

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Greg Long	:	
Plaintiff,	:	Case No. C2 05-118
	:	Judge Watson
v.	:	Magistrate Kemp
	:	
Nationwide Mutual Insurance Co.	:	
Defendant.	:	

Plaintiff Long's Response to Defendant's Motion for Summary Judgment

I. Statement of Facts

Plaintiff Greg Long had been an employee with the defendant, Nationwide Mutual Insurance Company ("Nationwide"), since approximately 2002 in the position of security guard. Long's duties as a security officer were directed towards building safety. As a security officer, he made regular building tours to ensure that there were no fires, no burst pipes, no intruders, and no people in need of assistance. His duties also included ensuring normal business operations such as checking identification and locking/unlocking entry ways. In March 2004, Long was working at the company's "Neighborhood" location in Dublin, Ohio.

Nationwide initiated an officer of the month incentive program in which a security officer was recognized each month for outstanding achievement. Unfortunately, the program became nothing more than an opportunity for members in management to nominate themselves for the award. Unhappy with the results, several security officers decided to organize their vote in order to try to create representation of security officers among the award recipients (their votes only comprised 12 of over 100 eligible voters). Management at Nationwide received word that the security officers were organizing their nominations around a specific candidate each month (Long aff. attached hereto as exh.1).

Feeling that only management had the right to do that, in May 2004, Nationwide initiated an investigation. Jim Cox, third shift supervisor at Nationwide's Plaza One location, was assigned to head the investigation (Carter affidavit at p.1). Jay Beighley, officer of corporate security, testified that he became aware of the "Security Officer of the Month" incident through rumor and that the rumors became strong enough that Nationwide chose to investigate the matter (Beighley depo at p.10).

On May 19, 2004, as part of the investigation into the "Security Officer of the Month" incident, Lauren Martin, Human Resources, and Jim Cox interviewed Long. At the meeting, the two accused Long of unethical conduct because of his participation with several other security officers in organizing their vote on one candidate. Long denied any wrongdoing and indicated that he had knowledge of illegal activity engaged in by Jim Cox, his superior who was supposed to set an example for plaintiff and other employees in his supervision (Terry Dunlap, a friend and co-worker of Cox, also participated in the unethical activity).

Upon hearing the allegation, Cox responded, "What does that have to do with anything? That does not have to do with anything here! Have you read your policy guide that you given when you were first employed? That will conclude the interview at this time!" Long indicated that he was aware of pornographic material being sent through Nationwide's e-mail system by Cox and Dunlap. Martin requested Long to deliver those e-mails to her (Long aff. attached hereto as exh.1)

The unethical conduct that Long reported concerned the transmission of intra-company emails containing pornographic material. On March 31, 2004 and on several other occasions, Dunlap and Cox had sent emails containing sexually explicit materials to

other Nationwide employees via their Nationwide email accounts. Among various other sexually explicit e-mails as listed on Goodman depo exh. 4, Dunlap and Cox had relayed the emails contained in Long depo exh. 12. One e-mail contained an animated image that depicted several topless woman lined up and was entitled "Superbowl Wave" also known as "Police line-up." The animated image showed a wave going from one woman to the next. The other email contained a picture of a nude woman straddling a car's emergency brake.

Long and Travis Hoffman (security officer) forwarded this information to Lauren Martin in a six page facsimile message dated May 21, 2004 (Long depo. exh.12). Long also forwarded this information to Michael Flack (ethics and compliance), Leslye Winkler (Human Resources), and Terri Hill. Acting on behalf of Don Goodman and/or Jim Cox, security officer Bob Slatzer went to Terri Hill's office upon learning that the facsimile had been sent and read the correspondence prior to Ms. Hill's arrival on Monday. Mr. Slatzer received no punishment for doing so and was later promoted to management (Long aff. attached hereto as exh.1). Beighley became aware of this facsimile message on or about May 22, 2004 although he was not sure of the exact date (Beighley depo at p.16).

As for the security officers involved in coordinating their nomination around an individual candidate, they each received one time notices. On May 21, 2004, additional punishment was recommended for Hoffman and Long as a result of the officer of the month investigation. Beyond one time warnings, it was recommended that they be transferred downtown and Hoffman be demoted. Beighley approved the recommendation to move Long downtown (Beighley depo. at p.15-16). Nationwide

often assigns security officers downtown as a form of punishment and so they can be scrutinized more easily (Walker affidavit at p.3).

On May 24, 2004, Don Goodman, security manager and friend of Cox, telephoned Hoffman and harassed Hoffman about the May 21 facsimile (Goodman depo. p.66-72; Long depo. exh. 12). Slatzer had told Goodman about the correspondence. Goodman demanded that he receive a copy of the facsimile from Hoffman. He went so far as to say, "I am giving you a direct order to hand over a copy of that fax" Hoffman refused to provide the information to Goodman (Long aff. attached hereto as exh.1).

In response to Goodman's directive, on May 25 or 26, 2004, Long and Hoffman sent a letter to Ms. Winkler complaining of hostile work environment (Long depoexh.15):

We appreciate your quick response and your commitment to finding the truth. However, when we sent this information to you, our work environment became a very hostile place. Travis Hoffman, who is also involved in this situation, was harassed by Don Goodman on the morning of Monday, May 24th between 8:30 and 8:45AM, He was ordered to hand over a copy of the fax that was sent out. We consulted Doug Wright about the situation and he said it was inappropriate for a manager to demand such materials. * * * We fear that if we give you more information we will fall under more fire from our superiors. We are not willing to risk that if they are only going to receive minor punishment for their offenses.

Believing that his transfer to Plaza I was retaliatory, on May 28, 2004, Long sent an email to Ms. Scott alleging retaliation based upon his turning in Cox and Dunlap (Long depo exh 16):

Myself and officer Hoffman have been purposely moved out of the neighborhood and I feel that it is solely related to sending off the faxes which you are investigating. 1st and 2nd shift schedules have not been touched at all. I was told by the scheduler that unofficially he was told to "move myself and Hoffman downtown and make sure that we were in Plaza I and Plaza 3 with certain individuals at the helm of the control room each shift." I think actions like this clearly violate Nationwide's no retaliation policy. Just because we decided to step forward, we are now being punished for it. The security manual clearly states that seniority will be used when scheduling ASSIGNMENTS and days off whenever possible. I do not see how now is any different than the previous years other than

us faxing off potentially damaging info against the same people who are now making this decision.

The second reason for this note is basically I do not feel comfortable working this close to the people that I have turned in. It has already been demonstrated by the second in command (Don Goodman) that he has no problem harassing either Hoffman or myself over this issue. He has gone as far as ordering copies of the very stuff we sent to you which is supposed to be confidential. I only felt comfortable turning this stuff over to HR knowing that I could work in the neighborhood and not have to run into anyone who would be upset by the faxes. It seems that even people who aren't on the faxes have no problem harassing us. I would hate and really don't want to know what would happen if I came across a person that I named in the fax. (Long depo exh 16).¹

Sean Lefever, in charge of work scheduling, told Plaintiff, "Travis will survive this but you won't" and "Don Goodman wants me (Sean Lefever) to call him personally if Travis or you call off from your duties downtown"(Long aff. attached hereto as exh.1). During this time, Long called off for sick leave and was ordered to bring a doctor's excuse by Dirk Pinkerton which was prohibited by Nationwide policy. The request went through Bob Wellman (Long's supervisor) and continued up the chain through Goodman and finally to Beighley (Goodman depo. exh. 6).

On June 4, 2004, Cox finally received a one time notice from Beighley concerning inappropriate materials being sent over Nationwide's e-mail system. Nationwide chose to terminate Dunlap because of prior discipline Dunlap had received. Nationwide simply gave Cox a one time notice instead of termination because Cox had no prior discipline on file according to Nationwide (Scott depo at p.58-59; Cox depo. at p.7-15).

¹ On June 2, 2004, Hoffman sent a letter to Ms. Scott alleging retaliation against Greg Long and him. Hoffman also met with Scott and indicated that he was being retaliated against (Scott depo at p.45).

On his way out of the building and in the Front Street parking garage, Cox ran into Taylor Walker, another security officer. Walker recounts the meeting in his affidavit:

I yelled over to Jim Cox and approached him as he was getting into his vehicle.

I told Jim Cox that I had heard that he was given a "once and done." A "once and done" is a written warning indicating that further violations will result in termination. I had heard that Jim Cox had been given this written warning for passing pornographic materials to others using Nationwide's e-mail system. It was my understanding that Greg Long and Travis Hoffman had reported Jim Cox to management for passing pornographic materials via Nationwide's e-mail system.

Jim Cox responded, "Where did you hear that?"

I indicated to him that that was just what I heard.

Jim Cox responded, "I didn't get a once and done."

Jim Cox subsequently indicated that Greg Long, Travis Hoffman and Jonathan Carter were all cancers on the department and that if he caught them outside of Nationwide property, he was going to kick their asses or words to that effect.

Jim Cox stated that Jay Beighley had brought Greg Long and Travis Hoffman downtown so they would be forced to quit or so that Nationwide could find something to fire them for or words to that effect.

Jim Cox stated that he was going to stand in the elevator lobby every morning to make sure that Greg Long and Travis Hoffman were checking employee identification cards of Nationwide employees and the second they missed one, he was going to have them fired or words to that effect.

Jim Cox knew that this would present a perfect opportunity to fire them because at 7 a.m., hundreds, if not thousands, of Nationwide employees are coming through the lobby doors and it is impossible to check all of their employee identification cards as many don't wear their identifications and there are too many people moving too quickly to check all of their identifications.

Sometime later, I was contacted at home by Barb Scott from the Human Resources department concerning Jim Cox's statements.

I told Ms. Scott what had happened. She told me that I would be called downtown to give a formal written statement. This never occurred. I believe that

Nationwide chose to ignore my information. (affidavit of Taylor Walker p.2, attached hereto as exhibit 2)

Concerning Cox's lack of prior discipline, Walker added:

I have been informed that Nationwide is taking the position that Jim Cox has never received any discipline prior to the once and done I mentioned above. It is my understanding that Mr. Cox was once working as a third shift supervisor (at a location besides Plaza I) for Nationwide. At the same time, he was working as a police officer for the Lithopolis police department. Jim Cox would report to work at Nationwide and then take the security pool vehicle and drive to Lithopolis and work there while still on Nationwide time. He was caught when security tried to locate the vehicle and contact him. Part of his punishment was to be reassigned to Plaza I as a first shift supervisor. Nationwide often assigns security officers to Plaza I as punishment and so that they can be scrutinized more easily. (affidavit of Taylor Walker p.2 attached hereto as exhibit 2)²

Jonathan Carter, another security officer at Nationwide, testified to his knowledge concerning Cox's role in Long's termination:

Terry Dunlap and Jim Cox were close friends. They had similar interests, and Jim Cox helped Terry Dunlap in his campaign for the position of Sheriff near Pickerington.

Jim Cox performed the "investigation" into the Officer of the Month issue. Near that time Greg Long and Travis Hoffman reported to management that Jim Cox and Terry Dunlap were circulating pornographic material through the company's email system.

Jim Cox received a one time written notice for his role in this matter, and Terry Dunlap left Nationwide for his role in this matter. It is my understanding that Nationwide did not take more severe action against Jim Cox because he had no prior discipline. This is not true. Jim Cox was disciplined for stealing time from Nationwide. He used to clock in for work at Nationwide and then drive to

² Despite Walker's testimony, Cox claims that he never indicated to any Nationwide employee that he was trying to fire Long or Hoffman (Cox depo. at p.38). Cox claims that he never stated that he was going to physically assault Long, Hoffman or Carter (Cox depo. at p.39). Cox claims that he did not make the statement that he was going to have Long and Hoffman fired if they missed any employee not wearing their identification card (Cox depo. at p.39-40) But Cox does admit normally parking in the Front Street garage and does admit having a conversation with Taylor Walker there in June of 2004 (Cox depo at p.41). Cox further admits that he was not a friend of either Hoffman or Long (Cox depo at p.48) and that he did conduct penetration tests from time to time in which he would solicit an employee to walk into a Nationwide building without an identification card and see if the security officers were doing their job (Cox depo. at p.45-46).

Lithopolis (while on Nationwide time) and work as a police officer there (essentially receiving pay from two employers for the same work time).

Jim Cox harbored animosity for Terry Dunlap's firing against Greg Long, Travis Hoffman and myself. Especially after Terry Dunlap's wife died a week later. Greg, Travis and I all had targets on our backs. Greg was terminated. I was terminated for allegedly being late 3 times in six months. The last tardy probation was written for 12 months rather than the typical 3 months. I was issued a copy of the probation, but was not informed of the terms verbally. All of that aside, I was NOT late and records were altered from the times I called in upon arrival on the three days in question. According to them, I was late by 1, 3 and 5 minutes. NW policy states late is 7 minutes or more regardless of the facts. Nationwide was looking for a reason to get rid of the three of us.

Greg Long was terminated was for tampering with a security camera (hidden camera). Greg told me that he and another officer had found the monitor and VCR for this camera and just followed the wires to see where it went to. According to Jim Cox, they stopped the VCR from recording. It's my understanding that Jim Cox reported this to management and management acted upon this information by firing Greg Long. (affidavit of Jonathan Carter pages 1-2, attached as exhibit 3)

In June 2004, Cox was conducting an investigation on behalf of Kathy Lantz, a Nationwide employee. She had contacted Cox and alleged that somebody may have possibly been in her office and **looking through** personnel files (Cox depo. at p.29). Lantz's office was located on the 29th floor, north side of Plaza I (Cox depo. at p.62). Cox indicated that he would install a camera to videotape her desk area (Cox depo. at p.29). Cox placed the camera over the entrance to the office in the ceiling and attached it to a video recorder located in a locked telephone closet (Cox depo. at p.29). The telephone closet could be accessed via a security badge with the proper clearance.

While working at Plaza I, Long's duties included walking the floors of Plaza I. He had a security badge that gave him access to doors and telephone closets. Part of his assigned duties were to scan and open telephone closets (Cox depo. at p.60-61; Goodman depo exh. 10). Long carried out these duties and opened the telephone closet located in Lantz's office. He discovered the video recorder in the closet and the camera in the

ceiling. Cox had not informed Long that he was conducting an investigation concerning Lantz's allegations and thus had not informed Long about the camera or the video recorder (Long aff. attached hereto as exh.1). Long informed security officer Daniel Boyle about what he had found. Long and Boyle later returned to examine the camera and video recorder but did nothing else to the items.

On another shift, Long opened the telephone closet as per his job requirements and discovered another camera located in the closet. Cox had placed another camera in the closet after his camera in the ceiling had been, according to him, slightly moved (Cox depo. at p.32). The camera recorded Long "getting in to the closet, paying attention to the VCR, bending over, paying attention to the VCR, and paying attention to the camera that was in the closet looking at him"³ (Cox depo. at p.33). The camera did not catch Long tampering with the cameras or the video recorder (Cox depo. at p.33-34). Cox felt that Long's duties did not include opening up telephone closets (Cox depo. at p.35) so he reported to Beighley and Scott that Long had tampered with his camera and video recorder (Cox depo. at p.36-37). According to Carter, Cox had told management that Long and Boyle had stopped the VCR from recording (Carter affidavit at p.2). Cox could not testify in his deposition that he had conclusive proof of Long tampering with the camera(s) or video recorder only suspicions, yet he still reported to management that Long had done so (Cox depo. at p.49-54).

³ Compare Defendant's current position with their position to EEOC: "The tape from the second camera revealed that Charging Party had entered the locked closet on one of his security checks of the 29th floor, Charging Party had no legitimate reason for entering the closet and tampering with the camera or tape equipment. **When Human Resources was advised that Charging Party was the person responsible for tampering with the equipment . . .**" (Scott depo exh. 15)

On June 16, Cox and Beighley (who have adjacent offices - Beighley depo at p.9) approached Barb Scott concerning Cox's suspicions that Long was tampering with his camera(s) and video recorder (Scott depo at p.31). Cox and Beighley indicated to Cox that "there had been some tampering with the camera equipment" (Scott depo at p.32). Cox provided Scott with information indicating that Long was the one tampering with the camera (Scott depo at p.32). Scott testified in deposition that Beighley and Cox indicated to her at this time that the cameras and video recorder were part of an investigation resulting from an associate's allegation that **"items were stolen off her desk"** (Scott depo. at p.34). Cox and Beighley indicated to Scott that Long should not be in the telephone closet at all (Scott depo. at p.36).

At 11:09 a.m. that very day, Cox received an email from Richard Hicks (Goodman depo. exh 10). Cox had previously requested information concerning what areas Long could access while on tour. Hicks had forwarded an email from Wayne E. Lees dated February 23, 2004. In that email, Lees stated that as of that date, security officers were required to scan readers on the list attached to the email. The list included the telephone closet on the 29th floor on the north side of Plaza I (Goodman depo. exh 10). Lees had sent the original email to several recipients including the Plaza I Control room. Cox may have received the email on its original delivery date of February 23, 2004 as part of the Plaza I Control room. Either prior to or after his conversation with Scott, Cox learned that Long had legitimate access to the telephone closet.

Security officer Daniel Boyle accompanied Long on one of his visits to the cameras and video recorder on the 29th floor. Despite his involvement with Long, Scott did not consider recommending any discipline for Boyle (Scott depo. at p.41) Scott

interviewed Boyle concerning Boyle's and Long's roles in the matter. As to Long's role, Boyle stated to her that they walked down the hall and Long pushed up a ceiling tile (Scott depo. at p.28-29).

As a result of the information Cox provided to Scott (that Long had tampered with his investigation), Scott recommended Long's termination and Beighley approved that recommendation on June 18, 2004 (Scott depo exh. 3; Beighley depo. at p.28-29).

II. Argument

A. Plaintiff's claim of retaliation

1. Plaintiff can establish a retaliation claim

To prove a prima facie case of retaliation, a plaintiff is not required to engage in formal complaint procedures. *EEOC v. Romeo Community Schs.*, 976 F.2d 985 (6th Cir. 1992). Protected activity includes, but is not limited to, unofficial assertions of rights through complaints at work, and formal complaints to management, and writing letters which contained critical comments about perceived discriminatory practices. *Id.*; *Kowalski v. Kowalski Heat Treating, Co.*, 920 F.Supp. 799 (N.D. Ohio 1996); *Alexander v. Gerhardt Enterprises, Inc.*, 40 F. 2d 187, 195 (7th Cir. 1994). “[I]t is the assertion of statutory rights which is the triggering factor, not the filing of a formal complaint.” *EEOC v Romeo Community Schs.*, 976 F.2d 985 (CA6 1985)(citing *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir. 1984)). In addition, the law does not require that the practice about which a plaintiff complains be, in fact, unlawful so long as the plaintiff has a reasonable belief that the activity is unlawful. *Id.*

Protected activity includes actions much broader than filing a charge of discrimination. *Abbott v. Crown Motors, Inc.*, 348 F.3d 537 (6th Cir. 2003)(Title VII

protects employee participation in employer's internal investigation of allegations filed with pending EEOC charge); *Passantano v. Johnson & Johnson Consumer Products*, 212 F.3d 493 (9th Cir. 2000)(employee's informal complaint of sex discrimination was protected activity); *EEOC v Romeo Comm. Sch.* 976 F.2d 985 (6th Cir. 1985)(not necessary to file a formal charge to be protected against retaliation).

If the plaintiff possessed a reasonable belief that he was discriminated against by his employer or that he was engaging in protected activity, and the employer later retaliated because he engaged in protected activity, the employer has violated the anti-retaliation provisions of Title VII regardless of whether his initial claim of discrimination was unlawful. *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312-13 (6th Cir.1989); *Compare with Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 791-92 (6th Cir.2000) (Section 1983 claim); *Fine v. Ryan International Airlines*, 305 F.3d 746, 752 (7th Cir. 2002)(where appeals court held that even though district court granted summary judgment on discrimination issue, retaliation claim survives);EEOC Compliance Manual, (CCH) ¶ 8006.

In an action under the retaliation provisions, the plaintiff need not prove that the sole reason for the company's decision to terminate the plaintiff's employment was because of retaliatory conduct. It is sufficient to show that the retaliation played a part in the company's decision to terminate the plaintiff's employment. *McDonnell Douglas v. Green*, 411 U.S. 792, 804, 806, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Although other reasons for termination may have existed, retaliation cannot be a factor in the decision.

2. Long possessed reasonable belief that he engaged in protected activity

Nationwide's "No Harassment" policy reads in pertinent part:

What is Harassment?

Any action by executives, managers, associates, temporaries, contractors, vendors or others that interferes with or unreasonably affects your work performance or creates an intimidating, hostile or offensive work environment is harassment. Examples of harassment can include: (1) **Sending verbal or written communications, including e-mail, of a sexual or demeaning nature.** (2) Assigning less desirable work or working conditions to people because of their, race, sex, or other personal characteristics. (3) Treating individuals in a demeaning fashion.

Reporting Harassment

Anyone who becomes aware of an incident that might create a discriminatory, offensive, hostile or harassing working environment must report it to a manager or an HR professional immediately. Managers who become aware of an incident must report it to HR immediately. All complaints of harassment or discrimination will be promptly investigated by HR and handled in as confidential a manner as possible. You are assured that there will be **no retaliation against you for participating in an, investigation or making a complaint with the reasonable belief that harassment or discrimination has occurred.** Any retaliation by another associate is a violation of this policy and will result in disciplinary action, which may include termination of employment.

Nationwide's policy clarifies that harassment includes sending verbal or written communications, including e-mail, of a sexual or demeaning nature. Plaintiff and others were offended by the e-mail communications (Long depo at p.78; Long affidavit). Cox and Dunlap had sent e-mails to a group of Nationwide employees. The e-mails attached to Long depo exh. 12 were originally sent to Cox, Curtiss Lewis Jr., Richard A. Miller, Steven Young, Roger A. Eaton, and Kevin T. Moore. Young forwarded those e-mails to at least one other Nationwide employee (Long depo exh. 12). From there, the e-mail reached Hoffman and Long. Cox appears to have forwarded the "super bowl wave" email to Tim Lewis as it is also know as "police line-up" (Cox depo. exh 2). With the ability to easily transmit e-mail messages, their pervasiveness is readily apparent as Long

and Hoffman, as well as Bob Wellman (Wellman depo at p.14-16), received the e-mails despite not being on the original recipient list. Long and Hoffman formally complained of this behavior on May 21, 2004 (Long depo exh. 12). The e-mails listed on Cox depo exh. 2 contained the following images (as well as others not depicted below):



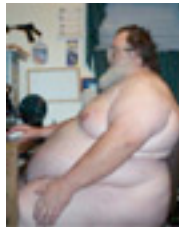
Right thong-Wrong thong



New Car Smell



Police line-up



Why Women Shouldn't Have online affairs



Miss Chernobyl 03



How to protect face from sunburn

All the images would neatly fit within Nationwide's "No Harassment" policy as being of a "sexual or demeaning nature" and thus defined as unlawful harassment. Acting pursuant to this policy, Long held a reasonable belief that by reporting the e-mail transmissions, he: (1) was engaging in protected activity; (2) was reporting unlawful sexual harassment; and (3) would not be subject to retaliation.

The Supreme Court addressed the issue of whether facts and circumstances rise to the point that a reasonable person could have believed that they constituted a violation of Title VII in the case of *Clark County School District v. Breeden*, 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d509 (2001). The Court recounted the facts as follows:

On October 21, 1994, respondent's male supervisor met with respondent and another male employee to review the psychological evaluation reports of four job

applicants. The report for one of the applicants disclosed that the applicant had once commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon." At the meeting respondent's supervisor read the comment aloud, looked at respondent and stated, "I don't know what that means." The other employee then said, "Well, I'll tell you later," and both men chuckled. Respondent later complained about the comment to the offending employee, to Assistant Superintendent George Ann Rice, the employee's supervisor, and to another assistant superintendent of petitioner. Her first claim of retaliation asserts that she was punished for these complaints.

The Court reasoned: "No reasonable person could have believed that the single incident recounted above violated Title VII's standard. The ordinary terms and conditions of respondent's job required her to review the sexually explicit statement in the course of screening job applicants. * * * * [A]nd in the District Court respondent "conceded that it did not bother or upset her" to read the statement in the file."

In contrast to the facts and circumstances of *Breeden* are those of the instant case: (1) the behavior complained of violated Nationwide's "No Harassment" policy and was defined in that policy as "harassment"; (2) this was not a single or isolated incident - the behavior occurred from at least December 8, 2003 through March 30, 2004 (Cox depo exh. 2); the behavior was pervasive as it reached not only the intended 68 recipients over the 16 month time period (Cox depo. exh. 2; Long depo exh. 12), but also unintended recipients like Long and Hoffman and perhaps countless other unintended recipients as Nationwide employs thousands of employees (Beighley depo. at p.21); (3) the behavior was severe as it depicted male and female nudity and individuals engaged in sexual acts; (4) Nationwide regarded the behavior as severe and pervasive as it terminated the employment of Dunlap and issued a one time notice to Cox; and (5) Long's job duties did not involve the review of such material.

The facts and circumstances of the instant case would indicate to the reasonable

person that he was engaging in protected activity by reporting this conduct. A reasonable person is not considered to have the same knowledge of the law as an attorney. *Love v. Pullman*, 404 U.S. 522 (1972). Plaintiff also engaged in protected activity when he complained of retaliation and hostile work environment directly to Barbara Scott, on approximately June 7, 2004 (Scott depo exh. 10) and via correspondence on many other occasions (Long depo exh.12, 15 and 16).

3. Plaintiff suffered adverse actions as a result of his protected activity

Long suffered adverse actions close in time to his complaints to management. After verbally complaining to Martin and Cox on May 19, 2004 and complaining in writing on May 21, 2004, Long was moved downtown to Plaza I on May 22, 2004. As Walker stated, "Part of his punishment was to be reassigned to Plaza I as a first shift supervisor. Nationwide often assigns security officers to Plaza I as punishment and so that they can be scrutinized more easily" (Walker affidavit at p.3). Indeed, "Jim Cox stated that Jay Beighley had brought Greg Long and Travis Hoffman downtown so they would be forced to quit or so that Nationwide could find something to fire them for or words to that effect." (Walker affidavit at p.2).

In fact, on June 4, 2004, Cox threatened to take further adverse action against Long and others saying that " Greg Long, Travis Hoffman and Jonathan Carter were all cancers on the department and that if he caught them outside of Nationwide property, he was going to kick their asses" (contrast Cox's statement with defendant's claim that plaintiff can only produce temporal proximity to support retaliatory nexus) (Walker affidavit at p.2, exh. 2). This occurred a mere 13 days after plaintiff's written complaint

to Human Resources concerning Cox and the same day that Cox received his written warning (immediately after his receipt).

On May 28, 2004 and June 7, 2004, Long complained of retaliation to Scott (Long depo. exh 16; Scott depo exh. 10). 11 days later, Scott recommended Long's termination and Beighley approved that recommendation. In this case, instances of adverse action follow close on the heels of Long's protected activity. Such acute proximity will support a causal connection between them. *DiCarlo v. Potter*, 358 F.3d 408 (6th Cir. 2004). Furthermore, the causal connection is strengthened by the statements of Beighley and Cox against Long. Beighley's statement constitutes direct evidence of retaliatory intent.

Cox's statement clearly does.⁴ Cox's bias infected Beighley and Scott's decision making process. Both Scott and Beighley acted pursuant to information received from Cox: that Long tampered with his camera/VCR; however, Cox and Scott admitted that they reviewed no video demonstrating that Long had tampered with the camera/VCR. Defendant's reason for terminating Long has no basis in fact and is thus pretextual.

⁴ Limiting direct evidence of discrimination to the statements and actions of formal decision makers would overlook discrimination by who lack formal authority but who exercise substantial influence in the decision. "The reason for this is simple: if a biased subordinate has substantial influence over the employment decision, the subordinate's bias can bear directly on the decision." *See Wells v. New Jersey Corp.*, 58 F.3d 233 (CA6 1995). A plaintiff may establish direct evidence through the statements or conduct of a person who lacks formal authority to hire or fire but who nonetheless influences the decision. *See Ostrowski v. Atlantic Mut. Ins. Co.*, 968 F. 2d 171, 182 (CA2 1992); *Rose v. New York City Bd of Educ*, 257 F. 3d 156, 162 (CA2 2001) (discriminatory comments of plaintiff's supervisor, who did not have formal firing authority but who had "enormous influence on the decision making process," constituted direct evidence; *Walden v. Georgia Pacific Corp.* 126 F. 2d 506, 514-15 (CA3 1997) ("A person is in the decision making process . . . when he has direct access to the formal decision maker and his discriminating animus is linked to the formal decision maker's specific decision to fire the plaintiffs."); *Simpson v. Diversitech Gen., Inc*, 945 F. 2d 156, 160 (CA6 1991) ("The plaintiff met his burden under *Price Waterhouse* by proving that his supervisor's racial bias led substantially to his dismissal and the fact that the supervisor did not pull the trigger is of little consequence").

Nationwide has no proof that (1) Long moved a camera; (2) Long shut off the video recorder; or (3) Long tampered with the investigation. Nationwide can cite no corporate policy indicating that Long could not access the telephone closet or observe the camera/VCR. On the contrary, Nationwide's own documentation indicates that Long was supposed to enter the phone closets (Goodman depo exh.10). Cox received a copy of it on the day he complained to Scott of Long's alleged tampering, so he knew that Long had legitimate access to the closet. Scott did not consider punishing Boyle (security officer not stationed at Plaza I, yet came over to Plaza I from his shift elsewhere to view the camera) who was an accomplice to the incident. Scott did not consider punishing Cox for threatening to assault Long, yet Scott recommended termination to Long for merely observing a camera and VCR.

B. Termination in violation of public policy

In order to establish a claim for wrongful termination in violation of Ohio public policy, a plaintiff must demonstrate:

1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).
2. That dismissing employees under circumstances like those involved in the plaintiffs dismissal would jeopardize the public policy (the *jeopardy element*).
3. The plaintiffs dismissal was motivated by conduct related to the public policy (the *causation* element).
4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element)." *Id.*

The clarity and the jeopardy elements are questions of law and policy to be determined by the court. *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134,151 (citing *Collins v. Rizkana* (1995), 73 Ohio St. 65, 70. The causation and overriding justification elements are questions of fact to be determined by the trier of fact. *Id.*

Ohio Revised Code §4112 prohibits discrimination by employers in general and prohibits sexual harassment and thus is the source for plaintiff's public policy claim. In the instant case, Plaintiff reported violations of Nationwide's harassment policy to human resources and management as mandated by Nationwide's policies. Long maintains that Nationwide was motivated by his complaints to terminate his employment as Cox, the sexual harasser, provided management with false information that ultimately resulted in Long's termination. Dismissing employees under circumstances like those involved in the Long's dismissal would jeopardize the public policy prohibiting sexual harassment as it promotes further harassment.

Cox was left with the message that he could violate Nationwide's harassment policy, receive a minor punishment, threaten physical harm to the reporting employees, threaten termination to the reporting employees, subject the reporting employees to greater job scrutiny and ultimately motivate decision-makers to terminate the reporting employees. Such actions deter others from reporting sexual harassment and thus promote sexual harassment.

C. Intentional Infliction of Emotional Distress

Generally when a defendant retaliates against a plaintiff for exercising his rights, it is acting in an extreme and outrageous manner with the intent to cause emotional distress. In this case, immediately following plaintiff's complaint about pornographic emails, defendant moved plaintiff to Plaza I in order to force him to quit or find a reason to fire him (Walker affidavit at p.2). Cox affirmed this motive: "He was going to stand in the elevator lobby every morning to make sure that Greg Long and Travis Hoffman were checking employee identification cards of Nationwide employees and the second

they missed one, he was going to have them fired " (Walker affidavit at p.2). Cox admitted to conducting penetration tests to determine if employees were doing their jobs, and Cox ultimately had a hand in firing Long when he reported to Beighley and Scott that Long had tampered with his investigation despite having no conclusive proof. All of this came on the heels of Cox receiving discipline as a result of Long.

Scott's intention was to also have Long fired. She deliberately ignored Walker's recounting of events with Jim Cox: "I told Ms. Scott what had happened. She told me that I would be called downtown to give a formal written statement. This never occurred. I believe that Nationwide chose to ignore my information" (Walker affidavit at p.2). Scott chose not to recommend discipline for Cox despite his threats to retaliate against Long, including physically. Scott also chose not to punish Boyle for the same offense (tampering with a security camera/video recorder) despite his participation in the matter.

These three examples demonstrate the defendant's intent to retaliate against the plaintiff. The intent to inflict emotional distress is inherent in the situation and is bolstered by Cox's intent to inflict physical distress (Walker affidavit at p.2).

For foregoing reasons, Plaintiff respectfully requests the Court to deny Defendant's Motion for Summary Judgment.

Respectfully submitted,

/s/ Andrew J. Ruzicho II

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2006, I electronically filed the foregoing with the Court's electronic filing system which delivered this document to opposing counsel.

/s/ Andrew J. Ruzicho II

ANDREW J. RUZICHOII(0064024)