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BACKGROUND

In January 2003 Defendant Riviera Operating Corporation (Riviera) was involved in a separate trial involving Jean Sylvia, which concerned charges of hostile work environment based on sex and age (Sylvia case). In a phone conversation that occurred on January 14 or 23, 2003, EEOC attorney Samantha Blake divulged the names of potential witnesses in the Sylvia case to the Defendant's attorney, Kimberly Wanker, who is also the attorney for Defendant in this action. Among the names divulged were employees Joanna Harris (Harris), and Ronni Hill (Hill). On January 25 or 26, 2003 the Defendant initiated surveillance on Riviera employees Harris and Hill. Harris and Hill were terminated from their employment with Defendant soon after the investigation began. Harris was terminated February 27, 2003, and Hill was terminated on March 6, 2003, both were terminated for "dishonesty."

David Christensen (Christensen) was a former employee of Defendant from 1990-1999. Christensen allegedly was also mentioned in either the January 14 or 23, 2003 phone conversation as a potential witness in the Sylvia case. In November 2003 Christensen claims he applied for a job opening with Defendant. Christensen was not rehired by Defendant.

In the case at bar, the claimants charge that Defendant retaliated against Harris, Hill, and Christensen for their participation as witnesses in litigation against Defendant in the Sylvia case. The EEOC has brought suit for these retaliation claims. Harris and Hill have intervened as individually interested parties in this litigation and have joined the EEOC's argument concerning this motion. Hill individually has also made claims against Defendant for allowing a hostile work environment.

Defendant now brings a motion for summary judgment against all plaintiffs on all remaining claims. For the reasons discussed below, the Court only grants the motion as it pertains to Christensen's retaliation claims and Hill's hostile work environment claims.

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DISCUSSION: SUMMARY JUDGMENT

In entertaining a summary judgment motion, the Court "must draw all reasonable inferences in favor of the non-moving party." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Summary judgment is only proper if no material factual issues exist for trial. *Warren v. City of Carlsbad*, 58 F. 3d 439 (9th Cir. 1995).

I. RETALIATION

To make out a prima facie case of retaliation under Title VII, plaintiffs must put forth evidence sufficient to show that they: (1) were engaged in a protected activity, (2) suffered an adverse employment action, and (3) there was a causal link between their activity and the employment decision. *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F. 3d 1185, 1196-97 (9th Cir. 2003).

(A) Ronni Hill and Jo-Anna Harris

Hill and Harris clearly satisfy points one and two for a prima facie retaliation case since they were named as potential witnesses in the Sylvia case and an investigation began soon thereafter which led to their dismissal. Point three is the focus of this motion for summary judgment. Defendant points to several cases in the Seventh Circuit to show that Plaintiffs' argument of temporal proximity is insufficient to preclude summary judgment. These cases stand for the proposition that "[a] plausible scenario cannot counter direct evidence offered in support of a motion for summary judgment." (Def's. Reply, Doc. 47, p. 10.)

However, in the Ninth Circuit the controlling law is clear: "Temporal proximity between protected activity and an adverse employment action can *by itself* constitute sufficient circumstantial evidence of retaliation in some cases." *Bell v. Clackamas County*, 341 F.3d 858, 865 (9th Cir. 2003) (emphasis added). In *Bell*, the Ninth Circuit gave a convincing list of cases that stood for this same proposition within the Circuit: *Villiarimo v. Alha Island Air*, Inc., 281 F.3d 1054, 105 (9th Cir. 2002)(cited to show that "[c]ausation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity."); *Winarto v. Toshiba*

Am. Elecs. Components, Inc., 274 F.3d 1276, 1287 n. 10 (9th Cir. 2001); and Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (cited to show that "sufficient evidence of causation existed where adverse actions occurred less than three months after complaint was filed, two weeks after charge first investigated, and less than two months after investigation ended"). Bell, 341 F.3d at 865-66. Defendant's counsel is obviously aware of the Bell case, but only cites the case as it applies to Christensen, where, as discussed below, it has admittedly less chance of thwarting a summary judgment motion. (See Def's. Mot. for Summ. J., Doc. 27, p. 24.)

It is undisputed that the surveillance of Plaintiffs Harris and Hill began soon after their names were given to defense counsel as potential witnesses for the Sylvia case. The surveillance began on January 25 or 26, 2003. There is a minor question as to whether the names were divulged to counsel in a January 14, 2003, or a January 23, 2003, phone conversation. (Def's. Mot. for Summ. J., Exh. 3, p. 4). The Ninth Circuit has refrained from creating a per se rule about the timing required to meet muster in these circumstances. *Coszalter v. City of Salem*, 320 F.3d 968, 977-78 (9th Cir. 2003). However, given the Ninth Circuit law outlined above, and the factual setting of this case, either combination of dates provides sufficient circumstantial evidence to give rise to material issues of fact concerning whether there is a causal link between the Plaintiffs' protected activity and their later dismissal.

Even though Defendant claims a legitimate and alternative reason for firing Hill and Harris, the Ninth Circuit has clearly held, and reiterated, that "evidence based on timing can be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by the defendant." Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F. 3d 493 (9th Cir. 2000) (cited in Bell, 341 F. 3d at 866) (emphasis added).

Other circumstantial evidence causes the Court to question the propriety of granting this motion, but such discussion of that evidence would be redundant. As such, the Court denies Defendant's motion for summary judgment as to Harris' and Hill's retaliation claims.

(B) David Christensen

Christensen's situation is noticeably distinct from that of Harris and Hill. Notably, the factual setting of Christensen's claim makes it difficult for the Court to give nearly the same weight to a temporal proximity argument as the Court did for Harris and Hill. Specifically, Christensen would have been named as a potential witness in mid to late January, and then was not rehired in November when possible opportunities arose. Both parties seem to realize this problem, and as such, the EEOC claims that it "need not establish temporal proximity with respect to Christensen because there is direct evidence of retaliation against him." (Pl's. Opp'n., Doc. 28, p. 16.) The Court, as explained below, disagrees with this assertion and as such will grant the motion for summary judgment as it pertains to Christensen.

The EEOC's argument for direct evidence is based on a series of conversations he had with Holtzman, an employee of Defendant. In one conversation, Holtzman told Christensen that his possibility of being hired "wasn't a sure thing yet, but that he and Linda Komisar would be the first two hired." (Pl's. Opp'n, Doc. # 28, p. 16.) In a subsequent conversation, Christensen claims that Holtzman asked Christensen "how he could be a witness for Jean [Sylvia] and go against all of the friends that he had at the Riviera." *Id.* This was Christensen's testimony as well during his deposition. (Pl's. Mot. for Summ. J., Exh. 38, Dep. p. 38.)

Just because the Sylvia litigation was discussed does not mean it was a reason in the decisionmaking process. Even if the conversation evidenced some type of discrimination, Holtzman's position with the Defendant does not entail making the hiring decision, and therefore, the conversation is irrelevant in determining the intent of defendant.

Plaintiff claims that Holtzman was a manager. (Pl's. Opp'n, Doc. 28, p. 17.)

Defendant claims that Holtzman was a "Riviera Pit Liaison." (Def's. Mot. for Summ. J., Doc. 27, p. 24.) Plaintiff has submitted no evidence to indicate that Holtzman has hiring or firing capability. Christensen's deposition clearly shows that he understood Holtzman did not have the authority to hire or fire by himself, and also could not hire someone unless Michael Falba (Falba),

Vice-President, approved it. (Def's. Mot. for Summ. J., Exh. 38, Dep. p. 37-38.) Simply alleging, as Christensen does, that "[i]f Bruce [Holtzman] wanted somebody hired, he could get them hired" is not evidence of Holtzman's manager status. Therefore, there simply is not enough evidence here, direct or indirect, for a prima facie case of retaliation.

Even if there was enough evidence for a prima facie case of retaliation here, Defendant, as dictated by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), has met its burden to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 802. Defendant has submitted evidence that Falba, the person who would have been in charge of hiring Christensen, never received Christensen's application for employment. (Def's. Mot. for Summ. J., Exh. 6, ¶ 20.)

Under *McDonnell Douglas*, the Plaintiff would now need to show that the employer's nondiscrimnatory reason was "a pretext for discrimination." *Lindahl v. Air France*, 930 F. 2d 1434, 1437 (9th Cir. 1991) (*citing McDonnell Douglas*, 411 U.S. at 804). "The Plaintiff may carry this burden 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* (*quoting Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). Plaintiff fails to carry the burden on either of these standards. Plaintiff has not persuaded the Court that a discriminatory reason more likely motivated the employer but relies heavily on the assertion of "direct evidence." As indicated above, the Court finds this "evidence" unpersuasive. Furthermore, the Plaintiff has not shown that the employer's proffered explanation is unworthy of credence. Consider Christensen's deposition:

"Q. Okay. How did you obtain the application?

"A. I'm not sure. I don't remember.

"Q. You filled out the application, did you return it to the Riviera?

"A. Yes.

"Q. Where did you return it?

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"A. I'm not sure."

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(Def's. Mot. for Summ. J., Exh. 38, Dep. p. 33.) Later, the deposition continues:

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"Q. And somehow, we don't know how, you got an employment application?

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"A. Yes.

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"Q. And you returned it somewhere, but you don't know where; is that right?

The Plaintiff has failed to persuade the Court directly that a discriminatory reason

6 7 "A. That's right."

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(*Id.* at 36.) Intermittently Christensen alleges that he gave his application to possibly Holtzman (Id. at 34), his friend Steve Batchelder (Id.), or with perhaps more confidence "somebody upstairs"

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(Id. at 46). In short, the Plaintiff barely manages to allege that Chrisensen obtained, filled out, and

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turned in an application "to someone." Plaintiff provides no evidence to show that Defendant's

more likely motivated the employer or that the defendant's legitimate reason is unworthy of

credence. Accordingly, the Court will grant the motion for summary judgment as to Christensen.

II. HOSTILE WORK ENVIRONMENT

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reason for not rehiring Christensen is unworthy of credence.

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(A) Ronni Hill

17 Because Hill only filed a joinder to the EEOC's argument for her retaliation claims, 18

she has not responded to the Motion for Summary Judgment as it pertained to her hostile work environment claims. Defendant argues that Hill's failure to respond to the motion for summary judgment concerning the hostile work environment claims is a consent to summary judgment

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according to Local Rule 7-2(d) which states: "The failure of an opposing party to file points and

This reasoning however does not apply to motions for summary judgment. *Mirage Resorts, Inc.*,

v. Stirpe, 152 F. Supp. 2d 1208, 1213 (D. Nev. 2000). In Mirage the Court found in accordance

with the ruling in *Cristobal v. Siegel*, 26 F.3d 1488, 1491 (9th Cir. 1994), that:

authorities in response to any motion shall constitute a consent to the granting of the motion."

a trial court may not grant summary judgment unless the moving party bears its burden of showing it is entitled to such a judgment. A local rule that directs a court to grant a summary judgment motion solely because no opposing papers have been filed is inconsistent with Rule 56 of the [FRCP], and therefore is impermissible under [FRCP] 83.

Mirage, 152 F. Supp. at 1213 (citations omitted).

Even though there was an opposition filed in this case (Doc. 28), to which Harris and Hill joined (Docs. 32 & 33), nothing in the opposition addresses Hill's hostile work environment claims. Nevertheless, the reasoning stands that LR 7-2(d) does not negate a moving party's burden in a summary judgment motion. As such, the Court considers whether the moving party has met its burden to show that there is no issue of material fact as to Hill's hostile work environment claims, even when all reasonable inferences are made in Hill's favor.

In the opinion of the Court, Hill has simply failed to show a prima facie case for hostile work environment. To present this claim, Hill would have to show that she was (1) subjected to verbal or physical conduct of a harassing nature, (2) the conduct was unwelcome, and (3) "that the conduct was sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Kortan v. California Youth Auth.*, 217 F.3d 1104, 1110 (9th Cir. 2000). To evaluate these prongs the Court will "look[] at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 23 (1993). *See also Kortan*, 217 F.3d at 110 (*citing Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2283 (1998)).

Hill's complaint lays out a foundation for the first two prongs of analysis. The alleged terms used, and pictures displayed, were of a harrassing and sexual nature. It is apparent that this behavior was unwelcome as well given that Hill claims she reported this behavior to her supervisor. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 873-74 (9th Cir. 2001). However,

Hill fails to make out a prima facie case based on the third prong of analysis and for that reason the Court grants summary judgment for Defendant as to Hill's hostile work environment claims.

Hill filed her complaint with the EEOC on or about June 2, 2003, which states that "from her first day on the job until her termination, she was subjected to a sexually hostile, intimidating and offensive work environment." (Doc. 7, Compl. ¶ 17.) This hostility was caused by derogatory and demeaning words and pictures. Hill "repeatedly reported the harassment and yet continued to be subjected to it on a *daily basis*." (*Id.* at ¶ 23) (emphasis added). Hill was terminated on or about February 28, 2003. If these claims were alone in a vacuum it may appear that "the conduct was sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment." *Kortan*, 217 F.3d at 1110. However, as stated above, the Court is required to look at "all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether *it unreasonably interferes with an employee's work performance*." *Harris*, 510 U.S. at 23 (emphasis added).

In essence, the problem is that Hill's arguments for hostile work environment and retaliation are pitted against each other. In her complaint Hill states:

On or about January 13, 1987, the Riviera hired Ms. Hill as a dealer and within six months she was promoted to the position of floor-person. She was 38 years old at the time. She was then promoted to senior floor person in or about February 2002. Throughout the tenure of her employment, up until the date of her termination on February 28, 2003, she was a loyal and dedicated employee, performing all the requirements of her job in a professional manner.

(Compl., Doc. 11, ¶ 15.)

These statements lead the Court to believe that the conduct did not "unreasonably interfere[] with [her] work performance." *Harris*, 510 U.S. at 23. Such loyalty and dedication over the course of nearly 16 years of employment, coupled with intermittent promotions, without filing an EEOC complaint until after she was terminated for "dishonesty," indicates to the court that the hostile work environment claim is somewhat disingenuous. The Court notes that Hill

alleges she started complaining to her manager about the environment in 1995, but that no action was taken. (Compl., Doc. 11, \P 19.) Hill's complaint would therefore suggest that she was complaining on a daily basis for seven years about the harassment until she was terminated, without filing a complaint with the EEOC.

Therefore, according to the considerations the Supreme Court listed in *Harris*, Hill's complaint fails. The behavior, though allegedly frequent, did not threaten physical harm, mainly consisted of offensive utterances and pictures, and by Hill's own statements, does not appear to have affected her job performance. *Harris*, 510 U.S. at 23.

In a distinguishable case, the Ninth Circuit determined that there was grounds for a hostile work environment claim. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001). *Nichols* is somewhat similar to Hill's case because of the repetitive nature of the conduct, the medium of the hostility, and the fact that the alleged harassment was repetitively reported. However, in *Nichols* the alleged discriminatory conduct was much more focused on the plaintiff individually and did not stem from a general work environment. Furthermore, in that case the Plaintiff left the job in frustration on his own volition after only four years. *Id*.

Therefore, after "looking at all the circumstances," and taking all reasonable inferences in favor of Hill, the Court determines that there is no genuine issue of material fact as to Hill's hostile work environment claims and that summary judgment should be granted for Defendant as to those claims.

DISCUSSION: STRIKE EVIDENCE

Plaintiff's motion aims to preserve the retaliation claims concerning Harris and Hill. The claims have been preserved. Therefore, Plaintiff's Request to Strike is denied as moot.

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AO 72 (Rev. 8/82)

CONCLUSION Accordingly, and for good cause appearing, IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (#27) is GRANTED in part and DENIED in part as follows: (1) The Motion is GRANTED as to Christensen's claims for retaliation and Hill's claims for hostile work environment. (2) The Motion is DENIED as to all other remaining claims. IT IS FURTHER ORDERED that Plaintiff's Request to Strike Defendant's Evidence Supporting Its Motion for Summary Judgment (#34) is DENIED as moot. Dated: October 2, 2006. United States District Judge

AO 72 (Rev. 8/82)