined that she would be given indefinite unpaid suspension and that her termination would be recommended to the Board of Education. Ms. Holt, on the other hand, repeatedly sexually harassed her students and was given progressive discipline including a warning, and then a three day suspension, before finally being recommended for termination after raping one of her students. Thus, there is at least a question of fact for the jury to determine as to whether Termonia was retaliated against when BSD suspended her without pay and formally notified her of its intent to terminate her for a first offense.

[5] Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1086 (3d Cir. 1996).
[6] Abramson v. William Patterson Coll. of N.J., 260 F.3d 265, 288-89 (3d. Cir. 2001).

STATEMENT OF FACTS

A. Pattern of Antagonism after Termonia's First Lawsuit. Termonia was born and raised in Algeria and worked as a French secondary teacher for approximately 20 years.[7] (A31-32, Term. 5:22-6:3; A33-34, Term. 9:24-10:10). She received numerous awards and accolades including being named Teacher of the Year.[8] Her supervisor and acting Principal from 2006-2009 said that she was assertive, expressive, and "her passion was the kind of passion that [he] would have wanted to see in the teachers that taught [his] kids." (A0099-100, Byrem 18:17-19:10). Her students liked her. (A0102-107, Isaacs 5:20-10:10; A0109, Wozniak 7:6-11). Her co-worker stated she was caring. (A0115-120, Pinkston 7:16-17; A0120, Pinkston 17:11-17). Beginning in 2003, Termonia applied for numerous administrative positions at BSD, but was not chosen. (D.I. 91, A00138). On May 4, 2006, she filed a lawsuit alleging BSD had discriminated against her based on national origin by not hiring her for several open administrative positions (dean of students, assistant principal) in violation of Title VII. (D.I. 91, A2037). On October 21, 2009, Termonia and BSD settled that lawsuit. (D.I. 91, A1524).

---

[7] Cites to "A__" refer to the Appendix.

[8] In 1995, Termonia was the Laureate National for Outstanding Service to French Students. (D.I. 91, A0012-13, Term. 12:10-13:7). She was honored as Teacher of the Year by the Delaware chapter of the American Council on Teaching Foreign Languages in 1997. (D.I. 91, A0013-15, Term. 13:24-15:20). She received, administered, and was awarded numerous national education grants. (D.I. 91, A00015-17, Term.15:21-17:22). She has extensive curriculum experience. (D.I. 91, A0017-29, Term.17:23-29:20). Termonia's evaluations have been excellent. (D.I. 91, A2247-2265; A2270-90). (See D.I. 91, A2046-2112, for awards and accolades).

The facts below show a pattern of antagonism beginning when Termonia filed her first lawsuit, culminating in her receipt of her notice of unpaid suspension and recommendation of termination.

In early September 2009, Dr. Thompson, Principal of Brandywine High School (BHS) chose Ms. Lopez, a non-tenured teacher who had been there less than three years, over Termonia for the position of World Language Department Head. He claimed he would have chosen the teacher with the most experience, education, and abilities, and the teacher had to apply, but inexplicably chose a non-tenured teacher over Termonia who had not even applied for the position. (Thomp. 23:2-25:21, A0124-126). During the mediation of her first lawsuit, Thompson was forced to give the job to Termonia after she and her attorney complained to the BSD, and the mediator found that she was the only one who applied and had the most qualifications. (A0035-38, Term. 50:5-53:13; A0039-43, 97:13-101:1).

Termonia was then bullied by Lopez and other teachers. (A0047-52, Term.138:24-143:12). She complained to Thompson on May 19, 2010 that she was being harassed, bullied, and called a "pain in the ass." (A0255-257; A0195) and on June 2, 2010 that Lopez and the other foreign language teachers were screaming and yelling at her. (A196). Termonia was visibly upset. (A150-51, Thomp. 126:24-127:2; see generally A0132-160, 107:17-135:22). Lopez called Termonia old (A0140, Thomp.116:3-11; A0154, 130:10-15) and/or "elder."

(A0090). Pursuant to BSD policy Thompson was required to interview both parties and issue a report to HR. (A0237-238). But Thompson failed to follow policy and issue a report. (A0159, Thomp. 135:1-9).

In the fall of 2009, BSD posted openings for assistant principal at two high schools.[9] Termonia applied. (D.I. 91, A0106, Term. 106:13-16; D.I. 91, A0479; A0484). In November 2009, less than one month after she had settled her first lawsuit, plaintiff learned that she again had not been selected for an interview for the assistant principal positions. All candidates hired were younger than plaintiff, of American origin and had not filed lawsuits against BSD.[10] As a result, plaintiff filed a charge of discrimination with the Department of Labor based on age and national origin discrimination and retaliation on Feb. 1, 2010 and this lawsuit on Dec. 20, 2010. (D.I. 91 at A1496). After this, it was clear BSD retaliated. It makes sense that those who retaliated were those whose actions were called into question by the filing of the lawsuit –Principal Thompson, Termonia's supervisor, Human Relations Director Kim Doherty, the person in charge of making sure the school complied with employment laws and Superintendent Mark Holodick, who was ultimately in charge.

[9] (D.I. 91(docket entry number of Appendix to Summary Judgment Answering Brief below), at A0368, A0372).
[10] (D.I. 91 at A2340; A2409; A2475; D.I. 91 at A1014; D.I. 91 atA2697,A2698; A2700; A2699).

B. BSD's Claimed Reason for Suspension and Termination. On December 12, 2010, Termonia disciplined student J., who refused to take a class test. The discipline was Termonia's duty and right under 14 Del.C. § 701 and the Brandywine Education Association's collective bargaining agreement ("BEA"), §§ 11.3, 14.2.2, A0229, A233). Termonia gave J. the choice of taking the test or being sent out of class, and J. refused to take the test. Termonia sent J. to SDC (Student Development Center) which is like suspension. (Termonia 168:9-169:1, A0061-62). Thompson, knowing this, forced J. back into her classroom (A0059-66, Term. 166:14-173:3) and verbally disciplined Termonia in view of the class. He was stern, mad, and unhappy. (A0063, Term. 170:11-21; see A0121-122, Pinkston 25:20-26:11 (students told Ms. Pinkston Thompson chewed Termonia out when he returned J. to the classroom)). It is a violation of the BEA (collective bargaining agreement) for a principal to verbally discipline a teacher in front of students and to override a teacher's decision to send a student to SDC. 14 Del.C. § 701, BEA §§ 11.3, 14.2.2. (A0226, A230). Plaintiff filed a grievance on December 22, 2010. (A0200, Doherty 48: 15-19; A0067-68, Term. 176:9-177:12). During the grievance hearing on February 7, 2011, Thompson testified that "he was unaware of the fact that the student came to his office rather than reporting to SDC (time-out) as [Termonia] had directed [J.]." (A0246). He also testified that the decision to permit J. back into class was mutual. (Id.). For these reasons, the

Hearing Officer, HR Director Kim Doherty, found that there was no evidence of a violation of the BEA on February 14, 2011. (Id; A0201, Doherty 53:5-8). Termonia knew Thompson was lying and was upset and outraged. No one else had interviewed the disinterested student witness so she decided to do it herself. (A0070,Term. 179:15-19; Ex. C, Springer rept. p. 19). When J. volunteered to give a statement, Termonia took her up on it and got the permission of her math teacher, Mr. Wozniak, for J. to be excused from class for 15 to 20 minutes on April 7, 2011. (A069-74, Term. 178:8-183:13; A0111, Wozniak 9:7-22). It was Termonia's intention to use the statement to support her grievance and lawsuit by proving Thompson was lying because she believed Thompson was retaliating against her. (A0067-68, Term. 176:7-177:21). She asked J. to write a statement of her memory of the incident. (A0073, Term. 182: 6-12; A0076, 185:16-18). J. wrote that she told Thompson she had been sent to SDC by Termonia *before* he returned her to class. (A0267-268). Thompson told J. he would "let [her] into class," despite knowing this. (A0261). He told Termonia to "let [J.] back in to class." (A0261). Termonia told Thompson that J. was "sent out." (A0062, Term. 169:12-14). Even Doherty, the HR Director, acknowledged J.'s statement caused her to suspect that Thompson had **lied** in the grievance hearing. (A0207-208, Doherty 83:12-84:14).[11] In April 2011, J.'s mother complained to the BSD that

[11] Doherty claimed that upon discovering this she informed Superintendent Holodick of this

Termonia had shown J. the grievance determination. (Doherty 31:9-22, A0199, Doherty Ex. 9, A0237-38). Termonia admitted showing J. the grievance determination when she asked her to write the statement. (A0074-75, Term. 183:1-184:15).[12] That day, Termonia was experiencing severe symptoms of black outs and left school during her planning period, the last period of her day, when no students were assigned to her, without signing out. (A0080-81, Term. 190:10-191:8; A0203, Doherty 68:3-21; and A0204, 69:8-70:24, Doherty Ex. 13, A0239-242). That same day, Termonia was placed on leave prior to the BSD's investigation. (A0248-249). On April 21, 2011, Doherty recommended to Superintendent Holodick that Termonia be terminated for (1) Immorality, (2) Misconduct in Office, (3) Disloyalty, (4) Neglect of Duty, and [violations of the CBA and Code of Ethics] because she had taken a student out of class and had left school early.[13] As a result of the actions of BSD, on May 2, 2011 Termonia went on disability, but returned to work on August 16, 2011, even against her doctor's advice, because she wanted to work. (A0077-79, Term. 187:8-189:2). BSD

---

potential violation of the Employee Code of Ethics by a Principal, (A0202, Doherty, 55:8-10; A0208, 84:12-17) but Holodick denied knowing anything about it. (A0264-265, Holodick, 28:22-29:2).

[12] Student J. and her mother also claimed Termonia made a comment about Mr. Thompson's ego being inversely proportional to the size of his genitals, but Termonia denied making this comment. Doherty admitted that after investigation she could make no determination as to whether this comment happened or not. (Doherty 86:19-87:20, A0210-211).

[13] A0279. Doherty explained that the first four were "reasons for termination" and the last two were "the things that have been violated to get to the reasons that you can terminate a teacher." (A0224, Doherty 103:19-21).

notified Termonia on August 26, 2011 that she would be suspended without pay effective August 29, 2011 and that the Superintendent would recommend her termination at the next scheduled Board meeting in October 2011. (A0091-95, 8/26/11 letter; A0225, Doherty 104:8-18; A0084-85,Termonia 208:19-209:7).

C. Pretext – Failure to Use Progressive Discipline and Immediate Notice of Recommendation of Termination. HR Director Doherty investigated the complaint that J. had seen HR's grievance decision. She recommended to the Superintendent that based only on Termonia's interview of J. and failure to sign out during her planning period, her last period of the day when she had no students, Termonia should be immediately terminated after 20 years of an unblemished record of teaching. (See A0278-79).

Importantly, there was no rule that prohibited teachers from showing a student a grievance decision, from interviewing students during class or requiring them to ask parental permission. (A0068-69, Term. 177:17-178:4; A0206, Doherty 72:13-16; A0216, Doherty 92:5-15). *In fact, interviewing students during class was done all the time*. (A0109-111, Wozniak 7:12-9:22). Termonia had done it with the permission of J.'s teacher. (A0111, Wozniak 9:7-22). J. had not missed any important work. (A0112-13, Wozniak 12:10-13:7). J. offered to give the statement. (A0070, Term. 179: 5-14). Doherty was not even concerned that the student may have a motive to get Termonia in trouble, despite knowing that

Termonia had a history of discipline problems with J, as that was the subject of Termonia's grievance against Dr. Thompson. (A0213-215, Doherty 89:8-91:2). She did not consider J.'s motive. (A0214, Doherty 90:3-12). Yet if J. had a motive, that could explain differences their versions of the incident. In fact, J. had received a "C" in Termonia's class in her freshman year, and then a "D" in the 2010-2011 school year. (A0281-283, J. 7:22-9:10). Termonia had made several attempts to complain to J.'s mother that year regarding J.'s performance in school. (A0284-285, J. 16:24-17:8; A0291, J. 30:5-12; A0183-85). Termonia's request that J. write a statement "didn't bother [J.] enough for [her] not to write it…" (A0287, J. 21:11-12; A0288, J. 22:1-8). *J. had written statements for the BSD disciplinarian before.* (A0289-290, J. 23:12-24:9). J.'s mother made a big deal out of it, which J. did not understand. (A0290, J. 24:12-18). Doherty had no knowledge of Termonia ever making an inappropriate statement to a student or lying. (A0211-212, Doherty 87:12-88:6).

This claimed reason for recommending Termonia's termination is clearly pretextual because teachers have only been recommended for termination for the reasons Termonia was when they engaged in criminal actions or progressive discipline had been used and did not remedy the problem. Plaintiff asked BSD about other instances where BSD employees were recommended for termination for: (1) Immorality, (2) Misconduct in Office, (3) Disloyalty, and (4) Neglect of

Duty. The circumstances of other employees recommended for termination for the same reasons as Termonia are summarized as follows:

Employee	**Infraction**	**Reason for Recommendation of Termination**
Termonia	Asked student to write a statement during math class; Left school early during a planning period	Immorality, Neglect of Duty, Misconduct, and Disloyalty
Rachel Holt[14]	Raped a 13 year old student and allowed another student to watch	Immorality, Misconduct *BSD resp to P 2nd rogs, # 4, 6, A0297-298*
Employee 1	Embezzled Money	Immorality
Employee 2	Teacher Watched Pornography at School	Immorality *Doherty 97:3-99:1, A0218-220*
Employee 3	Employee Watched Pornography in School	Misconduct *A0223-224, Doherty 99:16-100:18; A0220-221, Doherty 100:19-22*
Employee 4	teacher left students outside alone, near a road, unwatched during a fire drill	Neglect of Duty *A0221-223, Doherty 100:23-102:4*
Employee 5	series of violations of an improvement plan where the teacher was given unsatisfactory performance ratings for many years was put on an Improvement Plan, and repeatedly	Neglect of Duty and Willful Insubordination *A0221-223, Doherty 100:23*-102:8

[14] Plaintiff's counsel is aware of this teacher's name because of prior litigation regarding her. Plaintiff does not know the other employees' names.

	refused to comply with its requirements and objectives so as to allow her Principal to measure her progress	

Termonia was the only one to engage in protected activity.

Rachel Holt was terminated for misconduct and immorality because she had inappropriate contact with a student. In that case, the guidance counselor, Maryann Giannotti, reported concerns about Holt's unprofessional relationships with students such as kissing, sitting on their laps, etc. (A0303-304, Giannotti 40-44; A0308-309-314, Giannotti 62-65). In response BSD issued Rachel Holt a reprimand letter. Thomas v. Board of Educ. of Brandywine School Dist., 759 F.Supp.2d 477, 484 (D.Del. 2010). Then another BSD employee reported that Holt kissed a student, which Holt admitted. Thomas, 759 F.Supp.2d at 485; (A0305, Giannotti 50:23 – 51:10). In response, BSD placed Holt on a three day suspension. (A0309, Giannotti 68:7-23). Only when Holt was arrested for raping one student and allowing another to watch, did BSD terminate her. Thomas, 759 F.Supp.2d at 486; (See A0082-83, Term. 194:15-195:13; A0315, Giannotti 90:18-92:10). So in Holt's case, where children were clearly in danger of being sexually abused, progressive discipline was used, while in Termonia's case, where there was no threat of any danger to a student, it was not. BSD determines whether to use "progressive discipline" based on the "severity of the infraction." (A0196,

Doherty 11:11). Meaning it must have come to the illogical conclusion that Termonia's interviewing J. was a more severe infraction than kissing students, sitting in their laps, taking them home in her vehicle, and referring to them as "boo." Thomas, 759 F.Supp.2d at 482-85. BSD preferred to use progressive discipline except in extreme cases. (A0262, Holodick 25:5-9). Termonia's actions were not extreme. Holodick cited nothing reckless, malicious, criminal, nor any intentional violation of policy by Termonia. (A0262-263, Holodick 25:2-26:23). There is no explanation why BSD could not have used progressive discipline, even if it started with a serious discipline like a three day suspension, of this 20 year, dedicated, and decorated teacher who Holodick stated had no prior history of discipline. (A0260, Holodick 11:18-21). BSD's claimed reasons for recommending Termonia's indefinite unpaid suspension and termination are weak and inconsistent. **The only logical explanation is that they retaliated against her when they treated her more harshly than a child molester, and as harshly as criminals**. Further, discovery in this case revealed that Thompson lied in a grievance proceeding, and Doherty was aware of it, yet no investigation or discipline occurred. It is clear that BSD was out to get Termonia because she had filed this lawsuit.

Termonia was so devastated at the notice of unpaid suspension and termination for reasons such as immorality and neglect of duty, that she developed

PTSD and depression and became disabled. (A0089; A0079, Term. 189:3-14). Termonia received a letter dated September 29, 2011, indicating that she was not currently a BSD employee but that if she ever attempted to return, she would be immediately recommended for termination based on the reasons specified earlier. (A0096-97). Termonia's forensic psychiatrist has opined that "[t]he trauma of the termination notice was of the magnitude to produce symptoms consistent with Post Traumatic Stress Disorder" and that she is "overcome with rage, disbelief, humiliation, and shame in that she has been accused of being immoral, disloyal, neglecting her duties, committing misconduct in office and violating various policies, when contrasted to a twenty year history of being a dedicated, accomplished and exemplary teacher." (Springer Report Ex. C, p. 20). Termonia's psychiatric symptoms of depression and PTSD are a "direct consequence of BSD's 20 years of [actions], and culminating in the April [sic] 2011 actions taken by the District." (Springer Report, Ex. C, p. 21).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN ISSUES OF FACT REMAINED.

A. Questions Presented. Did the Superior Court err in granting summary judgment when disputes of material fact remained? This issue was preserved in Plaintiff's SJAB 1 and 2 (D.I. 91 and D.I. 114), oral argument on summary judgment(A0025-29), Motion for Reargument (D.I. 121) and oral argument on reargument. (Ex. B).

B. Scope of Review. The standard of review on appeal from a grant of summary judgment is de novo. DaBaldo v. URS Energy & Const., 85 A.3d 73, 77 (Del. 2014).

C. Merits of Argument.

1. Standard of Review by Court Below. Summary judgment is granted only when the record shows no genuine issue of material fact. Doe v. Cahill, 884 A.2d 451, 462-63 (Del. 2005). The burden of proof is on the Defendant to prove there is no genuine issue material fact. Moore v. Sizemore, 405 A.2d 679, 680-81 (Del. 1979). The trial court should accept all undisputed facts and the **non-moving party's version of disputed facts.** Merrill v. Crothall-Am., Inc., 606 A.2d 96, 99-100 (Del. 1992) (emphasis added). As both the U.S. Supreme Court and Third Circuit have unequivocally stated, when an employer moves for summary judgment, even the uncontradicted testimony of interested

witnesses supporting the employer, such as supervisors and other workers, should not be considered or otherwise weighed in the summary judgment balancing. "[W]hen evaluating a summary judgment motion a court should not consider even uncontradicted testimony of an interested witness where that testimony supports the movant." Hill v. City of Scranton, 411 F.3d 118, 131 n.22 (3d Cir. 2005) (citing Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 149-151 (2000)); see also Hill, 411 F.3d at 129 n.16.

2. The Court Below's Decision. The court below assumed that the notice of unpaid suspension and termination were adverse actions. (5/22/14 hring p. 41:3-13, Ex. B). The court granted summary judgment as to retaliation on these actions because there was "an adequate basis for the adverse employment action…[]" (5/22/14 Hring. p. 39:6-23, Ex. B). Yet whether there is a non-discriminatory reason given for taking the actions is not the end of the inquiry.

The Court must determine whether there is evidence sufficient to cast doubt upon the stated non-discriminatory reason for giving her unpaid suspension and a recommendation of termination, under the pretext framework of McDonnell Douglas, and/or evidence of retaliatory animus sufficient to shift the burden of proof under Price Waterhouse. See Frederick v. Avantix Labs., Inc., 2010 WL 2898321 *2 (D. Del. July 20, 2010) (after non-discriminatory reason given by defendant, the Court denied summary judgment because there was "evidence in the

record creating questions of fact concerning whether this reason was a pretext for [retaliation]"). There can be both a legitimate and non-legitimate reason for the adverse action, but it is illegal where the non-legitimate reason is a determinative factor. Miller v. CIGNA Corp., 47 F.3d 586, 597 (3d Cir. 1995). The court completely ignored such evidence in this record and "inappropriately resolved disputed issues of fact." Boerger v. Heiman, 965 A.2d 671, 675 (Del. 2009). Plaintiff submits this ruling was wrong and ignored evidence of animus, causation, pretext, a pattern of antagonism, and history of retaliation, factual issues on causal link that must be decided by the jury.

3. Retaliation – Pretext Framework. This Court follows federal law analyzing Title VII to decide cases under the DDEA. Riner v. Nat'l Cash Register, 434 A.2d 375, 376 (Del. 1981). Federal courts analyze these cases under two different frameworks: the "pretext" framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and the "Mixed Motives" framework of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Under the pretext framework, "the initial presumption of discrimination arises from the plaintiff's prima facie case of discrimination [or retaliation] because [the court] presume[s such] acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061,1069 (3d Cir. 1996) (reargued en

banc) (quotations omitted). In her retaliation prima facie case, plaintiff must prove the following elements: (1) she engaged in a protected activity under 19 Del. C. §711(f); (2) BSD took adverse action against her; and (3) a causal link exists between the protected activity and the adverse action. Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 177 (3d Cir. 1997). Where a plaintiff presents evidence to meet all three prongs of the prima facie case, summary judgment must be denied. Abramson, 260 F.3d at 289. It is not clear in the court's bench ruling whether it found plaintiff had met her prima facie case. Ultimately, if defendant is able to articulate a non-retaliatory reason for taking the adverse action, the burden shifts back to the plaintiff to proffer evidence that 1) the claimed non-retaliatory reason is unworthy of credence or 2) retaliatory animus is more likely the reason for taking the adverse action. It appears that the court below found neither pretext nor any evidence of animus, but it is not clear from the court's opinions below.

a. Protected Activity. DDEA makes it unlawful for any employer to "discriminate" against any employee who "opposed any practice prohibited by this subchapter… or because such person has testified, assisted or participated in any manner in an investigation, proceeding, or hearing to enforce the provisions of this subchapter." 19 Del. C. § 711(f). It is clear that plaintiff engaged in protected acts under the DDEA by opposing practices made unlawful under it, including retaliation and age and national origin discrimination, by filing

lawsuits and participating in the Department of Labor's investigation and her lawsuit, including procuring J.'s statement. The anti-retaliation provisions of DDEA provide a safeguard for employees who oppose illegal employment practices under DDEA, as plaintiff did. See Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc., 450 F.3d 130, 134 (3d Cir. 2006.) It is not necessary that plaintiff prove the underlying merits of each of her claims, but only that she was acting under a good faith, reasonable belief that a violation of DDEA existed when she engaged in the protected activity, which plaintiff clearly was as no motion to dismiss was filed. Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir.1996). Those who took adverse actions against Termonia - the HR Director and Superintendent- were aware of her engagement in protected activities. See A0196-198, Doherty 11:17-13:16; see A0265-266, Holodick 29:22-30:12. This was not disputed below.

b. Adverse Action. What constitutes an adverse employment action in retaliation cases is broader than in discrimination cases, where the action must affect the terms and conditions of employment. The anti-retaliation provision of the DDEA

> does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. [The] provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well

> dissuade a reasonable worker from making or supporting a charge of discrimination.

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. at 57. The "significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." Id. at 69. For example a "schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children…" Id. This standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. Id.

Recent decisions have explained what types of adverse actions meet the Burlington N. standard. An adjustment in employees' shift times is sufficient to constitute an adverse action in a retaliation case. Hicks v. Baines, 593 F.3d 159, 170 (2d. Cir. 2010). So is a negative performance review. Crawford, 529 F.3d at 974. Even mere threats of termination have been found to be adverse actions. Abramson, 260 F.3d at 288 (recommendation of termination is adverse action); Slater v. Town of Exeter, 2009 WL 737112, *9-10 (D.N.H. Mar. 20, 2009) (threats, particularly those to fire an employee, can constitute adverse action); E.E.O.C. v. Creative Networks, LLC, 2009 WL 597214, * 6 (D. Ariz. Mar. 9, 2009) (threat that 'I could fire you right now' could constitute adverse); Harris v. City of Chicago, 1998 WL 59873, *17 (N.D. Ill. Feb. 9, 1998) ("we are unwilling to say that the alleged threats to fire Harris and Acklin did not impact their jobs in

an undesirable manner. Thus, the court finds that the claims in the complaints are enough to allege a materially adverse employment action under Title VII."); Martin v. Gates, 2008 WL 4657807, *10 (D. Haw. Oct. 20, 2008) ("Indeed, threats may be materially adverse if they would deter a reasonable person from engaging in protected activity"); Thomas v. iStar Fin., Inc., 438 F. Supp. 2d 348, 366 (S.D.N.Y. 2006) aff'd, 629 F.3d 276 (2d Cir. 2010) ("Threats could also potentially be a materially adverse action") (citing Brown v. Henderson, 115 F. Supp. 2d 445, 451 (S.D.N.Y. 2000) aff'd, 257 F.3d 246 (2d Cir. 2001)).

Whether the unpaid suspension and notice of recommendation of termination based on violations including immorality are "adverse actions" depends on whether Termonia can "show that a reasonable employee would have found the challenged action[s] materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from [engaging in protected activity].'" Burlington N., 548 U.S. at 68 (citations omitted). In Termonia's case, she received a formal notice that she would be placed on unpaid suspension and of BSD's intent to recommend termination.[15] The threat of a receipt of such a notice

[15] "[I]f an employee is unable to work because of a disability 'caused' by the employer, the employee may obtain compensation for the resulting lost pay." Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 141 (1st Cir. 2009) (citations omitted). See Deavenport v. MCI Telecomms. Corp., 973 F. Supp. 1221, 1227 (D. Colo. 1997) (citing Whatley v. Skaggs Co., 707 F.2d 1129, 1138 (10th Cir. 1983) (same). As explained in Facts above, and as plaintiff and her expert psychiatrist will testify, BSD's retaliatory actions caused plaintiff's disability and therefore it does not bar her right to recovery for the unpaid suspension and notice of termination. She was

would most certainly dissuade a reasonable worker from engaging in protected activity. Who would engage in litigation to protect their rights if they knew they would have to face unpaid suspension and termination as a result? The court below assumed the notice of unpaid suspension and termination were adverse actions. (Ex. B, 5/22/14 tr. p. 37:3-9, 41:3-13).

c. Causal Link. "[T]he causal link element [is construed] broadly so that 'a plaintiff merely has to prove that the protected activity and the ... [adverse] action are not completely unrelated.'" Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004). Termonia's litigation was in progress when all adverse actions occurred. "[A] period as much as one month between the protected expression and the adverse action is not too protracted" to form the sole evidentiary basis of causation. Id.. Therefore, temporal proximity of 14 days, the time between Termonia's protected activity of asking for J.'s statement and when HR recommended Termonia's termination, is automatically proof of causation. While two days is clearly sufficient, the Court has held that 19 months is "too attenuated to create a genuine issue of fact" absent additional evidence of retaliatory animus or pretext. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000). Where temporal proximity is not unduly suggestive of retaliation,

---

rendered not well enough to continue working as a result of BSD's actions and BSD should not benefit from that.

the causal link can also be satisfied by evidence of a pattern of antagonism or discriminatory motivation. Id. at 286. See Woodson v. Scott Paper Co., 109 F.3d 913, 920-21(3d Cir. 1997) (in year between protected activity and adverse action, plaintiff subjected to antagonistic behavior); Robinson v. SEPTA, Red Arrow Div., 982 F.2d 892, 895 (3d Cir. 1993) (in the two years between protected activity and adverse action, plaintiff was subjected to reprimand for minor infractions, his absences were miscalculated, and his supervisors attempted to provoke him into insubordination.). "[T]he 'mere passage of time is not legally conclusive proof against retaliation.'"[16]

In Abramson v. William Patterson Coll. of N.J., it was not until a year after the plaintiff engaged in her first act of protected activity that the adverse action occurred. 260 F.3d 265, 270, 283-84 (3d. Cir. 2001). However, similar to Termonia, during that time, the plaintiff endured antagonism in the workplace. Id. at 272-74. Like Termonia, the record indicated that the majority of the Abramson plaintiff's peers and students were satisfied with her work, and that she was well-qualified for her position. Id. at 272. The Third Circuit held that this evidence created an inference of a causal link, and that any evidence a plaintiff has that shows the stated reasons are pretextual or which casts doubt on the stated reasons, can be used for creating a causal link, as well. Id. at 288-89).

[16] Woodson, 109 F.3d at 920 (citing Robinson, 982 F.2d at 894 (3d Cir.1993)); see also Kachmar, 109 F.3d at 173; Aman, 85 F.3d at 1085.

In Termonia's case, the adverse action occurred ***only four months*** after her lawsuit was filed, with intervening and continuing acts of protected activity, and ***only 14 days*** after the last of plaintiff's numerous distinct protected activities – procuring a statement from J. Antagonism by BSD grew increasingly worse as Termonia continued to engage in protected activity. The timing plus the comparison of Termonia's treatment versus other teachers casts doubt on BSD's stated reasons for plaintiff's unpaid suspension, and recommendation and notice of termination. (See pretext evidence discussed in Facts, § C, above, and the retaliatory animus described below in Argument § 4, which proves causation. Abramson, 260 F.3d at 288-89, Kachmar, 109 F.3d at 178). The court below originally found that no causal link because plaintiff had no evidence of causation and her request for J.'s statement was not protected activity. (Ex. A, p.16-18). In the court's bench ruling it found that defendant articulated a non-discriminatory reason for noticing plaintiff's termination and there was no evidence of retaliation, so it is unclear at what stage in the analytical framework the court found BSD was entitled to summary judgment. (Ex. B, 5/22/14 tr. p. 39:8-23).

d. Plaintiff's Ultimate Burden in a Pretext Case. "[W]hen the defendant answers the plaintiff's prima facie case with a legitimate, non-discriminatory reasons for its action, the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably (1) disbelieve

the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). Where a "[p]laintiff has advanced evidence of discriminatory animus and motive, harassment toward Plaintiff, and has demonstrated inconsistencies in the evidence, which the Court concludes may lead a reasonable fact-finder to disbelieve Defendant's nondiscriminatory reason or believe that a discriminatory reason was more likely than not the motivating or determinative cause behind [the adverse action]," summary judgment may not be granted. Frederick v. Avantix Labs., Inc., 2010 WL 2898321, *2 (D. Del. July 20, 2010) (citing Fuentes, 32 F.3d at 764). This is identical to Delaware's summary judgment standard which instructs the Court to accept plaintiff's version of disputed facts.

Here, plaintiff can proceed under either of the two prongs of Fuentes.[17] Under prong one, Plaintiff proceeds with a pretext case. Bray v. Marriott Hotels, 110 F.3d 986, 990 (3d Cir. 1997). To do so a "plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" Fuentes, 32 F.3d at

[17] "Retaliation in an employment context is analyzed under the same burden-shifting rubric that is used for discrimination claims." Davis v. Nat'l R.R. Passenger Corp., 733 F. Supp. 2d 474, 493 (D. Del. 2010) *(*quoting Subh v. Wal–Mart Stores East, LP, 2009 WL 866798, at *18 (D.Del. March 31, 2009)).

764-65. "In deciding the 'ultimate question' of whether the employer unlawfully discriminated . . . the factfinder's disbelief of the reasons put forward by the defendant ... may, together with the elements of the prima facie case, suffice to show intentional discrimination." Sheridan, 100 F.3d at 1066 (quoting Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)). In other words, "[i]f the plaintiff has pointed to evidence sufficiently to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case." Fuentes, 32 F.3d at 764; Sheridan, 100 F.3d at 1071. Rather, "no additional proof of discrimination is required." Hicks, 509 U.S. at 511; Sheridan, 100 F.3d at 1066, 1071.

There are abundant weaknesses, implausibilities, inconsistencies, incoherencies and contradictions in the BSD's stated reasons for recommending and noticing Termonia's unpaid suspension and ultimate termination, such that a jury could find them unworthy of belief. In short, as explained in Facts, § C, only criminal actions have warranted termination for "Immorality, "Misconduct in Office, and "Disloyalty," the same reasons Termonia was recommended and noticed for termination. Only in cases where an employee had been progressively disciplined and failed to comply with such directives or where a teacher had left unsupervised children near a road during a fire drill, endangering their lives, were

employees terminated for "neglect of duty." Thus, a jury could easily find that BSD's claimed reasons for recommending and noticing Termonia's termination were pretextual and actually done in retaliation for her protected activities of filing lawsuits and charges of discrimination and litigating of her case.

Alternatively, the second prong of the pretext framework "allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Fuentes v. Perskie, 32 F.3d at 762. A jury could find retaliatory animus towards plaintiff, as discussed in Argument § 4, which meets prong 2.

4. The Mixed Motive Framework. Under the "mixed motive" or "direct evidence" framework of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), an employee who presents "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision," Id. at 277 (O'Connor, J., concurring), no longer need satisfy the "pretext" or "indirect evidence" framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Once a plaintiff produces direct evidence that discriminatory or retaliatory animus was a motivating factor in an employment decision, the burden of persuasion on the issue of causation shifts, and the employer must prove that it would have made the same employment decision, even if it had not considered the illicit factor. Fakete v. Atena, Inc., 308 F.3d 335, 338 (3d Cir. 2002). The burden

shifts only upon a showing that the "evidence is sufficient to permit the fact finder to infer that a discriminatory attitude was more likely than not a motivating factor in the employer's decision." Walden v. Georgia-Pacific Corp., 126 F.3d 506, 513 (3d Cir. 1997) (internal punctuation omitted). The Third Circuit, en banc, has explained that in the Price Waterhouse mixed motive context, "the plaintiff ... need show only that the forbidden motive played a role" to satisfy the "motivating factor" requirement. Miller, 47 F.3d at 597 n. 9. "In short, direct proof of discriminatory animus leaves the employer only an affirmative defense on the question of 'but for' cause or cause in fact." Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095 n.4 (3d Cir. 1995). In addition to direct evidence, certain types of circumstantial evidence also can trigger the Price Waterhouse analysis. The word "'direct' is imprecise because certain circumstantial evidence is sufficient . . . if that evidence can fairly be said to directly reflect the alleged unlawful basis for the adverse employment decision." Fakete, 308 F.3d at 339 (internal punctuation omitted). Plaintiff must be able to point to "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude." Starceski, 54 F.3d at 1096. This type of evidence "leads not only to a ready logical inference of bias, but also to a rational presumption that the person expressing bias acted on it when

he made the challenged employment decision." Fakete, 308 F.3d at 338 (internal quotations omitted).

One form of evidence sufficient to shift the burden under Price Waterhouse is "statements of a person involved in the decisionmaking process that reflect a discriminatory ... animus of the type complained of in the suit." Fakete, 308 F.3d at 339; see Starceski, 54 F.3d at 1096 (either conduct or statements suffice). These statements are sufficient even if they "are not made at the time as the adverse employment decision, and thus constitute only circumstantial evidence that an impermissible motive substantially motivated the decision." Fakete, 308 F.3d at 339. The most common type of circumstantial evidence of discriminatory or retaliatory intent consists of "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn." Troupe v. May Dep't Stores, Co., 20 F.3d 734, 736 (7th Cir. 1994). Evidence of an employer's past history of discrimination against other protected categories of persons constitutes "evidence from which a factfinder could reasonably conclude that an illegitimate factor more likely than not was a motivating or determinative cause of the adverse employment decision."[18]

[18] Fuentes v. Perskie, 32 F.3d at 765; Aman, 85 F.3d at 1086; EEOC v. Farmer Bros. Co., 31 F.3d 891, 897-98 (9th Cir.1994); Glass v. Phila. Elec. Co., 34 F.3d 188, 191-92 (3d Cir. 1994); Hawkins v. Hennepin Tech. Ctr., 900 F.2d 153, 155-56 (8th Cir. 1990); Estes v. Dick Smith

The Third Circuit has explained the rationale for the use of such evidence:

> Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices - evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. **In discrimination cases, however, such background evidence may be critical for jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.**

Glass, 34 F.3d at 195 (3d Cir. 1994) (quoting Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1103 (8th Cir. 1988) (emphasis added). This evidence is admissible "because of the discriminatory nature of the prior conduct, which in turn tend[s] to show the employer's state of mind or attitude towards members of the protected class...[T]he inference of the employer's discriminatory attitude [comes] from the nature of the prior acts themselves." Becker v. ARCO Chemical Co., 207 F.3d 176, 194 n.8 (3d Cir. 2000). Evidence of retaliatory practices is crucial in determining the true motive for the adverse action in a retaliation case.[19]

Doherty, who recommended to Superintendent Holodick that Termonia be terminated for all of the reasons cited above,[20] stated that **in interviewing [J.],**

Ford, Inc., 856 F.2d 1097, 1103 (8th Cir. 1988), overruled in part on other grounds by Price Waterhouse v. Hopkins, 490 U.S. 228 (1980).

[19] Aman, 85 F.3d at 1086; accord Farmer Bros. Co., 31 F.3d at 897-98 (evidence of employer's sexual harassment of female employees other than the plaintiff and evidence of disparaging remarks about women in general were relevant to determine motive in employment action); Glass, 34 F.3d at 195 (stressing the importance of admitting evidence of past discrimination to rebut the argument that the adverse action was taken for the stated reason).

[20] "[I]f a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action and if that act is a proximate cause of the

"[Termonia] used her employment with the District to secure unwarranted gain…" (D.I. 91, A0920). When asked what that referred to, Doherty stated: "[Termonia's] statement to me during her due process meeting was she intended to use the statement in her personal litigation."

> **Q. Okay. And so you felt that using the statement in her personal litigation would be unwarranted gain?**
> **A. If she benefitted financially, yes**.

(A0215, Doherty 91:3-13; see A0046, Term. 114:3-11). Doherty's statement exhibits animus toward Termonia's protected activities of filing a lawsuit and procuring a witness statement for it. Holodick echoed this sentiment when he compared Termonia's actions to those of an employee who had embezzled money: "Similar to Ms. Termonia using J. to her personal advantage when she pulled her out of class." (A0261, Holodick 21:5-7). Holodick followed Doherty's recommendation without question. (A0217, Doherty 96: 9-10; A0263, Holodick 26:17-23; A0265, Holodick 29:3-6, 12-17). Termonia's lawsuit was an assertion of her right to be free of discrimination and retaliation, which our legislature has stated is a valid exercise. To automatically equate an attempt to enforce those rights as "unwarranted gain" or "personal advantage" evidences a bias towards

---

ultimate employment action, then the employer is liable under USERRA." Staub v. Proctor Hosp., 131 S. Ct. 1186, 1194 (2011) (citations omitted). In Staub the Court noted that USERRA is similar to Title VII. Id. at 1191.

those who seek to ensure their rights are not being trampled on. BSD has retaliated in the past. See A0315; A0324-35 (guidance counselor claimed that she was terminated for blowing the whistle on the BSD concerning a teacher who was sexually inappropriate toward students); see also Bullock v. Brandywine Sch. Dist., 837 F. Supp. 2d 353, 363 (D. Del. 2011):

> But given that Mr. Brumskill transmitted Dr. Bullock's discrimination complaint to the Board, specifically noting that December 31, 2007 was the deadline for decisions renewal of all administrator contracts, a genuine dispute exists regarding the District's motives for issuing Dr. Bullock the non-renewal. Similarly, the record demonstrates that the District based its decision not to permit Dr. Bullock to return to active employment on her rebuttal of the District's internal investigation regarding his discrimination claims. A jury should determine whether the District's decision was retaliatory.

Id. This evidence of past retaliatory conduct by BSD suggests its true motive for the failure to hire, discipline, and subsequent recommendation and notice of termination was also in retaliation for protected activity. Aman, 85 F.3d at 1086. This circumstantial evidence of retaliatory animus demonstrates that plaintiff's protected activity at the very least "played a role" in the actions taken by BSD. Miller, 47 F.3d at 597, n.9. They are conduct of the decisionmaker which "reflect[s] a [retaliatory]... animus of the type complained of in the suit." Fakete, 308 F.3d at 339; see Starceski, 54 F.3d at 1096. Accordingly, the burden of proof shifts to BSD to prove by a preponderance of the evidence that it would have acted adversely against Termonia anyway, even absent retaliation, Fakete, 308 F.3d at

338. BSD cannot meet this burden and this determination requires resolving issues of fact which is the province of the jury.

CONCLUSION

Retaliation against an employee because he or she exercises their legal right to have a dispute resolved by a neutral bodies, i.e. a civil jury, is wrong in itself, but is doubly wrong when the retaliation is as a result of protecting and asserting one's right to be free of discrimination due to race, religion, national origin, or age.

Preventing discrimination and retaliation in the workplace is so important to our society that it is a fundamental restriction on an employer's actions. Unlike the vast majority of civil suits which operate under the American rule of each party paying their own attorneys' fees, attorneys' fees can be awarded to the plaintiff in retaliation and discrimination cases. Simply for exercising this right, which serves not only to protect Termonia's interests but all others who are or could be similarly discriminated against, she was recommended for termination for reasons that were crushing to her – Immorality, Neglect of Duty, Misconduct, and Disloyalty - after 20 years of teaching. Then to compound her loss she was denied by the lower court the simple opportunity to tell her story to a jury and have them resolve the issue when there was evidence to meet her prima facie case. Plaintiff requests that this Court reverse the court below's summary judgment decision on her claim of retaliation for her unpaid suspension and notice of termination.