

**THE AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW AND THE
GOVERNMENT ACCOUNTABILITY PROJECT**

**PANEL 2
THE SPECIAL CASE OF NATIONAL SECURITY WHISTLEBLOWERS**

**“AVOIDING TRAPS, MAKING CHANGE AND AN
EFFECTIVE LEGISLATIVE RESPONSE”**

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President, National Whistleblower Center
www.whistleblowers.org
June 23, 2008

National security whistleblowers lack adequate protections under law.² As a group, they are excluded from the protections afforded to other federal employees under the Civil Service Reform Act/Whistleblower Protection Act (“WPA”). Federal employees, including those who work in national security related agencies, urgently need Congress to enact fair and reasonable whistleblower protections. Any such law should provide national security whistleblowers with the same level of protection currently afforded all federal workers under Title VII of the Civil Rights Act of 1964, which includes compensatory damage awards, access to federal court and an opportunity to have a jury hear the case. *See*, Dan Browning, “Ex-Agent Wins Lawsuit Against FBI,” *Minneapolis Star Tribune* (February 5, 2007), Kohn Presentation, pp. 12-13.

**CURRENT STATUS OF FBI/NATIONAL SECURITY WHISTLEBLOWER
PROTECTIONS**

National security whistleblowers were explicitly excluded from coverage under the Civil Service Reform Act/Whistleblower Protection Act (“WPA”). Under these laws, the definition of a covered “executive agency” explicitly *did not include* the Federal Bureau of Investigation (“FBI”), Central Intelligence Agency (“CIA”), the Defense Intelligence Agency, the National Security Agency, among other intelligence organizations. The President of the United States also has the authority to exclude other intelligence related agencies (or units within agencies) from coverage under the WPA, 5 U.S.C. section 2302(a)(2)(C). Despite the exclusions contained in the WPA, the Department of Justice implemented regulations governing FBI employee whistleblowing. These regulations as codified in 28 C.F.R. Part 27. Congress also enacted a very limited Intelligence Community whistleblower law. The following table compares the whistleblower protections provided FBI agents (and other employees in the intelligence communities) with twenty other federal whistleblower laws. The results speak for themselves:

Employee Whistleblower Protection Statutes	Right to Present Witnesses Before A Judge	Compensatory or Special Damages	Right to a Trial or Hearing	Judicial Review	Right to Have Case Heard by Judge or Jury
Sarbanes-Oxley Act 18 U.S.C §1514A	Yes	Yes	Yes	Yes	Yes
Superfund Act 42 U.S.C §9610	Yes	Yes	Yes	Yes	Yes
Clean Air Act 42 U.S.C §7622	Yes	Yes	Yes	Yes	Yes
Pipeline Safety Act 49 U.S.C §60129	Yes	Yes	Yes	Yes	Yes
Safe Drinking Water Act 42 U.S.C §300J-9(I)	Yes	Yes	Yes	Yes	Yes
Solid Waste Disposal Act 42 U.S.C §6971	Yes	Yes	Yes	Yes	Yes
Toxic Substances Act 15 U.S.C §2622	Yes	Yes	Yes	Yes	Yes
Water Pollution Control Act 33 U.S.C §1367	Yes	Yes	Yes	Yes	Yes
Energy Reorganization Act 42 U.S.C §5851	Yes	Yes	Yes	Yes	Yes
Aviation Reform Act 49 U.S.C §42121	Yes	Yes	Yes	Yes	Yes
Vehicle Safety Act 49 U.S.C §31105	Yes	Yes	Yes	Yes	Yes
False Claims Act 31 U.S.C §3730 (h)	Yes	Yes	Yes	Yes	Yes
Federal Reserve Bank Employee Protection Act 31 U.S.C §5328	Yes	Yes	Yes	Yes	Yes
Occupational Health and Safety Act	Yes	Yes	Yes	Yes	Yes
FDIC Employee Protection Act 12 U.S.C §1790 (b)	Yes	Yes	Yes	Yes	Yes
First Amendment Violations 42 U.S.C §1983	Yes	Yes	Yes	Yes	Yes
Title VII Anti-Retaliation 42 U.S.C §2000e-3(a)	Yes	Yes	Yes	Yes	Yes
Federal Court Witnesses 42 U.S.C §1985	Yes	Yes	Yes	Yes	Yes
Americans with Disabilities Act 42 U.S.C §12203	Yes	Yes	Yes	Yes	Yes
FBI Whistleblower Protection 27 C.F.R. Part 28	No	No	No	No	No
Intelligence Community WPA, 5 U.S.C. App. 3, sec. 8H	No	No	No	No	No

LEGISLATIVE FIX

National security whistleblowers need legal protection. Currently, both the Senate and the House have passed amendments to the Whistleblower Protection Act (“WPA”) which seek to overhaul the WPA and correct numerous defects in the law and/or the decisions of the U.S. Court of Appeals for the Federal Circuit. *See*, H.R. 985 and S. 274. The two amendments are different, and the two Houses of Congress are in the process of reconciling these differences.

The current prospects for protecting national security whistleblower protection within the 110th Congress are quickly fading. First, the Bush Administration targeted the national security related provisions in the proposed amendments to the Whistleblower Protection Act as grounds for vetoing the legislation.³ This veto threat has resulted in added Congressional opposition to the Whistleblower Protection Act Amendments, especially those related to national security whistleblowers.

Second, S.274, the Senate’s amendments to the WPA, although well intentioned, still contain national security exclusions. In other words, if the Senate bill passes, national security whistleblowers will remain without any adequate legal protection and will remain outside the protections of the WPA. Thus, the only way national security whistleblowers will be protected under the current WPA reform efforts is if the Senate agrees with the House version of the law, despite the veto threats coming from the White House.

In Section 10 of H.R. 985 the House of Representatives took the lead in proposing explicit protections for national security whistleblowers. Section 10 is a major advancement in current law, and would permit national security whistleblowers in the FBI, CIA, NSA and other agencies to “blow the whistle” and obtain legal protections. The inclusion of Section 10 in any final House-Senate compromise should be strongly supported. However, even Section 10 contains significant shortcomings which undercut the intended reform. During the floor debate on H.R. 985, amendments to weaken the national security protections were proposed and passed. These amendments were political in nature and were not part of the original legislation. Two aspects of the last-minute amendments are of particular concern: (1) the scope of protected activity was radically narrowed, and (2) the right to a jury trial, which was explicitly granted to other federal employees, was deleted out of Section 10. *See*, H.R. 985 Section 10(f) (3)

[narrow definition of protected Congressional disclosures]; Section 10(f)(4) [narrow definition of “officials” for whom whistleblower disclosures may be made]; Section 10(c)(3) [dropping of the word “jury” which existed in the earlier versions]. It was originally hoped that the problems caused by the last-minute amendments would be favorably resolved in the House-Senate negotiation process.

If the current reform efforts do not succeed, the whistleblower community should reconsider its approach to seeking to amend the WPA. The WPA statute is riddled with numerous problems, and haunted by an endless series of bad judicial precedent from the U.S. Court of Appeals for the Federal Circuit. One of the problems with the WPA-correction approach to reform the WPA is that there is simply too much to correct, and proposed amendments become long and complicated, increasing the risk that Members of Congress will not understand the law and that the Executive Branch will raise disingenuous objections to the law based, in part, on the cumbersome nature of the needed amendments.

An alternative approach to reform is to abandon the WPA model altogether. Instead, federal whistleblower rights should be predicated on the Title VII model. The basis for this alternative approach is as follows:

1. National security employees are already protected under Title VII’s anti-discrimination laws. Currently, under Title VII of the Civil Rights Act of 1964, *as amended*, essentially **all** federal employees are already protected. Consistent with this coverage, the U.S. Supreme Court, in a 2008 decision, held that federal employees were also covered under the Age Discrimination in Employment Act’s anti-retaliation provisions. *Gomez-Perez v. Potter, Postmaster General*, -- U.S. – (May 27, 2008). Thus, precedent already exists which permits federal employees who work in agencies such as the FBI and CIA to have access to federal courts in retaliation and discrimination cases.

Administrative procedures and practices designed to ensure that confidential information is not improperly injected into a Title VII proceeding already exist, and employees at the FBI, CIA, NSA and other agencies regularly file Title VII claims. There is no evidence on the public record which indicates that these agencies have not been able to fully protect against the release of classified information during Title VII discrimination proceedings.

2. Under Title VII employees who allege discrimination or retaliation are already entitled to due process rights envisioned under H.R. 985. These laws have provided federal employees the right to fair and adequate procedures for nearly 20 years. Employees can obtain the simple justice which is expected in our system, including a day in court, a trial by a jury of one's peers and a full "make whole" remedy, including attorney's fees and compensatory damages, if they prevail. Procedures which work are already in place and already cover national security related employees. Simply expanding the pre-existing structure to also include retaliation based on other forms of protected disclosures would be feasible and would negate many of the "red herring" arguments set forth by opponents of protecting national security whistleblowers under H.R. 985/S. 274

3. The actual adjudication of a whistleblower retaliation case and a civil rights retaliation case are substantially identical. The only difference is what constitutes protected activity. Under the Civil Rights laws, protected activity concerns civil rights-related disclosures. Under the WPA, protected activity generally means a violation of law or waste of taxpayer monies. However, under both Title VII and the WPA, there is no need to demonstrate the veracity or validity of the underlying protected disclosure. The investigation of substantive whistleblower allegations can (and would) remain within the domain of the Office of Inspectors General or other oversight bodies.

In other words, under both anti-retaliation laws, it is the act of disclosure that is protected – regardless of whether the allegations pan out. In this manner the likelihood that a national security related whistleblower case results in the disclosure of any classified information is not only remote, but also almost inconceivable. Unquestionably, the disclosure of classified information in such proceedings would be prohibited and unnecessary.

The real issue in a retaliation case – whether it is filed under Title VII or the WPA -- concerns employee performance. Was the alleged adverse action in retaliation for a protected disclosure or what is justified under the circumstances. This is the heart of all employment-retaliation cases, and the evidentiary analysis of this aspect of a case is *identical*, regardless of whether the case is filed under the WPA or Title VII. Under Title VII, FBI agents and CIA case officers can have allegations of their alleged performance failures and misconduct fully adjudicated in Court. Issues of motive, willfulness and pretext are all relevant in a Title VII retaliation case. These are the precise issues which are also material in a whistleblower retaliation *employment discrimination* case. In other words, an employment discrimination case should not be confused with a case concerning the validity of the underlying whistleblower allegations.

4. Congress has already recognized the similarity of Title VII cases and other federal employee retaliation claims (including those under the WPA) under the current Civil Service Reform Act/WPA. Federal employee cases which include claims under Title VII and claims under other provisions of the civil service laws are known as “mixed cases.” As explained by the D.C. Circuit, retaliation cases – whether under Title VII or under another federal law (such as the WPA) essentially adjudicate the same issues: “This holding [conferring federal court jurisdiction over mixed cases] also reflects the legislative history, which states that ‘questions of the employee’s inefficiency or misconduct, and discrimination by the employer, [are] two sides of the same question and must be considered together.’” *Ikossi v. Department of Navy*, 516 F.3d 1037, 1042 (D.C. Cir. 2008). The *Ikossi* decision is attached Kohn Presentation, p. 14.

5. Congress has also recognized the right of federal employees to have their “mixed case” heard in a real court. Under the law, employees are encouraged to join their Title VII claim with other civil service claims (such as the WPA causes of action) and have those claims adjudicated by *one court*. As recently recognized by the U.S. Court of Appeals for the District of Columbia Circuit, under *current* law federal employees can bypass the Merits Systems process and go directly to federal court with their Civil Service claims (including WPA claims) if they simply join the civil service issues with the Title VII complaint. *Ikossi v. Department of Navy*, 516 F.3d 1037, 1042 (D.C. Cir. 2008).

6. Employees in the national security area have already used Title VII to obtain access to Court. Although such avenues are only open to employees who have valid Title VII discrimination cases (in addition to whistleblower-related concerns), the fact that national security employees have obtained access to (and justice in) federal courts undercuts the various hypothetical “red herrings” opponents of whistleblower protection often rely upon to justify their position.

This is exemplified in the case of former Special Agent Jane Turner, a twenty-five year veteran of the FBI. Jane Turner blew the whistle on the FBI’s mishandling of crimes against children on the Turtle Mountain and Fort Berthold Indian reservations. She filed whistleblower claims with the Office of Inspector General and the Office of Professional Responsibility. She also filed a sex discrimination complaint with the EEO covering many of the same issues. Under Title VII she was permitted to have her retaliation case heard by a jury of her peers. *Turner v. Gonzales*, 421 F.3d 688 (8th Cir. 2005). The *Turner* decision is attached to Kohn Presentation, p. 21.

At trial Jane Turner heavily relied upon examples of the FBI's mishandling of child abuse cases as evidence that she was the target of retaliation. Under Title VII, once an employee's job performance is questioned, the substantive nature of that job will always be an issue. In the context of a discrimination case (under Title VII or the WPA) these performance issues can easily be introduced into evidence without the disclosure of agency secrets or classified information. This is exactly what the D.C. Circuit understood would happen in *Ikossi*. This is what did happen in *Turner*.

Unlike the overwhelming majority of federal employees who are forced to have their cases heard within the Merit Systems process, Jane Turner was able to have her day in Court. Vindication in Court is central to the American system of justice and in repairing the damage inflicted upon employee-whistleblowers. This is evident from the news account on the Turner case which appeared in the *Minneapolis Star Tribune* after the jury returned its verdict (Kohn Presentation, p. 11):

“Federal jurors hugged former FBI agent Jane Turner on Monday after awarding her \$565,000 in damages and finding that the agency had retaliated against her . . .

“I think you are the very best FBI agent,’ juror Mashima Dickens told Turner, who investigated child sex-abuse crimes. ‘Looking at the way you were treated, I just said you were screwed left and right,’ Dickens said, tears rolling down her cheeks.

“I just want to tell you I have nothing but the utmost respect for you,’ juror Rene Anderle said as she hugged Turner in the hallway outside Chief Judge James Rosenbaum’s courtroom in Minneapolis.

“This is vindication,” said Turner, 55, of St. Paul. ‘We spoke truth to power, and we won.’”

Federal agencies and the White House may fear this result – but the American public needs its whistleblowers protected. This can only happen if they the employees have access to a system which respects due process and which permits them to obtain final vindication. Nothing else will work.

As a matter of policy it makes absolutely no sense to permit national security employees to have jury trials in federal court on discrimination cases but prohibit such trials on whistleblower issues. In reality, discrimination and retaliation claims adjudicate “two sides of the same question.” Excluding national security whistleblowers from the protection afforded FBI, CIA and NSA employees under Title VII is not justified, except if the intent of the exclusion is based on a desire to deter whistleblowing within these agencies, and to freely punish the very few who would risk their careers without strong legal backing.

Using Title VII procedures and remedies as a model for protecting federal employee whistleblowers (including national security whistleblowers) is easily justifiable to skeptical Members of Congress and the general public. Whistleblowers should have equal rights with other classes of employees. It is that simple. National security employees have been free to use Title VII for years, including the use of federal courts and juries to adjudicate the merits of retaliation and discrimination cases at the FBI, CIA and NSA, and there is no record of abuse of improper disclosure of secrets. Far from it. The cases are processed routinely by the federal judiciary. Moreover, the federal judiciary has tremendous authority to ensure the protection of government secrets – including the use of sealed proceedings, protective orders and harsh sanctions (including civil and criminal contempt).

Use of the Title VII model would shortcut attempts by those in Congress or the Executive Branch to come up with various “red herrings” designed to scare away support for whistleblowers, or misconstrue the meaning of proposed legislation. National security whistleblowers would simply obtain the very same procedures and remedies they *already have* under Title VII and other anti-retaliation laws (such as Age Discrimination). Incorporating whistleblower protections into the existing Title VII process would simply broaden the scope of activities already protected under law, without having to create a new bureaucracy to adjudicate these issues.

CONCLUSION

Based on fifteen years of successfully representing national security whistleblowers in hard-fought cases against the government, national security whistleblowers urgently need protection. The enactment of H.R. 985 would constitute a major step forward in protecting national security whistleblowers. The history and legal precedent under covering national security employees under Title VII of the Civil Rights Act strongly supports the passage of the reforms set forth in Section 10 of H.R. 985. If national security whistleblowers do not obtain full protection in the 110th Congress, we strongly recommend that the whistleblower community re-double its efforts to enact these protections and furthermore embrace Title VII as a model for a national whistleblower protection law.

A draft of such a whistleblower protection law is attached below.

**PROPOSED WHISTLEBLOWER PROTECTION AMENDMENT FOR REPORTING
VIOLATIONS OF FEDERAL LAW**

PURPOSE

Goal: To provide protection for employees who advance the public interest by providing information about the possible violation of federal laws to the appropriate authorities or who testify on federal law enforcement or oversight proceedings.

Method: Employee whistleblowers shall have identical protections as exist under Title VII of the Civil Rights Act of 1964, *as amended*. The procedures and remedies permitted under that law would be equally applicable for employee whistleblowers who engaged in activities protected under this law. It is the intent of Congress that the substantive and procedural rights set forth in this Amendment would be interpreted in a manner consistent with the judicial interpretations of Title VII of the Civil Rights Act of 1964, *as amended*.

Coverage: This law would cover all employees who already are permitted under law to have access to federal court in order to adjudicate their employment discrimination cases. Coverage would include all federal employees currently protected under Title VI of the Civil Rights Act of 1964, *as amended*.

PROTECTED ACTIVITY

(a) IN GENERAL. It shall be an unlawful employment practice for an employer to discriminate or retaliate against any employee or applicant for employment because the employee made a protected disclosure or because the employee has opposed any practice made an unlawful employment practice by this amendment, or because the employee has made a charge, testified, assisted or participated in an investigation, proceeding or hearing under this provision or other provision of federal law.⁴

(b) PROTECTED DISCLOSURE. A protected disclosure shall mean any lawful disclosure of information for which the employee reasonably believes constitutes a violation of any federal law, rule or regulation, the gross mismanagement or gross waste of federal monies or a danger to the public health or safety. A lawful disclosure includes any action by an employee to –

(1) provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a protected disclosure when the information or assistance is provided to or the investigation is conducted by

- (A) a Federal regulatory or law enforcement agency;
- (B) any Member of Congress or any committee of Congress;
- (C) An Inspector General or the Office of Special Counsel; or
- (D) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) commence, cause to be commenced or is about to commence a proceeding, or assist or participated in or is about to assist or participate in any manner in such a proceeding or in any other action designed to enforce the laws of the United States or the provisions of this section; or

(3) testify or is about to testify, in any federal, state, judicial, administrative or Congressional proceeding; or

(4) refuse to violate or assist in the violation of a federal law, rule, or regulation or engage in any conduct which the employee reasonably believes constitutes a violation of any law or which the employee reasonably believes constitutes a threat to the public health or safety⁵

PROCEDURES

Any employee who alleges a violation or retaliation or discrimination based on this law, shall be afforded the procedures set forth in Title VII of the Civil Rights Act of 1964, *as amended*.

REMEDIES

The remedies available will be identical to the remedies available under Title VII of the Civil Rights Act of 1964, *as amended*, and would include: ⁶

- posting a notice to all employees advising them of their rights under the laws EEOC enforces and their right to be free from retaliation;
- corrective or preventive actions taken to cure or correct the source of the identified discrimination;
- nondiscriminatory placement in the position the victim would have occupied if the discrimination had not occurred;
- compensatory damages;
- back pay (with interest if applicable) and lost benefits; and
- appropriate injunctive relief;
- a full “make whole” remedy; and
- Attorney fees, costs and expert witness fees.

DEFINITIONS OF EMPLOYEE AND EMPLOYER

DEFINITIONS-

Employer shall mean any employer covered under the Civil Rights Act of 1964, as amended or as set forth in sections 2000e(b) and 2000e-16, of Title 42, United States Code;

Employee shall include any employee, contractor, subcontractor, agent or representative of any employer;⁷

Title VII of the Civil Rights Act of 1964, *as amended* shall mean Title VII of the Civil Rights Act of 1964 and all amendments to that Act, including, but not limited to 102 P.L. 166, 105 Stat. 1071 (The Civil Rights Act of 1991).

FOOTOTES

¹ Stephen M. Kohn is the President of the National Whistleblower Center (www.whistleblowers.org), a partner in the Washington, D.C. law firm of Kohn, Kohn & Colapinto, LLP and the author or co-author of six books on whistleblower law: *Whistleblower Law* (Greenwood Publishing, 2004); *Concepts and Procedures in Whistleblower Law* (Quorum, 2000), *The Whistleblower Litigation Handbook*, (Weily Legal Publishing, 1990), *The Labor Lawyers Guide to the Rights and Responsibility of Employee Whistleblowers* (Quorum, 1988), *Protecting Environmental and Nuclear Whistleblowers: A Litigation Manual* (NIRS, 1985) and *Federal Whistleblower Laws and Regulations* (NWC, 2003). In 2006, he was awarded the Daynard Public Interest Visiting Fellowship by the Northeastern University School of Law. Since 1984 Mr. Kohn has specialized in representing public and private sector whistleblowers.

The National Whistleblower Center is a non-profit, tax-exempt organization specializing in the support of employee whistleblowers. Created in 1988, the Center's primary mission is to protect employees who disclose government or corporate abuse, misconduct and corruption. The National Whistleblower Center may be contacted at 3238 P Street, N.W., Washington, D.C. 20007. Tel. No. 202.342.1903. Fax No. 202.342.1904. Web address: www.whistleblowers.org.

² See, Goodman, Crump and Corris, "Disavowed: The Government's Unchecked Retaliation Against National Security Whistleblowers," *American Civil Liberties Union* (2007).

³ Executive Office of the President, Office of Management and Budget, "Statement of Administration Policy/H.R. 985 – Whistleblower Protection Enhancement Act of 2007," (March 13, 2007). In this statement, the Bush Administration emphasized provisions of H.R. 985 which protected national security whistleblowers part of its central justification for threatening to veto the law.

⁴ The initial definition is copied directly from the anti-retaliation provision contained in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 20003-3(a). It is also substantially identical to the similar provisions contained in numerous whistleblower provisions and the anti-retaliation provisions of the Age Discrimination in Employment Act, 29 U.S.C. section 623(d) and the Americans with Disabilities Act, 42 U.S.C. section 12203.

⁵ This definition of potential action incorporates the definition of protected activity in the whistleblower protection act and numerous other federal whistleblower protection laws which have been subject to near unanimous approval of Congress over the years. These definitions are not controversial and are widely accepted. See e.g. Civil Service Reform Act, 5 U.S.C. section 2302(b)(8)(B)(i); Sarbanes Oxley Act, 18 U.S.C. section 1514A(a); Energy Reorganization Act, 42 U.S.C. section 5851(a)(1)(B), (C), and (F); Motor Carrier Employee Protections, 49, U.S.C. Section 31105 (enacted into law in 2007).

⁶ Equal Employment Opportunity Complaint Processing Regulations, 29 C.F.R. Part 1614, www.eeoc.gov.

⁷ This provision incorporates the definition of employee and employer currently existing under Title VII of the Civil Rights Act of 1964, *as amended*.

Last update: February 05, 2007

Ex-agent wins lawsuit against FBI

Jurors said the FBI retaliated against the female agent, who filed a discrimination complaint in 1998.

By Dan Browning, Star Tribune

Federal jurors hugged former FBI agent Jane Turner on Monday after awarding her \$565,000 in damages and finding that the agency had retaliated against her for filing a 1998 sex-discrimination complaint.

"I think you were the very best FBI agent," juror Mashima Dickens told Turner, who investigated child sex-abuse crimes. "Looking at the way you were treated, I just said you were screwed left and right," Dickens said, tears rolling down her cheeks.

"I just want to tell you I have nothing but the utmost respect for you," juror Renee Anderle said as she hugged Turner in the hallway outside Chief U.S. District Judge James Rosenbaum's courtroom in Minneapolis.

"This is vindication," said Turner, 55, of St. Paul. "We spoke truth to power, and we won."

But Turner said she could never repair the damage done to her by her colleagues in the FBI, an organization she had dreamed of joining since she read Nancy Drew detective novels at age 12.

"I'm dead in their eyes because I betrayed them. And that's what's so sad," Turner said.

The government's attorneys declined to comment on the verdict in the trial, which began Jan. 24.

Stephen Kohn, one of Turner's attorneys and president of the National Whistleblower Center in Washington, called it historic. "I think it's the largest jury verdict in a civil rights case against the FBI for an individual plaintiff," he said.

The jury of six women and four men awarded Turner damages of \$60,000 in lost wages and \$505,000 for emotional distress, loss of reputation and similar injuries.

Rosenbaum will reduce the non-wage damages to the statutory limit of \$300,000, said Robert Hill, of Eden Prairie, another of Turner's attorneys.

Turner had a noteworthy career. After joining the FBI in 1978, she helped capture Christopher Boyce, a Soviet spy, and solved some horrendous child-sex abuse and murder cases on North Dakota Indian reservations.

Records show that she received superior or exceptional job ratings until after her supervisor, Craig Welken, was interviewed in 1999 about a sex-discrimination complaint she had filed the previous year. Her ratings plummeted, which led to a transfer from Minot, N.D., to a desk job in Minneapolis.

Jurors decided that the negative job reviews were retaliation for filing the internal discrimination complaint, but that the transfer was not.

About a month after Turner filed the complaint against Welken, a task force was being formed to investigate a child pornographer who had confessed in an Internet chat room to murdering his

7-year-old daughter. The killer, Larry Froistad, recanted his confession, and the U.S. attorney in North Dakota at the time, the late John Schneider, wanted Turner's help. Welken resisted initially, but said he gave in because Schneider was "unrelenting."

Schneider later credited Turner in an e-mail with solving the Froistad case.

Martha Fagg, one of two assistant U.S. attorneys from Iowa who represented the FBI, argued that Turner had basically stopped working after the Froistad case, and that the transfer to Minneapolis was designed to help her get back on track.

"In my opinion, she was using the EEO [Equal Employment Opportunity] process not as a shield, but as a sword," Fagg said.

However, Turner's attorneys introduced evidence that she kept up her casework and solved some especially tough cases while she was being downgraded on her reviews. Two assistant U.S. attorneys testified that they never saw Turner slack off.

Turner's attorneys plan to file for compensation. Kohn said the final bill will be "well over \$1 million to taxpayers in a case that should have been resolved at a fraction of the cost years ago."

Turner still has a complaint pending against the FBI with the U.S. inspector general's office. She reported that a fellow agent had brought back memorabilia from the World Trade Center in Manhattan after the Sept. 11 terrorist attacks. Turner said she was being run out of the FBI after that, so she retired in 2003.

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1 of 100 DOCUMENTS

KIKI IKOSSI, APPELLANT v. DEPARTMENT OF NAVY, ET AL., APPELLEES

No. 05-5456

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT***516 F.3d 1037; 2008 U.S. App. LEXIS 4381; 102 Fair Empl. Prac. Cas. (BNA) 1441***December 7, 2007, Argued
February 29, 2008, Decided****NOTICE:**

THIS OPINION IS SUBJECT TO FORMAL REVISION BEFORE PUBLICATION IN THE FEDERAL REPORTER OR U.S. APP. D.C. REPORTS. USERS ARE REQUESTED TO NOTIFY THE CLERK OF ANY FORMAL ERRORS IN ORDER THAT CORRECTIONS MAY BE MADE BEFORE THE BOUND VOLUMES GO TO PRESS.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the District of Columbia. (No. 04cv01392). *Ikossi v. England*, 406 F. Supp. 2d 23, 2005 U.S. Dist. LEXIS 34946 (D.D.C., 2005)

COUNSEL: Michael D. Kohn argued the cause for appellant. With him on the briefs was David K. Colapinto. Stephen M. Kohn entered an appearance.

Jane M. Lyons, Assistant U.S. Attorney, argued the cause for appellees. With him on the brief were Jeffrey A. Taylor, U.S. Attorney, and R. Craig Lawrence, Assistant U.S. Attorney. Michael J. Ryan and Wyneva Johnson, Assistant U.S. Attorneys, entered appearances.

JUDGES: Before: GINSBURG *, ROGERS and BROWN, Circuit Judges. Opinion for the Court by Circuit Judge ROGERS.

* Circuit Judge Ginsburg was Chief Judge at the time of oral argument.

OPINION BY: ROGERS**OPINION**

[*1038] ROGERS, *Circuit Judge*: This appeal arises from the termination of Dr. Kiki Ikossi's employ-

ment at the Navy Research Lab ("NRL") where she was an electrical engineer. After appealing to the Merit System Protection Board ("MSPB") and filing a complaint with the Equal Employment Opportunity ("EEO") office, Dr. Ikossi sued the Secretary of the Navy and the NRL in the district court, alleging gender, age, and national origin discrimination and unlawful retaliation as well as violations of the Family and Medical Leave Act ("FMLA") and the [**2] Civil Service Reform Act ("CSRA"). The district court dismissed her non-discrimination claims for lack of subject matter jurisdiction, dismissed her pre-termination claims as untimely, and granted summary judgment to the Secretary on her discrimination [*1039] and retaliation claims. We affirm in part and reverse in part. Because Dr. Ikossi did not administratively appeal the dismissal by the EEO office or file a civil action on those claims within ninety days, we affirm the dismissal of the pre-termination claims. However, because 5 U.S.C. β 7702(e)(1) provided subject matter jurisdiction over the entirety of Dr. Ikossi's "mixed case" under the CSRA when the MSPB failed to issue a final decision within 120 days, *id.* β 7702(a)(1), and because summary judgment was premature in view of her request for discovery pursuant to *Fed. R. Civ. P.* 56(f), we reverse and remand the case to the district court.

I.

In view of the controlling legal questions that resolve this appeal, we limit our statement of the evidence to highlight the procedural history.

Dr. Ikossi joined the staff at the NRL in 1998 after having been a tenured professor at Louisiana State University and an NRL summer research fellow for [**3] eight years. Her job description called for her to work on research teams as well as conduct independent research, and she was expected to "define, execute and publish the results of a personal research agenda." For much of her

employment, Dr. Ikossi was directly supervised by Dr. Harry Dietrich, her second level supervisor was Dr. Dennis Webb, and her third level supervisor was Dr. Gerald Borsuk.

Between 1999 and 2002, Dr. Ikossi received an array of awards from the NRL and consistently good reviews. However, Dr. Ikossi became increasingly concerned that she was not receiving proper credit for her work. For example, she was not assigned to lead a project to which her research had made substantial contributions, and she believed that her contributions had not been properly acknowledged by male colleagues in publications and presentations. Concluding this was a result of gender discrimination, she met in December 2000 with Dr. Webb and contacted the NRL's Human Resources Office ("HRO").

As a result of a reorganization initiated by Dr. Webb in March 2002, Mr. Brad Boos became Dr. Ikossi's immediate supervisor. As part of the reorganization, Dr. Ikossi was to move her office and share space [**4] with another full-time scientist, an arrangement she considered inadequate to meet her professional needs and inferior to that provided to her male colleagues, some of whom were permitted to set up private offices in unused laboratory space. On April 23, 2002, Dr. Ikossi complained to Mr. Boos, Dr. Webb, and the HRO that she was being subjected to a hostile work environment. On September 16, 2002, Mr. Boos issued her a letter of reprimand for yelling at a colleague, a level of discipline that Dr. Webb could not recall having ever been used and one more severe than that used in a case of sexual harassment, where the employee was issued a letter of caution, which does not become part of an employee's personnel record.

On June 3, 2002, Dr. Ikossi filed a formal EEO complaint alleging gender, age, and national origin discrimination. The EEO office accepted the complaint for investigation on July 19, 2002. She amended her complaint on November 17, 2002 and February 6, 2003 to add a retaliation claim and to allege that her supervisors had treated younger males with inferior qualifications substantially better than they treated her. On November 20, 2002, an EEO investigator held a fact-finding [**5] conference. By fall 2002, Dr. Ikossi was often on medical leave, and by the end of the year her health had deteriorated to the point she advised that she would not be able to work anytime soon. She took approved [*1040] leave under the FMLA between December 23, 2002 and February 28, 2003, at which time she began to work part-time. On December 2, 2002, Mr. Boos proposed that she be suspended for 14 days; Dr. Webb converted the proposal into a proposed removal of Dr. Ikossi from federal employment. Dr. Borsuk terminated Dr. Ikossi's employment on April 23, 2003.

On May 20, 2003, Dr. Ikossi filed a mixed-case appeal with the MSPB, contending that the termination of her employment violated Title VII and the Age Discrimination in Employment Act ("ADEA") as well as the CSRA and the FMLA. In a statement of jurisdiction, she noted that she had not included her termination claims in her pending EEO complaint. An administrative judge held a one-day hearing on August 28, 2003. The EEO office dismissed her complaint on September 16, 2003 on the ground that she had been afforded the opportunity to litigate those claims before the MSPB; she was advised that she had the right to appeal to the Equal Employment [**6] Opportunity Commission ("EEOC") or to file a civil action within ninety days. On December 17, 2003, the administrative judge dismissed her MSPB appeal in light of a tentative settlement between Dr. Ikossi and the NRL. Subsequently, after the administrative judge forwarded Dr. Ikossi's letter advising that she had withdrawn from the settlement, the MSPB treated the letter as a petition for review and remanded the case to the administrative judge on August 23, 2004 to determine whether she had timely withdrawn from the settlement.

Meanwhile, on October 10, 2003, Dr. Ikossi filed suit against the Secretary in federal district court alleging that the termination of her employment violated Title VII and the FMLA; on May 14, 2004 she moved to amend her complaint, including adding a hostile work environment claim. She filed a second lawsuit on August 16, 2004 that included her CSRA claims, pursuant to 5 U.S.C. § 7702(e)(1), and added the NRL as a defendant. In this complaint she alleged that she had been the victim of a hostile working environment due to discrimination based on age, gender, and national origin, that she had been, in effect, denied leave under the FMLA due to requests to continue [**7] to work while on approved medical leave, and that her termination violated Title VII, the ADEA, the FMLA, and the CSRA. The district court granted her motion to dismiss her initial complaint on August 24, 2004. On December 27, 2004, the administrative judge granted her motion to dismiss her administrative appeal without prejudice because her claims were pending before the district court on *de novo* review; on May 18, 2005, the MSPB denied the NRL's petition challenging the administrative judge's jurisdiction to issue a dismissal without prejudice.

The district court granted the Secretary's motion to dismiss the CSRA and FMLA claims for lack of subject matter jurisdiction, dismissed the pre-termination claims as time barred, and granted the Secretary's motion for summary judgment on the discrimination claims related to Dr. Ikossi's termination, concluding that she had failed to rebut the NRL's lawful reason for terminating her employment and denying her *Rule 56(f)* request for discov-

ery. *Ikossi v. England*, 406 F. Supp. 2d 23 (D.D.C. 2005). Dr. Ikossi appeals, except for the dismissal of her FMLA claim. Our review is *de novo*, see *Wilson v. Pena*, 316 U.S. App. D.C. 352, 79 F.3d 154, 160 n.1 (D.C. Cir. 1996), except [**8] for the denial of discovery, which we review for abuse of discretion, see *Carpenter v. Fed. Nat'l Mortgage Ass'n*, 174 F.3d 231, 238, 335 U.S. App. D.C. 395 (D.C. Cir. 1999).

II.

Section 7702 of Title 5 of the United States Code governs the adjudication of [*1041] mixed cases, which both challenge adverse personnel actions otherwise appealable to the MSPB and allege that discrimination played a part. See *Butler v. West*, 334 U.S. App. D.C. 55, 164 F.3d 634, 638 (D.C. Cir. 1999). As relevant to district court jurisdiction, section 7702(e)(1) provides that:

Notwithstanding any other provision of law, if at any time after-

...

(B) the 120th day following the filing of an appeal with the [MSPB] under subsection (a)(1) of this section, there is no judicially reviewable action .

...

...

an employee shall be entitled to file a civil action *to the same extent and in the same manner* as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

5 U.S.C. § 7702(e)(1) (emphasis added).

The district court ruled that the "to the same extent and . . . same manner" clause [**9] limited judicial review under section 7702(e)(1)(B) to claims that would otherwise arise under the listed civil rights statutes. *Ikossi*, 406 F. Supp. 2d at 29-30. Therefore, it determined that it lacked jurisdiction over Dr. Ikossi's non-discrimination claims until the MSPB had issued a final decision, at which point Dr. Ikossi could appeal

pursuant to 5 U.S.C. § 7703(b), which provides for judicial review based on an administrative record. Dr. Ikossi's challenge to the district court's interpretation of its jurisdiction over her mixed case is well taken because the district court's ruling is inconsistent with the plain text and legislative history of section 7702. While the district court may "stay the case, or hold it in abeyance, for a reasonable period of time" to allow the administrative process to conclude, *Butler* 164 F.3d at 643, it errs in dismissing non-discrimination claims for lack of subject matter jurisdiction because there is not a final decision by the MSPB.

The plain text of the concluding clause of section 7702(e)(1)--"to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964, . . . section 15(c) of the [ADEA], . . . or section 16(b) [**10] of the Fair Labor Standards Act of 1938"--demonstrates that it is not a limitation on the type of claims that may be pursued under section 7702(e)(1). The three referenced statutory provisions are procedural in nature: section 717(c) addresses the time for bringing a civil action and requires that the "head of department, agency, or unit" be named the defendant, 42 U.S.C. § 2000e-16(c); section 15(c) creates jurisdiction in the federal district court and provides for both legal and equitable relief, 29 U.S.C. § 633a(c); and section 16(b) authorizes damages and identifies federal or state court as the proper venue, 29 U.S.C. § 216(b). Thus, the concluding clause of section 7702(e)(1) merely specifies the procedure that governs mixed cases brought pursuant to section 7702(e)(1). An illustration of the operation of this clause appears in *Kienlen v. MSPB*, 687 F. Supp. 461, 463 (D. Minn. 1988), where the district court dismissed the MSPB as a defendant upon ruling that section 7702(e)(1), by incorporating section 717(c) of the Civil Rights Act, only permitted the plaintiff to name the Postmaster General as a defendant. And as is further illustrated by section 7702(a)(1)(B), which describes [**11] the kinds of discrimination claims that may be brought before the MSPB, Congress knew how to invoke the substantive provisions of the civil rights statutes. That provision references the entire "section 717 of the Civil Rights Act of 1964" rather than only section 717(c).

[*1042] The procedural nature of the concluding clause of section 7702(e)(1) also accords with its omission of any reference to the Rehabilitation Act, which is listed in section 7702(a) as a basis for a discrimination claim protected under section 7702. See 5 U.S.C. § 7702(a)(1)(B)(iii). Although the Rehabilitation Act provides substantive protection against discrimination, 29 U.S.C. § 791, it does not include procedural requirements for judicial review, incorporating instead the requirements of section 717 of the Civil Rights Act, see 29

U.S.C. β 794a; because *section 7702(e)(1)* already incorporates *section 717(c)*, reference to the Rehabilitation Act would have been superfluous. Reading *section 7702(e)(1)* to impose a jurisdictional requirement would create the odd result that a plaintiff alleging discrimination on the basis of disability, unlike a plaintiff alleging a violation of any other civil rights law identified in [**12] *section 7702(a)(1)(B)*, would be foreclosed from seeking judicial review after the MSPB had failed to render an appealable decision after 120 days. Moreover, interpreting the concluding clause of *section 7702(e)(1)* as more than a procedural limitation is incompatible with Congress's intent to set a timetable for the MSPB to decide "both the issue of discrimination and the appealable action," 5 U.S.C. β 7702(a)(1)(B), as it would deny the complainant a right to enforce this timetable with respect to a portion of her claim.

Construing *section 7702* to confer jurisdiction over all elements of a mixed case is also consistent with the section's "treatment of mixed cases in previous stages of the process: *section 7702* explicitly requires the Board in appealable cases alleging both discrimination and non-discrimination claims to decide *both* issues," *Wiggins v. United States Postal Serv.*, 653 F.2d 219, 221-22 (5th Cir. 1981) (emphasis in original) (quotation marks omitted). This holding also reflects the legislative history, which states that "questions of the employee's inefficiency or misconduct, and discrimination by the employer, [are] two sides of the same question and must be considered together," [**13] *Doyal v. Marsh*, 777 F.2d 1526, 1537 (11th Cir. 1985) (quoting S. Rep. No. 95-969, at 53 (1978), as reprinted in 1978 U.S.C.C.A.N. 2723, 2775); see also *Williams v. Dep't of the Army*, 715 F.2d 1485, 1490 (Fed. Cir. 1983) (en banc) (quoting same). As this court has observed, "discrimination and nondiscrimination claims . . . are closely related both logically and as a factual matter." *Hayes v. U.S. Gov't Printing Office*, 221 U.S. App. D.C. 363, 684 F.2d 137, 140 (D.C. Cir. 1982).

While this court has not yet addressed whether a district court has jurisdiction over non-discrimination claims under *section 7702(e)*, it has long viewed "[t]he plain language of [5 U.S.C. $\beta\beta$ 7702-03] [to] suggest[] that a mixed case is to be treated as a unit, and is to be brought before the district court." *Id.* at 139. The court in *Hayes* held that the district court rather than the court of appeals has jurisdiction over both discrimination and non-discrimination claims when an employee appeals a final decision by the MSPB. See *id.* at 139, 140 & n.2. In *Butler*, the court similarly concluded that *section 7702(e)* "clearly express[es] Congress' desire that mixed cases should be processed expeditiously, and that complainants should have [**14] access to a judicial forum should their claims languish undecided in the administrative

machinery." 164 F.3d at 640. So long as "the complainant has neither deliberately abandoned the administrative regime, . . . nor refused to cooperate in its processes, . . . *section 7702(e)(1)(B)* explicitly sanctions a civil action in the federal district courts once 120 days have passed without a final decision from the MSPB." *Id.* at 643. The court reached this conclusion after observing that "[t]he MSPB and EEOC regulations that structure the prosecution [*1043] of mixed cases are extremely complicated," *id.* at 638, and outlining the statutory "decision tree" to be applied, *id.* at 638-39. Subsequently, in *Evono v. Reno*, 342 U.S. App. D.C. 262, 216 F.3d 1105, 1109 (D.C. Cir. 2000), the court followed this decision tree and again concluded that "[s]ection 7702(e)(1) provides an employee with a right to file a 'mixed case' in the district court." Neither *Evono* nor *Butler*, however, involved non-discrimination claims.

The Sixth and Eleventh Circuits have expressly held that the district court has jurisdiction over non-discrimination claims when agencies fail to meet the 120-day time line established by *section 7702(e)(1)(B)*. See *Valentine-Johnson v. Roche*, 386 F.3d 800, 808, 811, 813 (6th Cir. 2004); [**15] *Seay v. TVA*, 339 F.3d 454, 472 (6th Cir. 2003); *Doyal*, 777 F.2d at 1533, 1535-37. Thus, in *Seay*, the Sixth Circuit held that the district court had subject matter jurisdiction over non-discrimination claims where the employer's EEO office failed to act within 120 days and that the plaintiff was not required to develop an administrative record by appealing to the MSPB. 339 F.3d at 471-72. Following *Seay*, the Sixth Circuit in *Valentine-Johnson* rejected the argument that 'nondiscrimination claims must always be reviewed on an administrative record.'" 386 F.3d at 813 (quoting *Seay*, 339 F.3d at 472). In *Doyal*, the Eleventh Circuit held that "the entire mixed case complaint was properly before the district court," 777 F.2d at 1537, and stated that "Congress, through [] *section 7702(e)(1)*, has explicitly given the employee certain rights and options, one of which is to file a civil action based on his mixed case complaint before resorting to the MSPB," *id.* at 1536.

The Secretary's analysis of *Valentine-Johnson* and *Seay* hardly compels a contrary interpretation. *Valentine-Johnson* is not a "solitary decision," Appellee's Br. at 27, and *Seay* does not support his position that the district court [**16] lacked subject matter jurisdiction over Dr. Ikossi's complaint. In *Seay*, the Sixth Circuit correctly stated that "[o]n-the-record review is required for nondiscrimination claims . . . [that are] appealed from the MSPB," 339 F.3d at 472 (emphasis added), which would occur under *section 7703* addressing appeals where the MSPB has ruled on the complainant's claims. But Dr. Ikossi is not appealing an MSPB decision but rather proceeding pursuant to *section 7702(e)(1)* because

the MSPB did not render a final decision within 120 days of the filing of her administrative appeal, and under that provision the district court may review her entire mixed case without an administrative record. The Secretary does not mention the Eleventh Circuit's opinion in *Doyal* (nor does Dr. Ikossi), and he has not cited any circuit court of appeals decision (or, for that matter, any district court opinion other than the one under review here) holding that the district court lacks jurisdiction over the non-discrimination aspects of a mixed case when a lawsuit is filed pursuant to *section 7702(e)(1)*. In *Vanover v. O'Leary*, 967 F. Supp. 1211, 1221 (N.D. Okla.1997), cited by the district court, *Ikossi*, 406 F. Supp. 2d at 29, [**17] but not the parties here, the district court held it could address the non-discrimination claims in a mixed case brought pursuant to *section 7702(e)(1)* only if the MSPB issued a final decision before the district court disposed of the discrimination claims. 967 F. Supp. at 1220-21. Although we credit the district court's concern that it did not "have the expertise to address the issue of whether a federal employee's termination was for the efficiency of the service," *id.* at 1221; see *Butler*, 164 F.3d at 643, the appropriate action in that situation is not to dismiss for lack of jurisdiction but rather to "stay the case, or hold it in abeyance, for a reasonable period of time," *id.* Insofar as *Vanover* suggests [*1044] that the district court lacks jurisdiction to consider *de novo* the non-discrimination claims in a mixed case, we disagree with its conclusion.

Moreover, the MSPB's grant of Dr. Ikossi's motion to dismiss her mixed case does not, as the Secretary suggests, oust the district court of jurisdiction. Dr. Ikossi cannot be deemed to have abandoned her non-discrimination claims by filing a motion in her administrative proceeding after she had filed her civil suit; to the contrary, her motion was [**18] designed to avoid the burden of concurrently litigating the same claims before both the district court and the MSPB. The Secretary's reliance on *Vinieratos v. U.S. Department of Air Force*, 939 F.2d 762 (9th Cir. 1991), is misplaced. In *Vinieratos*, the Ninth Circuit affirmed the dismissal of the complaint because the plaintiff, having elected an administrative remedy, failed to exhaust it by "wholly obstruct[ing] both the previously initiated EEO efforts and the MSPB's efforts" and thus had effectively abandoned the administrative proceedings. *Id.* at 770. Nothing in *Vinieratos* suggests that filing a motion to dismiss in an administrative forum can divest the district court of jurisdiction over a previously filed complaint.

III.

Dr. Ikossi's challenge to the dismissal of her pre-termination claims, however, fails. To be timely, she was required within ninety days of the EEO dismissal of

her complaint either to appeal to the EEOC or to file a civil suit. See 42 U.S.C. *section 2000e-16(c)*. She did not appeal to the EEOC, and although her initial complaint in district court was filed within ninety days of the EEO dismissal, it did not raise her pre-termination claims. Her second complaint, which [**19] did raise her pre-termination claims, was filed on August 16, 2004, long after the ninety-day period had expired.

Dr. Ikossi advances no persuasive argument that waiver, estoppel, or equitable tolling applies. See *Colbert v. Potter*, 374 U.S. App. D.C. 35, 471 F.3d 158, 164 (D.C. Cir. 2006). She contends that her motion to amend her initial complaint to add her pre-termination claims should excuse her delinquency. But this motion was not filed within ninety days of the dismissal. Alternatively she contends that the MSPB was obligated to extend its jurisdiction over her pre-termination claims after the EEO office dismissed her case, and therefore the district court can exert jurisdiction over them pursuant to *section 7702(e)(1)*. Yet she never requested the MSPB to consider these claims; her only filing with the MSPB with respect to her pre-termination claims stated that they were before the EEO office. Even assuming that the MSPB would have had jurisdiction once the EEO office dismissed her pre-termination claims on the stated assumption that she could raise them as part of her mixed case, Dr. Ikossi still had to raise them before the MSPB in order for *section 7702(e)(1)* to apply. Dr. Ikossi's contention that [**20] her termination claim, which was timely filed, sufficed under *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 117, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), to raise the panoply of her pre-termination hostile work environment claims is also to no avail, for *Morgan* does not suggest that a plaintiff can obtain judicial review of an EEO decision outside of the ninety-day period or raise a hostile work environment claim without first exhausting her administrative remedies, see, e.g., *Greer v. Paulson*, 505 F.3d 1306, 1317-18 (D.C. Cir. 2007). Rather, *Morgan* held merely that "[t]he timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes [*1045] of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period." 536 U.S. at 117.

IV.

Dr. Ikossi's challenge to the district court's grant of summary judgment to the Secretary before permitting discovery pursuant to *Rule 56(f)* might present a closer question in the absence of the district court's jurisdictional error and with the benefit of a complete administrative record, but we conclude that she sufficiently [**21] demonstrated a need for discovery.

Rule 56(f) provides that:

If a party opposing the motion [for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any just order.

In *Hackley v. Roudebush*, 171 U.S. App. D.C. 376, 520 F.2d 108, 149 (D.C. Cir. 1975), the court rejected the notion that a district court can ordinarily resolve a Title VII complaint based on the administrative record, noting the "substantial interests served by a fair and complete judicial fact-finding process, replete with the tools of discovery and compulsory process." The court stated:

Rather than presuming that the record is properly the sole basis for decision, and that the plaintiff must affirmatively establish his need for supplementation, courts should focus on the employee's complaint. The administrative record should be admissible as one piece of evidence concerning the issues raised in the complaint, but the employee should have the right to conduct discovery and compel the attendance of witnesses [**22] to furnish additional evidence. The Federal Rules accord the trial judge sufficient control over the conduct of discovery and the trial that duplication of proceedings-which serves no party's interest-should be minimal.

Id. at 151. More recently, in *Chappell-Johnson v. Powell*, 370 U.S. App. D.C. 162, 440 F.3d 484 (D.C. Cir. 2006), the court concluded that the district court abused its discretion by granting summary judgment in a Title VII case where the plaintiff had been afforded no discovery, citing cautioning instruction from the Supreme Court against premature grants of summary judgment, *id.* at 488 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)); see also *Holy Land Found. for Relief & Dev. v. Ashcroft*, 357 U.S. App. D.C. 35, 333 F.3d 156, 165 (D.C. Cir. 2003); *First Chi. Int'l v. United Exch. Co.*, 267 U.S. App. D.C. 27, 836 F.2d 1375, 1379 (D.C. Cir. 1988).

Nonetheless, Dr. Ikossi had the burden to state with "sufficient particularity to the district court--or, for that matter, to this court--why discovery was necessary." *Strang v. U.S. Arms Control & Disarmament Agency*,

275 U.S. App. D.C. 37, 864 F.2d 859, 861 (D.C. Cir. 1989). The affidavit filed by Dr. Ikossi's attorney identifies four individuals whom he wished to depose: her supervisors at the NRL (Drs. [**23] Webb and Borsuk and Mr. Boos) and a staff member at the NRL's HRO. Although the affidavit states that discovery is sought regarding their motivations in taking disciplinary action against Dr. Ikossi, it does not identify precisely what evidence it is hoped will be discovered. This lack of precision does not make any less self-evident, however, the nature of the evidence Dr. Ikossi seeks; Dr. Ikossi believes that the depositions of those four individuals will produce additional evidence that the termination of her employment was in retaliation for her pursuing an EEO complaint and for exercising her FMLA rights and was unlawfully motivated by gender, age, or national origin discrimination. By providing an explanation [*1046] for their actions, the four individuals, all of whom were involved in the NRL's disciplinary process, may reveal their motives, which lie at the heart of Dr. Ikossi's discrimination claims.

In denying Dr. Ikossi discovery for failing to show that the requested depositions would be "essential to justify [her] opposition," *Ikossi*, 406 F. Supp. 2d at 37 (quoting *Fed. R. Civ. P. 56(f)*) prior to the 2007 amendment (alteration in original), the district court concluded that "[t]he [**24] record in this case is extensive, and all of the major factual disputes appear to be quite well fleshed out. Further, plaintiff . . . has already had at least two opportunities to examine her three most promising proposed witnesses under oath." *Id.* at 36. However, neither reason survives analysis. First, the record in the district court does not appear to be as comprehensive as the district court's conclusion suggests. Fewer than twenty pages of the transcript of over 300 pages of the hearing before the administrative judge is in the district court record. Of those pages, all but three are testimony by Dr. Ikossi. The district court record also does not contain affidavits from any of the four individuals named in the *Rule 56(f)* affidavit. Further, one of them did not testify before the administrative judge and no testimony from a second appears in the district court record.

Second, the pages of the transcript of the administrative judge's hearing before the district court do not indicate the scope of the one-day hearing. Dr. Ikossi asserts that the hearing was "tightly constrained . . . so that the hearing could be completed in one day," Reply Br. at 13, an assertion the Secretary did [**25] not contest during oral argument. Although her attorney's affidavit stated that none of the four individuals had been deposed, Dr. Ikossi does not deny that three of them testified at the hearing. Still, the district court record does not indicate whether Dr. Ikossi was afforded a reasonable opportunity to cross-examine those three. The other examination op-

portunity referenced by the district court presumably was the EEO fact-finding hearing on November 20, 2002 on Dr. Ikossi's pre-termination claims. But this hearing could not provide her with an opportunity to elicit evidence about the termination of her employment because it occurred months before Dr. Webb had proposed her removal from federal service. Also, the district court record contains only twenty-three pages of the EEO transcript, all but five of which are testimony by Dr. Ikossi. Additionally, Dr. Ikossi notes that the district court record contained a transcript of a reference check conducted after the MSPB hearing, during which Dr. Webb made comments about her national origin, and she has never had an opportunity to question him about his motives in view of this comment.

Further, because the district court ruled that it [**26] lacked jurisdiction over Dr. Ikossi's non-discrimination claims, it never considered her request for discovery in light of all of the claims that were properly before it. Although the claims in a mixed case may be "closely related both logically and as a factual matter," *Hayes*, 684 F.2d at 140, they are not identical. It

is true that the district court record includes numerous documents and reveals that Dr. Ikossi filed responses to Dr. Webb's proposal to terminate her employment. For example, Dr. Ikossi has proffered emails authored by Dr. Webb, Dr. Dietrich, and Mr. Boos. However, self-generated emails are hardly comparable to testimony under oath. Given the key nature of testimony by the witnesses whom Dr. Ikossi sought to depose, the limited record of the administrative proceedings before the district court and the limited scope of those hearings, and the district court's misunderstanding of the claims properly presented to it, the district court abused its discretion in denying [*1047] Dr. Ikossi's request for reasonable discovery in this trial *de novo*. Consequently, the grant of summary judgment was premature.

Accordingly, we affirm the dismissal pursuant to *Rule 12(b)(6)* of the pre-termination [**27] claims as untimely filed, and we reverse the dismissal of the MSPB non-discrimination claims pursuant to *Rule 12(b)(1)* and the grant of summary judgment on the discrimination claims pursuant to *Rule 56* and remand the case to the district court.

LEXSEE 421 F.3D 688

**Jane A. T. Turner, Appellant, v. Alberto Gonzales, ' United States Attorney General;
Federal Bureau of Investigation; United States Department of Justice; Robert S.
Mueller, Director, Federal Bureau of Investigation, Appellees.**

1 Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Alberto Gonzales is substituted automatically for his predecessor, John Ashcroft, as respondent.

No. 04-3426

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

421 F.3d 688; 2005 U.S. App. LEXIS 18647; 96 Fair Empl. Prac. Cas. (BNA) 782

**June 24, 2005, Submitted
August 30, 2005, Filed**

SUBSEQUENT HISTORY: Rehearing denied by *Turner v. Gonzales, 2005 U.S. App. LEXIS 24649 (8th Cir. Minn., Nov. 16, 2005)*

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the District of Minnesota. *Turner v. Ashcroft, 2004 U.S. Dist. LEXIS 18669 (D. Minn., Sept. 17, 2004)*

COUNSEL: For JANE A.T. TURNER, Plaintiff - Appellant: Stephen M. Kohn, KOHN & KOHN, Washington, DC.

For JOHN ASHCROFT, United States Attorney General, FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, ROBERT S. MUELLER, Director, Federal Bureau of Investigation, Defendants - Appellees: Lawrence Donald Kudej, U.S. ATTORNEY'S OFFICE, Cedar Rapids, IA; Martha A. Fagg, U.S. ATTORNEY'S OFFICE, Sioux City, IA.

JUDGES: Before MELLOY, HEANEY, and GRUENDER, Circuit Judges.

OPINION BY: GRUENDER

OPINION

[*691] GRUENDER, Circuit Judge.

Jane Turner appeals an adverse grant of summary judgment on her claims of gender discrimination, hostile work environment and retaliation under Title VII of the Civil Rights Act, *42 U.S.C. § 2000e et seq.* We affirm the grant of summary judgment with respect to Turner's

gender discrimination and hostile work environment claims. However, we reverse the grant of summary judgment on the retaliation claim and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Turner was a long-time FBI Special Agent with commendations for her work **[**2]** **[*692]** on high-profile cases. From 1978 until 1998, she consistently earned performance ratings of "Superior" or "Exceptional." She was stationed at the Minot, North Dakota Resident Agency of the Minneapolis Division of the FBI during the events that led to this discrimination suit. She became the Senior Resident Agent (SRA) at Minot in 1987. The SRA is the top-ranking agent at a station that has no official supervisor. The parties dispute the degree of supervisory authority an SRA has over the other agents at the station.

In 1996, Turner was denied a supervisory position in Fargo, North Dakota. The position went to a male, Craig Welken, who became Turner's supervisor. Turner believed that gender discrimination played a role in the denial. However, Turner did not file an Equal Employment Opportunity (EEO) complaint about this incident.

In 1998, Turner began to complain that Welken was not properly crediting her with "statistics" for the cases she worked. "Statistics" are used by the FBI to evaluate worthiness for promotions and performance-based salary increases, known as "quality step increases." Turner also complained that she received lower mileage reimbursements than the male agents. **[**3]** Turner alleged that the other agents in Minot, who were all males, did not respect her and refused to follow her orders. When these other agents questioned Welken about Turner's authority

as an SRA to control their activities, however, Welken informed them that he was their official supervisor and the sole assigner of work. One veteran male agent told a newer agent that an SRA's duties were to "order supplies." Turner believed the other agents felt that she, as a woman, was only fit to do secretarial work. Turner filed an EEO complaint about this perceived gender discrimination in June 1998.

One month later, in July 1998, Welken assigned an agent with much less experience than Turner to the Froistad case, a high-profile case involving the sexual exploitation and murder of a five-year-old. The United States Attorney for the District of North Dakota, John Schneider, asked Welken to assign Turner instead because of her expertise in child crimes. Welken complied with the request. Turner obtained a confession from Froistad, and in October 1998 Schneider sent an e-mail giving Turner primary credit for the successful resolution of the case.

In her next performance review, in April 1999, [**4] Turner again received a "Superior" rating. However, Turner objected to the review because she felt it did not properly credit her work on the Froistad case or on other cases. Turner met with Welken on June 11, 1999 to discuss the performance review. According to Turner, Welken informed her that he would not give her credit because she "poached" the case and "sandbagged" him with Schneider.

On June 18, Turner wrote a memorandum to Welken's supervisor, Minneapolis Division Special-Agent-in-Charge James Burrus, stating her complaints about the performance review and Welken's response. She also stated that Welken's discriminatory treatment of her had increased since her initial EEO complaint. She asked that the memorandum be made part of her personnel file. Burrus responded on June 22 that her complaints would be forwarded to Welken.

On June 23, Welken downgraded Turner's performance rating from "Superior" to "Minimally Acceptable/Unacceptable." The new, unscheduled interim performance review purported to cover Turner's work from late March through mid-June 1999 and cited the following reasons for the downgraded performance rating: failure to conduct investigative work in a [*693] timely manner, [**5] failure to properly notify other law enforcement officials about weekend unavailability, delayed report and time sheet filing, poorly written reports and minimal contacts with sources.

Welken began to document problems with Turner's work over the following months. In September and October 1999, Welken noted that one of Turner's reports showed she made inappropriate comments to a state's attorney on one case and that three Native American

reservation police officials complained about Turner being difficult to work with on another case. However, the state's attorney immediately wrote a letter to the FBI saying Turner's behavior was not unprofessional, and the reservation police chief later stated in deposition testimony that Turner always worked well with the reservation police and the incident was a minor one that would normally be worked out among the participants without complaint. Nevertheless, Turner continued to receive poor performance ratings.

New Minneapolis Division Special-Agent-in-Charge Doug Domin met with Turner in September 1999 and found her to be a "very troubled agent." According to Domin, Turner admitted that she was taking antidepressants but was not under a doctor's [**6] care. She displayed a range of extreme emotions and showed Domin photographs of abused child victims from her cases. Domin informed her that he would personally review her work over the following 60 days.

The FBI Inspection Division conducted a routine investigation of the Minneapolis Division, including the Minot office, in October 1999. The report recited the problems previously mentioned with Turner and also cited procedural errors that Turner allegedly had made during the Froistad and Vigestad investigations. The report concluded that Turner should be transferred to a work site that allowed more direct supervision and also recommended a Fitness for Duty Evaluation. Although the FBI claims that the report was based on independent interviews with FBI agents and outside law enforcement officials who worked with Turner, Turner argues that the investigator merely restated inaccurate information about her gleaned from Welken and Domin. Turner presented statements from local law enforcement and prosecutorial personnel that her work was generally outstanding and showed no decline during the 1998-99 time period.

Turner received another poor performance rating in December 1999, making [**7] her eligible under FBI regulations for an involuntary transfer. Domin immediately transferred her to Minneapolis. She filed a second EEO complaint in March 2000. After the FBI allowed her to exceed the standard 90-day relocation deadline, she began work in Minneapolis in May 2000. One of Turner's new co-workers in Minnesota recalled being warned before her arrival that she was "someone to avoid, or at least be wary of," because she was "prone to initiate administrative or civil action with little provocation." Turner was assured that the FBI continued to value her expertise in investigating crimes against children, but she did not receive work assignments in that area commensurate to those she had received in Minot. During her time in Minneapolis, Turner's supervisors documented performance problems and instances of disruptive behavior. Eventually, the FBI instituted termination proceed-

ings. Turner resigned in October 2003, before the termination proceedings could be completed.

Turner filed suit against the FBI, its director, the Department of Justice and the Attorney General (collectively "the FBI") under Title VII for sexual discrimination, [*694] retaliation and hostile work environment [**8] based on the events leading up to her transfer to Minneapolis. The district court granted the FBI's motion for summary judgment on all claims. The district court concluded that Turner presented no evidence of causation to sustain her discrimination and hostile work environment claims. As for the retaliation claims, the district court concluded that any adverse actions taken by the FBI were justified by evidence of Turner's poor performance and erratic behavior. Turner appeals the grant of summary judgment.

II. DISCUSSION

We review a grant of summary judgment de novo. *Hesse v. Avis Rent A Car Sys.*, 394 F.3d 624, 629 (8th Cir. 2005). "Summary judgment is appropriate when the evidence, viewed in the light most favorable to the non-moving party, presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* If a reasonable jury could return a verdict for the non-moving party based on the evidence presented, summary judgment is inappropriate. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996). We must affirm the grant of summary judgment on a claim if any essential element of Turner's [**9] prima facie case is not supported by specific facts sufficient to raise a genuine issue for trial. *Hesse*, 394 F.3d at 629.

A. Discrimination

An employee's claim will survive a motion for summary judgment if the employee can produce "direct evidence of discrimination, that is, 'evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action.'" *Russell v. City of Kansas City, Missouri*, 414 F.3d 863, 866 (8th Cir. 2005) (quoting *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004)). Alternatively, the claim may survive a motion for summary judgment by creating an inference of unlawful discrimination through the familiar *McDonnell Douglas* three-step burden-shifting analysis. *Russell*, 414 F.3d at 866.

In this case, Turner's only alleged direct evidence of discrimination is one fellow agent's remark to another that an SRA's duties were to "order supplies." We view this evidence in the light most favorable to Turner and [**10] assume that the remark evidences discriminatory

animus. However, Turner produced no evidence to link this remark from a co-worker to the challenged employment decisions. Therefore, we proceed to the *McDonnell Douglas* burden-shifting analysis.

Under the *McDonnell Douglas* analysis, the elements of a prima facie discrimination claim are: 1) the employee belonged to a protected class; 2) she was qualified to perform her job; 3) she suffered an adverse employment action; and 4) she was treated differently from similarly situated males. *Hesse*, 394 F.3d at 631. The fourth element of a prima facie discrimination case also can be met if the employee provides "some other evidence that would give rise to an inference of unlawful discrimination." *Putnam Search Term End v. Unity Health Sys.*, 348 F.3d 732, 736 (8th Cir. 2003). Once an employee establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions, and then shifts back to the employee to show that the employer's reason was pretextual. *Hesse*, 394 F.3d at 631.

Turner cannot establish a prima facie case of discrimination [**11] because she [*695] has not presented evidence that would give rise to an inference of unlawful discrimination. She attempts to meet this fourth element of the prima facie burden by showing that she was treated differently from similarly situated males. This requires evidence that Turner and her male co-workers "were 'involved in or accused of the same or similar conduct and [were] disciplined in different ways.'" *Rodgers v. U. S. Bank, N.A.*, 417 F.3d 845, 2005 U.S. App. LEXIS 16157, No. 04-3000, slip op. at 10-11 (8th Cir. Aug. 11, 2005) (quoting *Wheeler v. Aventis Pharms.*, 360 F.3d 853, 857 (8th Cir. 2004)).

Turner presented evidence that male agents at her resident office made mistakes but did not receive downgraded performance reviews like the one Turner received in June 1999. However, the alleged mistakes were not similar to the conduct alleged in Turner's downgraded performance review. According to Turner's evidence, one male agent failed to recognize a child's injuries as an incident of sexual abuse and another male agent mishandled evidence in a child pornography case. These isolated investigative mistakes by each male agent are not similar to the pattern of ignoring internal workplace responsibilities [**12] and deadlines cited in Turner's downgraded performance review. We conclude that Turner has not established a prima facie case of discrimination. Accordingly, we affirm the district court's grant of summary judgment to the FBI on the discrimination claim.

B. Hostile Work Environment

The elements of a prima facie hostile-work-environment claim are: 1) the employee is a member of a protected group; 2) she was subject to unwelcome harassment; 3) there was a causal nexus between the harassment and her membership in the protected group; 4) the harassment affected a term, condition, or privilege of employment; and, in a case alleging harassment by non-supervisory employees, 5) the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. *Carter v. Chrysler Corp.*, 173 F.3d 693, 700 (8th Cir. 1999). The harassment must be both subjectively offensive to the employee and objectively offensive such that a reasonable person would consider it to be hostile or abusive. *Williams v. Mo. Dep't of Mental Health*, 407 F.3d 972, 975 (8th Cir. 2005).

To support her hostile work environment claim, Turner again relies [**13] on the statement by a co-worker that an SRA's duties were to "order supplies." Turner does not argue that she was present when this remark was made. She also contends that junior male co-workers' reluctance to take orders from her as an SRA and the initial assignment of the Froistad case to a less experienced male agent demonstrate a general lack of respect for her abilities because of her gender. However, Turner has presented no evidence of specific instances of workplace conduct that a reasonable person would consider to be hostile or abusive. Therefore, we affirm the district court's grant of summary judgment to the FBI on the hostile work environment claim. *See Burkett v. Glickman*, 327 F.3d 658, 661 (8th Cir. 2003) (affirming a grant of summary judgment to an employer on a hostile work environment claim where the employee's "only substantial supporting evidence" was the deposition testimony of a co-worker that a supervisor had occasionally used a disparaging word in front of other employees and the employee offered no evidence that she was present when such remarks were made).

C. Retaliation

We apply the *McDonnell Douglas* analysis to claims of retaliation. [**14] *Hesse*, 394 F.3d at 632. The elements of a [*696] prima facie case of retaliatory discrimination are: 1) the employee engaged in activity protected under Title VII; 2) an adverse employment action was taken against her; and 3) there was a causal connection between the two. *Id.* Once a plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions, and then shifts back to the plaintiff to show that the defendant's reason was pretextual. *Id.* at 631.

There is no dispute that Turner engaged in protected activity by filing complaints about sexual discrimination. Turner argues that her performance rating downgrade, the denial of step increases in salary, and her transfer to

Minneapolis all qualify as adverse employment actions. We examine each of these actions in turn.

1. Performance Rating Downgrade and Denial of Step Increases

"A poor performance rating does not in itself constitute an adverse employment action because it has no tangible effect upon the recipient's employment." *Spears v. Mo. Dep't of Corr. & Human Res.*, 210 F.3d 850, 854 (8th Cir. 2000). [**15] "An unfavorable evaluation is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment." *Id.*

Turner contends that the performance rating downgrade detrimentally altered the terms of her employment by making her ineligible for promotions, for transfers to positions with greater promotion potential, and for within-grade salary step increases--both the discretionary "quality step increases" and automatic time-ingrade step increases. Performance ratings that have a negative impact on promotion potential do not constitute an adverse employment action unless the rating actually led to the denial of the promotion. *Tademe v. St. Cloud State Univ.*, 328 F.3d 982, 992 (8th Cir. 2003). Turner made no showing that she would have gotten a promotion absent the performance rating downgrade. Therefore, the negative impact on her promotion potential does not render the performance rating downgrade an adverse employment action. Similarly, a "decision not to raise . . . salary [is] not an adverse employment action [where] . . . salary [is] not decreased or otherwise diminished [**16] in any way." *Id.* Therefore, Turner's resulting ineligibility for a *discretionary* quality step salary increase does not render the performance rating downgrade an adverse employment action.

Turner's resulting ineligibility for an *automatic* step salary increase based on time in grade, on the other hand, qualifies the performance rating downgrade as an adverse employment action because it delayed an otherwise automatic salary increase. No exercise of discretion would have been necessary for Turner's salary to increase; it would have happened automatically as long as her performance rating remained at Fully Successful" or higher. In other words, in this case the performance rating downgrade directly forfeited a non-discretionary salary increase, detrimentally altering the terms and conditions of Turner's employment. *See Spears*, 210 F.3d at 854. Therefore, we find that the performance rating downgrade qualifies as an adverse employment action.

We also find evidence sufficient to raise a genuine issue of material fact as to whether Turner's complaints caused the performance rating downgrade. "A plaintiff can establish a causal connection between his complaints

[**17] and an adverse action through circumstantial evidence, such as the timing of the two [*697] events. Generally, however, a temporal connection alone is not sufficient to establish a causal connection." *Eliserio v. USW, Local 310*, 398 F.3d 1071, 1079 (8th Cir. 2005) (citation omitted).

In this case, the timing of Turner's performance rating downgrade strongly supports an inference of causation. Turner wrote a memorandum to her second-line supervisor, Burrus, referring to her previous EEO complaint and alleging increased discriminatory treatment by her supervisor, Welken. Burrus informed Turner that he would forward the memorandum to Welken, and five days later Welken generated an "interim" performance review that downgraded Turner in all rated areas. The fact that it was not a regularly scheduled performance review and occurred less than two months after the regular annual review in April (in which Turner received a "Superior" rating) is further circumstantial evidence that the performance rating downgrade was motivated by Turner's complaints. Therefore, Turner provided sufficient evidence to establish a prima facie case for her retaliation claim based on her performance rating [**18] downgrade.

2. Transfer to Minneapolis

"A transfer constitutes an adverse employment action when the transfer results in a significant change in working conditions or a diminution in the transferred employee's title, salary, or benefits." *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 919 (8th Cir. 2000). Turner's title, salary and benefits were not affected by the transfer to Minnesota. Turner first contends that the necessity to develop new informants and local law enforcement contacts in Minneapolis was tantamount to starting her career over again, constituting a significant change in working conditions. We are not persuaded that the normal inconveniences associated with any transfer, such as establishing one's professional connections in a new community, are sufficient, without more, to demonstrate a significant change in working conditions. See, e.g., *Montandon v. Farmland Indus.*, 116 F.3d 355, 359 (8th Cir. 1997) ("However unpalatable the prospect may have been to him, the requirement that [the employee] move to [a different city] did not rise to the level of an adverse employment action."). In contrast, a significant change in working [**19] conditions does occur where there is "a considerable downward shift in skill level required to perform [the employee's] new job responsibilities." *Meyers v. Neb. Health & Human Serv.*, 324 F.3d 655, 660 (8th Cir. 2003). Turner has presented evidence sufficient to raise a genuine issue of material fact as to whether the work she was assigned after her transfer to Minneapolis was a considerable downward shift

from her responsibilities in investigating crimes against children while she was stationed in Minot. Therefore, we find a genuine issue of material fact as to whether the transfer qualifies as an adverse employment action.

We also find evidence sufficient to raise a genuine issue of material fact as to whether Turner's complaints caused the transfer. Turner's performance rating downgrade in June 1999, five days after her letter of complaint, was the first step in the paper trail required to impose an involuntary transfer on an FBI employee. The necessary paper trail was completed with Turner's "Unacceptable" performance rating in December 1999, and Turner was transferred immediately. A reasonable jury could infer that Turner's transfer was a continuation of the [**20] same chain of causation that arguably linked the performance rating downgrade to Turner's complaint letter, as discussed above.

We conclude that Turner presented a prima facie case of retaliation sufficient to survive summary judgment.

[*698] 3. Evidence of Justification and Pretext

Because Turner established a prima facie case, the burden shifts to the FBI to articulate a legitimate, non-discriminatory reason for its actions, and then shifts back to Turner to show that the FBI's reason was pretextual. *Hesse*, 394 F.3d at 631. The FBI contends that the performance rating downgrade and transfer to Minneapolis were justified by Turner's documented poor performance and disruptive behavior. We disagree.

The FBI states that Turner's poor performance justified the June 1999 performance rating downgrade. The performance rating document attributed the downgrade to failure to conduct investigative work in a timely manner, failure to properly notify other law enforcement officials about weekend unavailability, delayed report and time sheet filing, poorly written reports and minimal contacts with sources. Turner first attempts to rebut this evidence with statements from Assistant [**21] [*699] United States Attorneys and law enforcement personnel with whom she had worked closely for several years that her performance did not in fact decline during the 1998-99 time frame. However, these individuals would not necessarily be aware of a decline in her ability to meet internal FBI deadlines and the quality of her internal FBI reporting. Next, Turner argues that her strong record of positive performance reviews before June 1999 creates an inference of pretext for the sudden negative review. "Recent favorable reviews are often used as evidence that the employer's proffered explanation for the adverse action had no basis in fact or was not actually important to the employer." *Smith v. Allen Health Sys.*, 302 F.3d 827, 834 (8th Cir. 2002). In this case, Turner had received a "Superior" rating in her regularly scheduled

annual performance review on April 26, 1999, less than two months before the negative, unscheduled interim review. This supports an inference that the FBI's sudden concerns about internal deadlines and report quality were pretextual.

The FBI also alleges that Turner made mistakes on the Froistad and Vigestad cases in 1998 and 1999. However, Turner [**22] introduced rebuttal evidence from a U.S. Customs agent who was present with her at the time these mistakes allegedly occurred. The agent avers that Turner engaged in no questionable or unprofessional conduct and behaved as "the epitome of an FBI agent" at all times in question. This raises a genuine issue of material fact as to whether the FBI's allegations of misconduct are mere pretext.

Finally, the FBI cites incidents that occurred in September and October 1999, such as complaints about Turner from local law enforcement and a state's attorney, Turner's emotional behavior in the September meeting with Domin, and the results of the allegedly independent FBI investigation, as justification for the adverse actions. First, we note that incidents from September and October 1999 cannot justify the June 1999 performance rating downgrade.² To the extent that these incidents might justify the December 1999 decision to transfer Turner, the "independent" investigator admitted that he interviewed no one who interacted with Turner on a regular basis and merely accepted without question information provided by her supervisors, each of whom worked hun-

dreds of miles away from Turner's location. [**23] Federal agents, Native American reservation law enforcement personnel, and Assistant United States Attorneys who worked closely with Turner averred that she did not commit the specific procedural errors alleged in the inspection report, that historically her work was outstanding, and that her performance showed no decline during the 1998-99 time period.

2 The FBI also attempts to rely on incidents that occurred in Minneapolis after Turner began work there in May 2000. These incidents cannot justify either the June 1999 performance rating downgrade or the December 1999 decision to transfer Turner.

We conclude that Turner produced rebuttal evidence sufficient to raise a genuine issue of material fact regarding the FBI's proffered justification for the adverse employment actions. Therefore, we reverse the district court's grant of summary judgment to the FBI on Turner's retaliation claim.

III. CONCLUSION

We affirm the grant of summary judgment with respect to Turner's gender discrimination and hostile [**24] work environment claims. We reverse the grant of summary judgment on the retaliation claim and remand for further proceedings consistent with this opinion.