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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

No. CV 05-3032-PHX-SMM

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Plaintiff,

**MEMORANDUM OF DECISION AND
ORDER**

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v.

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CREATIVE NETWORKS, LLC, an
Arizona corporation,

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Defendant.

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Before the Court is Defendant Creative Networks, LLC (“Creative Network”)’s Motion for Summary Judgment as to Kathy Allen, filed April 10, 2009 (Doc. 132).¹ Plaintiff Equal Employment Opportunity Commission (“EEOC”) filed a response on June 12, 2009 (Doc. 143), followed by a supplemental response on July 24, 2009 (Doc. 148).² Creative

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¹Creative Networks chose not to bring a summary judgment motion with regard to the other Plaintiff in this case, Rhonda Encinas-Castro.

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²Along with its summary judgment Response, the EEOC filed a motion to strike portions of Creative Networks’ summary judgment motion (Doc. 142). The Court granted the motion in part in a July 2, 2009 Order (Doc. 147). The Court ordered that Section III(B) of Creative Networks’ motion be stricken because it discusses whether Creative Networks had notice of Rhonda Encinas-Castro’s charge of discrimination (*Id.*). This topic had been decided by the Court in a previous summary judgment ruling (Doc. 130). In addition to striking Section III(B), the Court also ordered the EEOC to file a short response regarding whether being named in an EEOC charge constitutes protected activity (Doc. 147).

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A second motion to strike was later filed by the EEOC on September 2, 2009 (Doc. 152). The EEOC requested that the Court strike (1) Section D(1) of Creative Networks’ Reply in support of summary judgment and (2) Exhibit D of the Reply. After reviewing the briefing as well as holding oral argument, the Court denied the motion to strike (Doc. 164).

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1 Networks then replied on August 10, 2009 (Doc. 150). Creative Networks requested oral
2 argument in connection with its Motion for Summary Judgment (Doc. 132). The parties have
3 had the opportunity to submit evidence and briefing. Accordingly, the Court finds the
4 pending motion suitable for decision without oral argument and Creative Networks' request
5 is denied. See LRCiv 7.2(f), 56.2. Having considered the parties' briefing and other
6 submissions, the Court now issues this Memorandum of Decision and Order denying
7 Creative Networks' motion.

8 **FACTUAL BACKGROUND**

9 The EEOC alleges that Creative Networks discriminated against two of its employees,
10 Rhonda Encinas-Castro ("Encinas-Castro") and Kathryn Allen ("Allen"), in retaliation for
11 having opposed discrimination and/or having participated in a proceeding under Title VII,
12 including an investigation of alleged employment discrimination (Doc. 1, Compl). Encinas-
13 Castro claims that Creative Networks retaliated against her by terminating her for filing a
14 discrimination charge with the EEOC (Compl. ¶ 9). Allen claims that Creative Networks
15 retaliated against her by holding a corrective counseling session after she was identified as
16 a witness in fellow employee Encinas-Castro's EEOC charge (Id. ¶ 10).

17 On May 16, 2003, Encinas-Castro filed a charge of discrimination with the EEOC
18 (Doc. 144, Pl's Statement of Facts ("PSOF") ¶ 1; Ex. 1; Ex. 2, Encinas-Castro Decl. ¶ 3).³
19 After an EEOC representative interviewed Encinas-Castro, she was told that the EEOC
20 would finish the charge and mail it to her for her signature (Id.). Subsequently, Encinas-
21 Castro received the EEOC charge in the mail, and she signed and dated it on Tuesday, May
22 20, before mailing it back to the EEOC (Id.). The EEOC received the signed charge on
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24 A motion for reconsideration of that Order (Doc. 165) was filed on December 28, 2009 and
25 it was denied by the Court (Doc. 168).

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27 ³For ease of reference, Exhibit 1-10 are attached to Document 144, EEOC's Statement
28 of Facts. Exhibit A-F are attached to Document 133, Creative Networks' Statement of Facts.

1 Friday, May 23 (PSOF ¶ 1; Ex. 1). Encinas-Castro's charge specifically included Allen's
2 name as a witness to the discriminatory comments (PSOF ¶ 2; Ex. 1; Ex. 2, Encinas-Castro
3 Decl. ¶ 4).

4 Upon filing her charge with the EEOC, Encinas-Castro told several coworkers that
5 she had gone to the EEOC to file a charge (PSOF ¶ 3; Ex. 2, Encinas-Castro Decl. ¶¶ 5-7).
6 On May 16, the day Encinas-Castro filed her discrimination charge, she advised Millie
7 Santiago that she had gone to the EEOC to file a charge and identified Allen as a witness
8 (PSOF ¶ 3; Ex. 2, Encinas-Castro Decl. ¶ 6). A few days later, on May 19, Encinas-Castro
9 advised Ginger Call ("Call") that she had gone to the EEOC to file a charge and identified
10 Allen as a witness (PSOF ¶¶ 3, 9; Ex. 2, Encinas-Castro Decl. ¶ 5). Call was a Program
11 Manager with Creative Networks (PSOF ¶ 8). Call then informed her supervisor Jennifer
12 Clark ("Clark") that there was a rumor that Encinas-Castro was going to file a charge of
13 discrimination with the EEOC (Id. ¶ 10; Ex. 3, Call Dep. at 118:6-16). Clark indicated that
14 she was going to pass the information onto Ron Cornelison ("Cornelison"), Executive
15 Director of Creative Networks (PSOF ¶¶ 11, 24; Ex. 3, Call Dep. at 119:8-18). Also, on May
16 19, Encinas-Castro told Bonnie Cooper ("Cooper") that she had filed an EEOC charge and
17 named Allen as a witness (PSOF ¶¶ 3-4; Ex. 2, Encinas-Castro Decl. ¶ 7). Cooper then told
18 Call that Encinas-Castro had filed a charge, and Call told Cooper that she had already
19 elevated the information about the charge to Cornelison (PSOF ¶ 4; Ex. 4, Cooper Dep. at
20 22:15-23:20).

21 Sometime after filing her charge, Encinas-Castro informed Allen that she had named
22 her as a witness in the charge and that the EEOC may be contacting her (PSOF ¶ 5; Ex. 6,
23 Allen Decl. ¶ 3; Ex. 9, Encinas-Castro Dep. At 85:2-17). In turn, Allen confided in Edna
24 Faulkner ("Faulkner"), Coordinator for the Maricopa Integrated Health Services ("MIHS")
25 and Division of Developmental Disability ("DDD"), about Encinas-Castro's charge (PSOF
26 ¶¶ 5-6; Ex. 6, Allen Decl. ¶ 4). Allen also told Faulkner that she had been mentioned as a
27 witness in Encinas-Castro's charge (PSOF ¶ 6; Ex. 6, Allen Decl. ¶ 4). On May 29, 2003,
28 Faulkner told Allen that she had been called into a meeting, "they" are aware of Encinas-

1 Castro's charge and "everything is going to really explode now." (PSOF ¶ 7; Ex. 5, Allen
2 Dep. at 90:8-17, 90:21-91:14). Allen testified that Faulkner told her that Leary and Clark
3 were at the May 29 meeting (Ex. 5, Allen Dep. at 91:15-24).

4 Sometime before May 30, Call spoke again with Clark and Cornelison and advised
5 them of a rumor that Encinas-Castro had gone to the EEOC (PSOF ¶ 12). Cornelison and
6 Clark replied, "Let's bring [Encinas-Castro] in and have a discussion with her." (Id.; Ex. 3,
7 Call Dep. at 120:3-25) A meeting with Encinas-Castro was held on May 30 and that same
8 day, Cornelison fired Encinas-Castro (PSOF ¶¶ 13-14; Ex. 2, Encinas-Castro Decl. ¶ 12; Ex.
9 3, Call Dep. at 121:3-7). Cornelison testified that after he fired Encinas-Castro, Faulkner told
10 him that he should speak to Allen too (PSOF ¶ 27; Ex. 8, Cornelison Dep. at 175:1-11).

11 After she was fired, Encinas-Castro called Allen and told her about the termination
12 (Ex.5, Allen Dep. 95:13-14; Ex. 6, Allen Decl. ¶ 5). Minutes later, Faulkner came to Allen's
13 office and indicated that Cornelison wanted to speak with Allen (PSOF ¶ 15; Ex.5, Allen
14 Dep. at 95:13-18; Ex. 6, Allen Decl. ¶ 6). In attendance at this meeting was Allen,
15 Cornelison, Clark, Faulkner, and Operations Manager, Linda Leary ("Leary") (PSOF ¶ 15,
16 Ex. 5, Allen Dep. at 95:19-21; Ex. 6, Allen Decl. ¶ 7; Ex. 7, Faulkner Dep. at 96:9-16; Ex.
17 8, Cornelison Dep. at 180:20-23). The EEOC claims that Cornelison, Clark, and Faulkner
18 all knew about Encinas-Castro's charge when they met with Allen (PSOF ¶¶ 5-6,9-10,12).

19 During the meeting, Cornelison told Allen, "I want to tell you something right now,
20 I could fire you right now, because this is a right-to-work state, and I don't even have to have
21 a reason, but I want to give you a chance to be a successful employee here." (Id. ¶ 16; Ex.
22 5, Allen Dep. at 95:22-25) Cornelison then asked Allen what she knew about Encinas-
23 Castro's EEOC charge (PSOF ¶ 17; Ex. 5, Allen Dep. at 96:3-10). When Allen denied
24 knowing anything, Cornelison told Allen, "'Well, there's been talk that you have been calling
25 back and forth to the Surprise office and spreading rumors,' and . . . 'I want to really try and
26 make you successful here,' and . . . 'I, out of all the people in this company since I've started,
27 I've noticed you with a negative attitude.'" (PSOF ¶ 18; Ex. 5, Allen Dep. at 96:10-16) Prior
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1 to the May 30 meeting, Allen had never been disciplined or counseled for performance
2 problems before (PSOF ¶ 21; Ex. 6, Allen Decl. ¶ 1).

3 During the meeting, Cornelison allegedly spoke to Allen in a belligerent and hostile
4 manner (PSOF ¶ 22; Ex. 6, Allen Decl. ¶ 12). Since Encinas-Castro worked in the Surprise
5 office until her termination, Allen took the reference to her communications with the Surprise
6 office to mean her conversations with Encinas-Castro about the discrimination (PSOF ¶¶ 19-
7 20; Ex.6, Allen Decl.¶ 9). Faulkner also took the comments about the Surprise office to
8 mean Allen’s conversations with Encinas-Castro, since the two women were friends (PSOF
9 ¶ 30; Ex. 7, Faulkner Dep. at 101:2-16). At the end of the meeting, Cornelison indicated that
10 he was going to have Faulkner monitor Allen’s work in the future (PSOF ¶ 32; Ex, 5, Allen
11 Dep. at 96:23-97:2).

12 Allen believed her job was threatened based upon (1) Cornelison’s statement that
13 Allen could be fired “right now” because “Arizona is a right-to-work state”; (2) the reference
14 by Cornelison to the EEOC charge filed by Encinas-Castro shortly after her termination
15 earlier in the day; (3) Cornelison’s angry and hostile demeanor; and (4) Encinas-Castro’s
16 termination on the same day (PSOF ¶ 23; Ex. 6, Allen Decl. ¶ 13). During the meeting, Allen
17 never acknowledged that she had a poor attitude or that she would improve her job
18 performance (PSOF ¶ 31). Leary told Allen that the meeting was not related to Allen’s job
19 performance (Id.).

20 PROCEDURAL BACKGROUND

21 Allen filed a Charge of Discrimination with the EEOC on March 19, 2005(Doc. 133,
22 Ex. E).⁴ On September 30, 2005, the EEOC filed suit, on behalf of Allen, under Title VII of
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24 ⁴This complaint alleged that after Allen’s name was referenced in Encinas-Castro’s
25 EEOC charge, Allen was called into a meeting with Cornelison, Faulkner, Clark, and Leary
26 (Doc. 132, Ex. E). During the meeting, “Cornelison made false accusations about me,
27 advised me my work performance would be monitored, and threatened to terminate my
28 employment.” (Id.) Additionally, “Cornelison harassed and intimidated me by advising me
that Arizona is a right to work state and he could terminate my employment at any time.”
(Id.)

1 the Civil Rights Act of 1964, as amended, and Title I of the Civil Rights Act of 1991 (Doc.
2 1). The initial complaint sued both Creative Networks, LLC and its parent company, Res-
3 Care, Inc. The EEOC alleged that Defendants subjected Allen to adverse employment
4 actions in retaliation for opposing what she reasonably believed was discrimination and/or
5 participating in a proceeding pursuant to Title VII, including being named as a witness in
6 Encinas-Castro's charge of discrimination (Compl. ¶ 10). The alleged retaliatory acts
7 included discipline and threats of termination (Id.).

8 On April 11, 2008, Defendants brought two summary judgment motions (Doc. 93, 97)
9 and the EEOC filed one as well (Doc. 95). The EEOC's motion requested the dismissal of
10 four of Defendants' affirmative defenses: statute of limitations, laches, estoppel, and waiver
11 (Doc. 95). After the motion was filed, the parties reached a stipulation to exclude the four
12 affirmative defenses (Doc. 109). Pursuant to the stipulation, the Court ordered that the
13 specified affirmative defenses be stricken from Defendants' Answers, and the EEOC's
14 summary judgment motion was denied as moot (Doc. 119).

15 The second motion, filed by Defendant Res-Care, sought its dismissal from the case
16 because it was not involved in its subsidiary Creative Networks' personnel decisions
17 (Doc.93). The Court granted this motion on March 19, 2009 and dismissed Res-Care from
18 the case (Doc. 131). Pursuant to Federal Rule of Civil Procedure 54(b), Res-Care moved for
19 entry of a final judgment on April 13, 2009 (Doc. 134). The Court granted Res-Care's
20 motion (Doc. 137), and final judgment as to Res-Care only was entered on May 4, 2009
21 (Doc. 138).

22 Finally, both Defendants brought a Motion for Partial Summary Judgment as to Kathy
23 Allen (Doc. 97). In this motion and the EEOC's response, the parties focused on the prima
24 facie case for retaliation. The Court denied Defendants' motion and allowed the parties to
25 file another summary judgment motion addressing legitimate, non-discriminatory reason and
26 pretext (Doc. 130). This motion is the one pending before the Court.

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STANDARD OF REVIEW

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2 A court must grant summary judgment if the pleadings and supporting documents,
3 viewed in the light most favorable to the nonmoving party, “show that there is no genuine
4 issue as to any material fact and that the movant is entitled to judgment as a matter of law.”
5 Fed. R. Civ. P. 56(c)(2); see Celotex Corp v. Catrett, 477 U.S. 317, 322-23 (1986); Jesinger
6 v. Nev. Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines
7 which facts are material. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986); see also
8 Jesinger, 24 F.3d at 1130. “Only disputes over facts that might affect the outcome of the suit
9 under the governing law will properly preclude the entry of summary judgment.” Anderson,
10 477 U.S. at 248. The dispute must also be genuine, that is, the evidence must be “such that
11 a reasonable jury could return a verdict for the nonmoving party.” Id.

12 A principal purpose of summary judgment is “to isolate and dispose of factually
13 unsupported claims.” Celotex, 477 U.S. at 323-24. Summary judgment is appropriate
14 against a party who “fails to make a showing sufficient to establish the existence of an
15 element essential to that party’s case, and on which that party will bear the burden of proof
16 at trial.” Id. at 322; see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir.
17 1994). The moving party need not disprove matters on which the opponent has the burden
18 of proof at trial. See Celotex, 477 U.S. at 323-24. The party opposing summary judgment
19 need not produce evidence “in a form that would be admissible at trial in order to avoid
20 summary judgment.” Id. at 324. However, the nonmovant “may not rely merely on
21 allegations or denials of its own pleading; rather, its response must . . . set out specific facts
22 showing a genuine issue for trial.” Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co.,
23 Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Brinson v. Linda Rose Joint Venture,
24 53 F.3d 1044, 1049 (9th Cir. 1995).

DISCUSSION

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26 Creative Networks seeks summary judgment on the EEOC’s claim of retaliation
27 related to Allen, asserting there are no genuine issues of material fact from which a jury
28 could conclude that Creative Networks retaliated against Allen in violation of Title VII.

1 Specifically, Creative Networks asserts that the EEOC cannot establish a retaliation claim
2 as to Allen for two separate reasons: (1) Allen is not entitled to the protection of Title VII's
3 participation clause pursuant to 42 U.S.C. § 2000e-3 and (2) Creative Networks demonstrates
4 a legitimate, non-discriminatory reason for its May 30, 2003 counseling session with Allen
5 (Doc. 132, 1:18-24).

6 **I. Retaliation**

7 The EEOC alleges retaliation in violation of Title VII of the Civil Rights Act of 1964,
8 42 U.S.C. § 2000e *et seq.* Title VII makes it an unlawful employment practice for an
9 employer to discriminate against an individual because she has opposed any employment
10 practice made unlawful by Title VII, or because she has made a charge, testified, assisted,
11 or participated in any manner in an investigation, proceeding, or hearing under Title VII. 42
12 U.S.C. § 2000e-3(a).

13 To establish a prima facie retaliation claim under Title VII, an employee must show
14 that (1) she engaged in a protected activity; (2) her employer subjected her to an adverse
15 employment action; and (3) a causal link exists between the protected activity and the
16 adverse action. Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 506
17 (9th Cir. 2000) (citation omitted); Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000);
18 Little v. Windermere Relocation, Inc., 301 F.3d 958, 969 (9th Cir. 2002). To show the
19 requisite causal link, the plaintiff must present sufficient evidence to raise an inference that
20 the protected activity was the likely reason for the adverse action. Cohen v. Fred Meyer,
21 Inc., 686 F.2d 793, 796 (9th Cir. 1982).

22 If a plaintiff has shown a prima facie retaliation claim, then the burden shifts to the
23 defendant to furnish legitimate nondiscriminatory reasons for the adverse employment action.
24 Ray, 217 F.3d at 1240. If the defendant meets that burden, then the plaintiff bears the
25 ultimate burden of demonstrating that the reason was merely a pretext for a discriminatory
26 motive. Id. The plaintiff may show pretext “either directly by persuading the court that a
27 discriminatory reason more likely motivated the employer or indirectly by showing that the
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1 employer’s proffered explanation is unworthy of credence.” Villiarimo v. Aloha Island Air,
2 Inc., 281 F.3d 1054, 1062 (9th Cir. 2002) (quoting Chaung v. Univ. of Cal. Davis, 225 F.3d
3 1115, 1123 (9th Cir. 2000)). Circumstantial evidence relied on to show pretext must be
4 “both specific and substantial.” Id.

5 **A. Prima Facie Case**

6 The Court previously found that the EEOC produced the minimal requisite degree of
7 proof necessary to establish a prima facie case of retaliation (Doc. 130). Then in response
8 to an EEOC motion, the Court allowed additional briefing solely on the issue of protected
9 activity (Doc. 147). Protected activity, one of the components of a prima facie case, had not
10 been raised until Creative Networks’ reply, and thus, the EEOC had not been afforded an
11 opportunity to address the issue (Id.). Moreover, the Court found that the issue of whether
12 being named as a witness in an EEOC charge constituted protected activity was a novel one
13 in the Ninth Circuit that should be addressed prior to any trial (Id.).

14 42 U.S.C. § 2000e-3(a) states that “it shall be an unlawful employment practice for
15 an employer to discriminate against any of his employees . . . because he has opposed any
16 practice made [unlawful by Title VII] . . . or because he has made a charge, testified, assisted,
17 or participated in any manner in an investigation, proceeding, or hearing.” This provision
18 has two components: an opposition clause and a participation clause. Allen cannot seek
19 protection under the opposition clause because she did not oppose the discrimination suffered
20 by Encinas-Castro.⁵ As a result, Allen must rely solely on the participation clause,
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24 ⁵Although the EEOC’s Complaint states that Allen was retaliated against “for
25 opposing what she reasonably believed was discrimination and/or participating in a
26 proceeding pursuant to Title VII”, Allen is not protected under the opposition clause (Compl.
27 ¶ 10). To find protection under the opposition clause, an employee must have opposed an
28 employment practice made unlawful by the statute. 42 U.S.C. § 2000e-3(a). In other words,
the opposition must be to an employment practice of the employer. Here, Allen took no
action to oppose any unlawful employment practices of Creative Networks.

1 contending that she “testified, assisted, or participated in any manner in an investigation,
2 proceeding, or hearing.”

3 According to Creative Networks, protected activity under Title VII’s participation
4 clause requires an affirmative action, such as testifying, assisting, or participating in an
5 investigation, proceeding, or hearing (Doc. 132, 5:6-8). Creative Networks asserts that
6 Allen’s passive acts of being named as a witness in Encinas-Castro’s EEOC charge and
7 telling others that she had been named is not enough to gain protection under the
8 participation clause (Id. 5:17-19). Allen had not made a charge of discrimination, testified,
9 or participated in an investigation, proceeding, or hearing (Id. 5:21-23). Moreover, argues
10 Creative Networks, Allen did not even know that she had been named in the EEOC charge
11 until after the fact (Id. 5:16-17).

12 The EEOC, however, contends that simply being named in an EEOC charge is
13 sufficient for protection under the participation clause for two reasons. First, the plain
14 language of Title VII’s retaliation provision broadly protects assistance or participation in
15 an investigation “in any manner.” (Doc. 148, 2:23-27). According to the EEOC, this phrase
16 “in any manner” is broadly interpreted by courts such that its expansive meaning is given
17 literal effect (Id. 4:9-11). Second, the EEOC argues that the purpose of Title VII’s retaliation
18 provision is to protect employees like Allen (Id. 4:22-5:2). Without such protection, named
19 witnesses could be intimidated freely by an employer into not testifying on behalf of a co-
20 worker (Id. 5:3-10). Such threats would deter employees from serving as witnesses and harm
21 Title VII prosecutions (Id. 5:22-6:2).

22 The Court finds no Ninth Circuit authority directly on point on the issue of whether
23 being named as a witness in a EEOC charge constitutes protected activity. However, courts
24 have utilized the approach advocated by the EEOC and considered both the statutory
25 language and purpose of Title VII in determining whether an activity is protected under the
26 anti-retaliation clause.
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1 1. Plain Language of Retaliation Clause

2 In construing a statute, a court must start with the language of the statute itself. The
3 Supreme Court has advised, “We have stated time and again that courts must presume that
4 a legislature says in a statute what it means and means in a statute what it says there.” Conn.
5 Nat’l Bank v. Germain, 503 U.S. 249, 253-54 (1992). When the words of a statute are
6 unambiguous, judicial inquiry ends upon a review of the statute’s language. Id. at 254.

7 42 U.S.C. § 2000e-3(a) states that “it shall be an unlawful employment practice for
8 an employer to discriminate against any of his employees . . . because he has opposed any
9 practice made [unlawful by Title VII] . . . or because he has made a charge, testified, assisted,
10 or participated in any manner in an investigation, proceeding, or hearing.” Courts have
11 consistently recognized that the explicit language of the participation clause offers broad
12 protection to Title VII claimants. In Deravin v. Kerik, the Second Circuit stated that the
13 “explicit language . . . is expansive and seemingly contains no limitations.” 335 F.3d 195,
14 203 (2d Cir. 2003). The court found that the words “participate[] in any manner” evinced
15 Congress’ intent to confer broad protection because the word “any” had an expansive
16 meaning. Id. at 204. “So long as ‘Congress did not add any language limiting the breadth
17 of that word,’ the term ‘any’ must be given literal effect.” Id. (quoting United States v.
18 Gonzales, 520 U.S.1 (1997)). Likewise, the Eleventh Circuit in Merritt v. Dillard Paper Co.
19 stated that the anti-retaliation provision is “straightforward and expansively written.” 120
20 F.3d 1181,1186 (11th Cir. 1997). The court continued, “as to ‘participated in any manner,’
21 the adjective ‘any’ is not ambiguous; it has a well-established meaning. . . ‘Congress did not
22 add any language limiting the breadth of that word,’ so ‘any’ means all.” Id. (quoting
23 Gonzales, 520 U.S. 1).

24 Other circuits, including the Ninth, have adopted a similarly broad reading of the
25 participation clause. See e.g., Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1006 n.18
26 (5th Cir. 1969) (noting that the participation clause provides “exceptionally broad” protection
27 for employees covered by Title VII); Booker v. Brown & Williamson Tobacco Co., 879 F.2d
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1 1304, 1312 (6th Cir. 1989) (noting that “federal courts have generally granted less protection
2 for opposition than for participation” and that the participation clause offers “exceptionally
3 broad protection”); Learned v. City of Bellevue, 860 F.2d 928, 932 (9th Cir. 1988) (“The
4 participation clause is broadly construed to protect employees who utilize the tools provided
5 by Congress to protect their rights.”)(citation omitted); Kelly v. City of Albuquerque, 542
6 F.3d 802, 814 (10th Cir. 2008) (“The term ‘any’ carries an expansive meaning when . . . it
7 is used without limitation. . . When the term is given its natural effect in this statutory context
8 it relates to all types of participation.”) (citation omitted).

9 As stated above, when the words of a statute are unambiguous, judicial inquiry ends
10 upon a review of the statute’s language. Conn. Nat’l Bank, 503 U.S. at 254. As a result,
11 reliance on the statute alone likely is sufficient to find that Allen engaged in protected
12 activity when she was named as a witness in Encinas-Castro’s charge of discrimination. The
13 participation clause has been given an expansive meaning by the courts and interpreted very
14 broadly to encompass many forms of participation. See e.g., Hashimoto v. Dalton, 118 F.3d
15 671, 680 (9th Cir. 1997) (initiating complaint with EEOC counselor is protected activity);
16 Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 174-75 (2d Cir. 2005) (employee named
17 as witness in deposition but who never testifies engages in protected activity); Merritt, 120
18 F.3d at 1186 (employee who involuntarily testifies engages in protected activity).

19 Here, Allen was named specifically in Encinas-Castro’s charge of discrimination as
20 a witness to discriminatory conduct and then discussed that fact with both Encinas-Castro
21 (PSOF ¶ 5) and Faulkner (PSOF ¶¶ 5-6). These actions associated Allen with Encinas-
22 Castro’s Title VII claim and were sufficient to place her within the protection of the
23 participation clause.

24 2. Purpose of Retaliation Provision

25 In addition to the statutory language, some courts consider the broader context of the
26 statute as a whole to ensure that statutory provisions are interpreted consistent with a statute’s
27 overall purpose. See Robinson v. Shell Oil Co., 519 U.S. 337, 345-46 (1997). The anti-
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1 retaliation provision 42 U.S.C. § 2000e-3(a) is meant to prevent harm to employees who
2 report discriminatory employment practices or assist in the investigation of these practices.
3 Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn., 129 S. Ct. 846, 852
4 (2009). The Supreme Court in Crawford held that “prudent employees would have a good
5 reason to keep quiet about Title VII offenses against themselves or against others” if an
6 employer could punish employees who reported discrimination without remedy. Id. The
7 purpose of the anti-retaliation clause is to “[maintain] unfettered access to statutory remedial
8 mechanisms.” Robinson, 519 U.S. at 346; see also Glover v. S.C. Law Enforcement Div.,
9 170 F.3d 411, 414 (4th Cir. 1999) (“Section 704(a)’s protections ensure not only that
10 employers cannot intimidate their employees into foregoing the Title VII grievance process,
11 but also that investigators will have access to the unchilled testimony of witnesses.”);
12 Booker, 879 F.2d at 1313 (“The purpose of the statute is to protect access to the machinery
13 available to seek redress for civil rights violations and to protect the operation of that
14 machinery once it has been engaged.”).

15 In Jute, a case on which both parties rely, the Second Circuit considered the anti-
16 retaliation provision’s broader context to ensure that its language was interpreted consistent
17 with Title VII’s overall purpose. 420 F.3d at 174. The court determined that the anti-
18 retaliation clause was enacted to shield an employee who attempts to challenge
19 discriminatory conduct from retaliation by his employer. Id. at 175. To leave an employee
20 who is “poised to support a co-worker’s discrimination claim wholly unprotected” would be
21 destructive of that purpose and would mean that an employer could retaliate freely provided
22 that it did so before the employee testified or otherwise participated in a Title VII proceeding.
23 Id.

24 Beyond the broad statutory language, the Court finds that the purpose of Title VII’s
25 retaliation provision is to protect employees like Allen whether they are poised to support a
26 co-worker’s discrimination claim, dispute the claim, or merely present percipient
27 observations. Investigators must have access to witness testimony that has not been shaped
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1 by an employer in an attempt to avoid liability. Having been named in a EEOC charge, Allen
2 may have been contacted by the EEOC during their investigation and asked to provide a
3 statement. Without the protection of Title VII, witnesses named in EEOC charges could be
4 intimidated into not testifying or supporting a co-worker's discrimination claims. Title VII
5 prosecutions would be chilled because witnesses would be afraid of retaliation by their
6 employers.

7 3. Jute v. Hamilton Sundstrand Corporation

8 Both parties rely on the Second Circuit's decision in Jute for their arguments
9 regarding protected activity. 420 F.3d at 174. In that case, the plaintiff Donna S. Jute
10 alleged that she was retaliated against after she was named as a witness in co-worker
11 Maryanne Brunton's Title VII suit. Id. at 169. After Brunton had claimed that sexually
12 disparaging flyers about her were posted in the workplace, Jute provided two statements to
13 investigators. Id. When Brunton later sued alleging a hostile work environment, Jute agreed
14 to testify on Brunton's behalf and saved vacation days to insure that she was readily
15 available. Id. Additionally, Brunton at her deposition named Jute as a favorable witness and
16 the only person to observe the posting of the flyers. Id. The following day, Jute was
17 removed from a team responsible for a computer system upgrade. Id. at 170. After
18 contacting Brunton to inquire whether she would be deposed, Jute learned for the first time
19 that Brunton's case had settled and that she had been named as a favorable witness by
20 Brunton during her deposition. Id. Jute claimed that the removal from the team, among
21 other adverse employment actions, was in retaliation for being named as a witness in
22 Brunton's deposition. Id. at 170-71.

23 Although Jute never actually testified, the Second Circuit held that she was protected
24 under the anti-retaliation clause. After an examination of the statute's language and overall
25 purpose, the court held that the participation clause extends to an employee who is named
26 as a voluntary witness in a Title VII suit, but who never is called to testify. Id. at 168, 175.
27 As such, Jute engaged in a protected activity for purposes of a retaliation claim. Id. at 175.
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1 The EEOC argues that similar to Jute who was named by Brunton in her deposition
2 as a favorable witness, Allen participated in the investigation of Encinas-Castro's Title VII
3 claim by being named as witness in her EEOC charge (Doc. 148, 4:4-6). However, Creative
4 Networks argues that this case is distinguishable because Jute was a *voluntary* witness
5 entitled to protection because of her involvement in the Brunton litigation (Doc. 150, 5:15-
6 18). Jute voluntarily gave statements to the employer's investigators and planned to testify
7 in support of Brunton's discrimination claims (Id. 4:18-21). She even saved vacation days
8 in order to be immediately available (Id.). Allen, on the other hand, was a "passive
9 participant" who name happened to appear in the EEOC charge, without her knowledge (Id.
10 5:26-6:1). Creative Networks argues that there is no evidence that she volunteered to testify
11 or planned to testify on Encinas-Castro's behalf (Id. 6:1-3).

12 A review of the Second Circuit's decision reveals that there are several similarities
13 between the facts of the present case and the Jute case. First, similar to Jute who was named
14 in a deposition but never testified, Allen was named in an EEOC charge but was never called
15 to testify or otherwise support Encinas-Castro's discrimination claim. Also, similar to Jute
16 who was unaware that Brunton had named her as a favorable witness, Allen did not know
17 that Encinas-Castro included her name in the EEOC charge until after the fact. However, as
18 Creative Networks points out, Jute had taken certain affirmative steps that evidence her
19 involvement. She had provided statements voluntarily to the employer's investigators and
20 reserved vacation days to be available to testify. Allen, on the other hand, took no steps
21 besides telling Faulkner after the fact that she was named in Encinas-Castro's EEOC charge.
22 In this sense, Allen was an involuntary participant who was forced into the midst of Encinas-
23 Castro's discrimination claim.

24 While the facts in Jute are somewhat distinguishable, the Court adopts the approach
25 of the Second Circuit in examining the statutory language and purpose of Title VII, as
26 discussed above. See pp. 11-14. Under this analysis, the Court finds that Allen engaged in
27 a protected activity when she was named in Encinas-Castro's EEOC charge, and thus, the
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1 first prong of Allen's prima facie case is met. The Court previously found that the EEOC
2 produced the minimal requisite degree of proof necessary to establish the other two prongs
3 of a prima facie case of retaliation: adverse employment action and causation (Doc. 130).

4 **B. Legitimate Non-Discriminatory Reason**

5 Once the prima facie case of retaliation has been established, a defendant must
6 articulate a legitimate, non-discriminatory reason for its actions. See Davis v. Team Elec.
7 Co., 520 F.3d 1080, 1094 (9th Cir. 2008). Creative Networks argues that it had a legitimate,
8 non-discriminatory reason for the May 30, 2003 counseling session with Allen. According
9 to Creative Networks, Allen suffered from several performance problems: (1) Allen had
10 difficulty adjusting to the change in culture from a "mom and pop" company to the larger
11 Creative Networks (Doc. 133, Def's Statement of Facts ("DSOF"))¶ 6); (2) Allen was found
12 "sitting in someone else's room" rumoring and gossiping (DSOF ¶¶ 9-10); and (3) Allen was
13 calling Creative Networks' Surprise office (DSOF ¶ 13). The EEOC also concedes that
14 Creative Networks has met its burden of offering a legitimate, non-discriminatory reason for
15 its action (Doc. 143, 7:12-13, 8:1-2).

16 **C. Pretext**

17
18 The EEOC is now required to produce evidence sufficient to create a genuine issue
19 of fact as to whether Creative Networks' legitimate and non-discriminatory reason was a
20 mere pretext for discrimination. The EEOC "can show pretext directly, by showing that
21 discrimination more likely motivated the employer, or indirectly, by showing that the
22 employer's explanation is unworthy of credence" because it is inconsistent or otherwise not
23 believable. Vasquez v. County of L.A., 349 F.3d 634, 641 (9th Cir. 2003) (citation omitted).
24 "To show pretext using circumstantial evidence, a plaintiff must put forward specific and
25 substantial evidence challenging the credibility of the employer's motives." Id. at 642
26 (citation omitted). The same evidence can be used to establish a prima facie case and to
27 create a genuine issue of material fact as to whether an employer's explanations are
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1 pretextual. Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 870 (9th Cir. 1996)
2 (citation omitted).

3 The EEOC has offered no direct evidence, but rather has relied upon only
4 circumstantial evidence. Several of the EEOC's arguments regarding pretext are unavailing.
5 The EEOC contends that Creative Networks' claim that Allen had difficulty adjusting to the
6 change in culture is unworthy of credence (Doc. 143, 9:21-10:3). The EEOC asserts that
7 Creative Networks was not a "mom and pop" company during Allen's employment because
8 Res-Care had purchased Creative Networks three years prior to Allen's hiring (Id. 10:3-8).
9 However, the deposition testimony submitted by the parties shows that Creative Networks'
10 culture changed when Cornelison assumed control of the company, rather than earlier.
11 (DSOF ¶ 6; Doc. 133, Ex. F, Faulkner Dep. at 26-27). Even after the merger of Creative
12 Networks and Res-Care, the "mom and pop" management remained in place until August
13 2002 when Cornelison was hired (PSOF ¶ 37). Allen worked at Creative Networks starting
14 in October 2001 and Cornelison did not start until August 2002 (PSOF ¶¶ 35, 37). Thus,
15 Allen worked in a "mom and pop" type atmosphere for nearly a year before Cornelison's
16 hiring and she was reluctant to adapt to the new corporate culture.

17 Additionally, the EEOC argues that Creative Networks' claim that Allen's poor
18 performance motivated the counseling session is undermined because Allen had never been
19 disciplined or counseled prior to May 30, 2003 (Doc. 143, 10:9-13). However, Faulkner
20 testified at her deposition that she had previously counseled a group of employees, including
21 Allen, regarding the company's expectations (Doc. 133, Ex. F, Faulkner Dep at 70-71).

22 Furthermore, the EEOC points to the fact that no other employees were summoned
23 into counseling sessions for trouble adjusting to the culture change (Doc. 143, 10:24-28).
24 In response, Creative Networks argues that several other employees were similarly counseled
25 during the relevant period, including some for negative attitudes (Doc. 150, 10:13-15).
26 Creative Networks references a chart submitted with its Initial Disclosure Statement that lists
27 the terminated employees for the relevant period, as well as to counseling notes taken by
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1 Cornelison and other managers (Id. 10:17-19; Doc. 133, Ex. D). However, the EEOC failed
2 to conduct discovery regarding these terminations. Even if Allen was treated differently than
3 other employees, as the EEOC claims, such an argument is more appropriate for a disparate
4 treatment claim, rather than one for retaliation. The EEOC must show not that Allen was
5 treated differently, but rather that she was counseled because of her protected activity, i.e.
6 being named as a witness in an EEOC charge.

7 Despite these unsuccessful arguments, the Court finds that the EEOC nevertheless has
8 met its burden of showing that Creative Networks' legitimate, non-discriminatory reason for
9 counseling Allen was pretextual. First, the close proximity in time between the protected
10 conduct and the adverse employment action is evidence of pretext (Doc. 143, 9:12-20).
11 Pretext can be established where there is a short period of time between the protected conduct
12 and the adverse action. See Miller v. Fairchild Indus., Inc., 885 F.2d 498, 505 (9th Cir. 1989)
13 (stating that a jury could find pretext based on close proximity between the protected conduct
14 and the adverse action); Passantino, 212 F.3d at 507 (“[E]vidence based upon timing can be
15 sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by
16 the defendant.”) (citation omitted). Encinas-Castro went to the EEOC on May 16, 2003 to
17 file a charge of discrimination that included Allen's name as a witness (protected conduct)
18 (PSOF ¶¶ 1,2). Less than two weeks later, on May 30, 2003, Allen was called into a
19 counseling session where her job was threatened (adverse action) (Id. ¶ 15). This close
20 proximity in time between the filing of Encinas-Castro's EEOC charge naming Allen and the
21 counseling session contributes to a finding that Creative Networks' reasons for counseling
22 Allen were pretextual.

23 Second, the manner in which the May 30, 2003 counseling session was conducted
24 provides some evidence that the real reason for the meeting was to deter Allen from assisting
25 Encinas-Castro with her discrimination charge or from filing one of her own (Doc. 143, 11:3-
26 6). Cornelison summoned Allen to his office shortly after firing Encinas-Castro (PSOF ¶ 15;
27 Ex. 5, Allen Dep. at 95:13-18; Ex. 6, Allen Decl. ¶ 6). In addition to Cornelison, three other
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1 managers were in attendance at the counseling session (PSOF ¶ 15; Ex. 5, Allen Dep. at
2 95:19-21; Ex. 6, Allen Decl. ¶ 7; Ex. 7, Faulkner Dep. at 96:9-16; Ex. 8, Cornelison Dep. at
3 180:20-23). During the session, Cornelison threatened Allen's employment by stating, "I
4 want to tell you something right now, I could fire you right now, because this is a right-to-
5 work state, and I don't even have to have a reason, but I want to give you a chance to be a
6 successful employee here." (PSOF ¶ 16; Ex. 5, Allen Dep. at 95:22-25) Additionally,
7 Cornelison's manner was belligerent and hostile towards Allen, even though her alleged
8 performance issues were non-terminable offenses (Doc. 132, 7:25-26; PSOF ¶¶ 21-22).

9 Third, the reference to Encinas-Castro and her protected conduct during the May 30,
10 2003 counseling session with Allen suggests that the counseling session was about
11 intimidating Allen (Doc. 143, 12:1-5). Cornelison asked whether Allen "knew anything
12 about this EEOC charge" during the counseling session and stated, "Well, there's been talk
13 that you have been calling back and forth to Surprise office and spreading rumors." (PSOF
14 ¶¶ 17-18; Ex. 5, Allen Dep. at 96:3-16) Since Encinas-Castro worked in the Surprise office
15 prior to her firing, Allen understood Cornelison's reference to the Surprise office to be a
16 reference to Encinas-Castro (PSOF ¶¶ 19-20; Ex. 6, Allen Decl. ¶ 9). Faulkner also took the
17 comments about the Surprise office to mean Allen's conversations with Encinas-Castro,
18 since the two women were friends (PSOF ¶ 30; Ex. 7, Faulkner Dep. at 101:2-16).

19 The Court finds genuine issues of material fact exist regarding whether Creative
20 Networks' proffered reason for counseling Allen is unworthy of credence. Creative
21 Networks held the May 30, 2003 counseling session only two weeks after Encinas-Castro
22 had gone to the EEOC to file a discrimination charge and named Allen as a witness. The
23 counseling session also was held within minutes of Encinas-Castro's termination.
24 Additionally, during the counseling, Creative Networks referenced both Encinas-Castro's
25 discrimination charge and Allen's discussions with the Surprise office, where Encinas-Castro
26 worked. Moreover, Creative Networks threatened Allen for what it admits were non-
27 terminable offenses. The Court finds that a reasonable jury could conclude that the purpose
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1 of the May 30, 2003 counseling was to threaten Allen's termination to deter her from
2 assisting Encinas-Castro with her claim, or to discourage Allen from filing her own
3 discrimination claim. As the Court cannot find that Creative Networks is entitled to
4 summary judgment as a matter of law on Allen's retaliation claim, the Court denies Creative
5 Networks' motion.

6 **CONCLUSION**

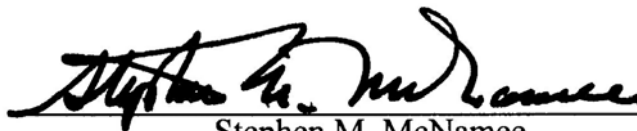
7 Summary judgment is not proper because the EEOC has demonstrated a genuine issue
8 of material fact as to Kathryn Allen's claim for retaliation under Title VII.

9 Accordingly,

10 **IT IS HEREBY ORDERED DENYING** Defendant Creative Networks, LLC's
11 Motion for Partial Summary Judgment (Doc. 132).

12 **IT IS FURTHER ORDERED** setting a final pretrial conference for **Wednesday,**
13 **March 3, 2010 at 2:00p.m.** before the Honorable Stephen M. McNamee in Courtroom 605
14 at 401 W. Washington Street, Phoenix, Arizona 85003.

15 DATED this 15th day of January, 2010.

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19 _____
20 Stephen M. McNamee
21 United States District Judge
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