

OFFICE OF COMPLIANCE

GLORIA HALCOMB,)	
)	
Complainant,)	
)	
v.)	OC No. 03-SN-29 (CV, RP)
)	
OFFICE OF THE U.S. SENATE)	
SERGEANT AT ARMS,)	
)	
Respondent.)	
)	

HEARING OFFICER’S DECISION

Introduction

On January 23, 2004, complainant filed her revised complaint in this matter. That complaint set forth three claims: (1) racial discrimination, (2) retaliation for engaging in protected activity, and (3) sexually hostile work environment.

Respondent subsequently moved for summary judgment. By Memorandum Order dated March 17, 2004, I ruled that complainant could only seek relief in this case for alleged acts of discrimination, retaliation, and hostile work environment which occurred after December 22, 2002, including her termination in May 2003, and which are not addressed in her pending case in the United States District Court for the District of Columbia.

Complainant’s case came on for hearing on March 15, March 31, April 1, April 2, April 5, April 6, and April 7, 2004. Complainant called thirteen witnesses, and respondent called seven.

At the close of complainant's case, I granted respondent's motion to dismiss the hostile work environment claim for reasons stated on the record. (Tr. vol. IV, p. 59, lines 17-19).¹ I also confirmed with complainant's representative that complainant's two remaining claims concerned (1) racially disparate treatment as between Ms. Halcomb and [REDACTED], another employee of respondent, and (2) termination of Ms. Halcomb as retaliation for engaging in protected activity. (Tr. vol. IV, p. 71, lines 16-20; Tr. vol. IV, p. 58, lines 19-22; Tr. vol. IV, p. 61, lines 21-22).

Following the hearing, both parties were afforded the opportunity to submit proposed findings of fact and conclusions of law with citations to the record concerning these claims and to respond to the proposed findings and conclusions of the opposing party. Oral argument was heard on July 21, 2004.

In her proposed findings of fact, many of which have no citations to the record, complainant has asserted claims of racially disparate treatment as between Ms. Halcomb and employees of respondent other than [REDACTED] (namely, Michael Lawrence, Michael Mastrian, and Sarah Lawrence). Complainant's proposed conclusions of law also purport to state claims under Maryland and District of Columbia employment law, which are not cognizable under the Congressional Accountability Act. The decision herein will set forth findings and conclusions only with respect to the two remaining claims identified during the hearing; complainant's contentions (most of which are, in any event, unsupported by the factual record and legally unsound) regarding other possible

¹ All references to the hearing transcript are indicated by "Tr." followed by the volume, page and lines at which the evidence appears. All exhibits are referred to as either "R. Ex." for respondent's exhibits or "C. Ex." for complainant's exhibits.

claims are outside the scope of the issues properly pleaded and tried and are therefore rejected.

With respect to those two claims, complainant has devoted much of her post-hearing briefing to trying to show that the Senate Radio & Television Gallery was poorly managed and that she was treated unfairly. There is abundant evidence to support the first proposition and some evidence to support the second. However, these propositions are legally irrelevant to complainant's recovery. I am not entitled to award Ms. Halcomb relief simply because Mr. Janezich was an inept and sometimes abrasive manager, whose management style created unhappiness and stress among most of his employees, nor that he may on occasion have misjudged the value of Ms. Halcomb's contribution to the Gallery.

Rather, Ms. Halcomb is entitled to relief here only if she can prove that, between December 22, 2002 and May 21, 2003, (1) she received, on account of her race, treatment that was unfavorably disparate from that afforded to a similarly situated white employee, or (2) she suffered adverse employment actions as retaliation for having participated in protected activity. Considering the evidence as a whole, complainant has failed to prove either claim.

Based on all the evidence of record, the reasonable inferences to be drawn there from, and my evaluation of the credibility of the witnesses, I find the pertinent facts to be as set forth below. In this regard, I note that complainant's credibility was seriously impeached at the hearing by contrary credible testimony from other witnesses, her demeanor, and evidence that she has repeatedly testified falsely under oath concerning having received a college degree from Howard University (where she was never enrolled

in a degree program) or from the University of the District of Columbia (where she was enrolled in such a program but was never awarded a degree). Complainant's explanations for this false testimony were unconvincing.

The findings and conclusions set forth below largely adopt those proposed by respondent, since such proposals were generally on point and supported by the record. I have confirmed the accuracy of respondent's proposed findings and conclusions and have, where appropriate, modified or rejected them.

I. FINDINGS OF FACT

A. Background

1. Complainant Gloria Halcomb ("Halcomb" or "Complainant") is a former employee of the SAA who worked in the Senate Radio & Television Gallery ("the Gallery").

2. The Gallery is the place where radio and television correspondents work when they cover the Senate. (Tr. vol. IV, p. 133, lines 14-18.) The Gallery is located in Room S-325 of the U.S. Capitol. (Tr. vol. IV, p. 133, lines 19-22.) Qualified correspondents of the radio and television news media are permitted to use the Gallery and comprise its membership. (Tr. vol. IV, p. 140, lines 14-17; *id.* pp. 140-41, lines 21-22, 1-2.)

3. Larry Janezich was Halcomb's supervisor. Janezich began his employment in the Gallery as a third assistant in 1970. (Tr. vol. IV, p. 7, lines 5-6, 20-22; *id.* p. 130, lines 20-22.) In 1990 he became Superintendent of the Gallery. (Tr. vol. IV, p. 131, lines 1-6.) In approximately 1993, the title "Superintendent" was changed to "Director." (Tr. vol. IV, p. 132, lines 5-10.) As Gallery Director, Janezich reports

directly to the Deputy Sergeant at Arms. (Tr. vol. V, p. 96, lines 13-16) (Fertig testimony).) Janezich's responsibilities as Gallery Director include, but are not limited to, the following: (1) directing Gallery services and operations; (2) determining the work priorities of the Gallery; (3) serving as a liaison between senior staff of the Gallery and the SAA, the Office of the Architect of the Capitol, the U.S. Capitol Police, the Senate Rules Committee, other Senate Committee offices, members of the Executive Committee of Radio & Television Correspondents ("Executive Committee"), and the broadcast news organizations; and (4) hiring, evaluating, managing and disciplining, including termination of, the SAA employees who work in the Gallery ("Gallery staff"). (Tr. vol. IV, p. 131, lines 7-20.) There are currently five full-time SAA employees on the Gallery staff who report directly to Janezich. (Tr. vol. IV, p. 141, lines 11-17.) The Gallery staff who report to Janezich include, in order of descending authority, the [REDACTED], [REDACTED], the Senior Media Relations Coordinator, Michael Lawrence, two Media Relations Coordinators, Mike Mastrian and Sara Robertson, and an Assistant Media Relations Coordinator, Shannon Finney. (Tr. vol. IV, pp. 141-42, lines 18-22, 1-10.)

4. The Executive Committee, which is a committee or board comprised of Gallery members who have been elected by the Gallery membership, is in charge of administration of the Gallery, which includes deciding who qualifies for Gallery press credentials. (Tr. vol. IV, p. 141, lines 2-9.) The Executive Committee has no authority to appoint, discharge or manage the Gallery staff. (Tr. vol. V, p. 57, lines 4-8 (Harkins testimony); *id.* p. 96, lines 9-12 (Fertig testimony).)

5. The Gallery staff have five key functions: accreditation, liaison, distribution, management of logistics, and enforcement of the rules. (Tr. vol. IV, pp. 142-

43, lines 19-22, 1-4.) The Gallery staff engage in several activities to fulfill those functions. In addition to tasks related to the accreditation of Gallery members, the shared duties of the Gallery staff include the following: (1) briefing members of the media on key legislative initiatives and public policy, and monitoring, tracking and analyzing Congressional activities to update media representatives; (2) coordinating logistics of media events and attending events as a liaison to facilitate media coverage; (3) administering work space for Gallery members; (4) advising Gallery members on Senate operations such as scheduling, procedure, floor strategy, committee structure and jurisdiction and parliamentary procedures; (5) responding to inquiries concerning legislative and public affairs; and (6) creating and maintaining an accurate log of Senate floor proceedings (“Chamber log”). (Tr. vol. IV, p. 143, line 5 through p. 148, line 12; *see* R. Ex. 24.)

6. The Gallery also has an intern program dedicated to minorities and women. (Tr. vol. IV, p. 30, lines 5-6; Tr. vol. VI, pp. 26-27, lines 18-22, 1-10.) The Gallery intern program started in 1994-95 under Janezich’s tenure as Gallery Director. (Tr. vol. IV, p. 30, lines 3-14.) Dan Tuckman, a CBS cameraman at the time, suggested the internship to the Executive Committee, and Janezich set up the program with the assistance of the Radio-Television News Directors Foundation (“RTNDF”). (Tr. vol. IV, p. 30, lines 10-14; Tr. vol. VI, p. 25, lines 8-14.) The intern program funds four interns annually, two of whom are selected and supervised by Janezich to work in the Senate Gallery; the other two interns work in the House Radio & Television Gallery. (Tr. vol. VI, p. 23, lines 4-5; *id.* p. 25, lines 15-18; *id.* p. 26, lines 4-7.) Throughout the entire program, the interns have been minorities or women. (Tr. vol. VI, pp. 26-27, lines 18-22,

1-10.) The minority interns who have participated in the program primarily have been African-American. (Tr. vol. VI, p. 27, lines 11-15.)

B. SAA Personnel Policies

7. The SAA's personnel policies give department directors, such as Janezich, discretion in selecting the form of discipline to be imposed for violations of SAA policies or expectations. (Tr. vol. V, p. 99, lines 10-15; R. Ex. 14, p. 33.) Department directors are to use factors such as the employee's work history and disciplinary record and the seriousness of the employee's misconduct in determining the level of discipline to be imposed. (Tr. vol. V, pp. 99-100, lines 22, 1-7; R. Ex. 14, p. 33.) In addition, department directors must consult with the Director of Human Resources before taking disciplinary action. (Tr. vol. V, p. 99, lines 16-21; R. Ex. 14, p. 33.) If a department director determines that termination is the appropriate level of discipline to be imposed, he or she, after consultation with the Director of SAA Human Resources, can terminate an employee. (Tr. vol. V, p. 84, lines 10-15; *id.* p. 135, lines 13-16.)

C. Halcomb's Employment in the Gallery

8. Halcomb's employment in the Gallery began in 1987. (Tr. vol. IV, pp. 161-62, lines 22, 1-2.) She was hired to fill the position of Fifth Assistant to the Superintendent of the Gallery. (Tr. vol. IV, p. 162, lines 3-5.) As Fifth Assistant, Halcomb was primarily responsible for overseeing the accreditation of Gallery members. (Tr. vol. IV, p. 165, lines 10-16.)

9. In 1990, Janezich promoted Halcomb to the position of Fourth Assistant. (Tr. vol. IV, p. 165, lines 17-21.) During the course of her employment, Halcomb's title was changed from Fourth Assistant to Media Relations Coordinator. (Tr. vol. VI, p. 75,

lines 12-18.) She held this title until her employment was terminated. (Tr. vol. V, p. 8, lines 20-22.) As Media Relations Coordinator, approximately 40 percent of Halcomb's job duties involved managing accreditation. (Tr. vol. V, p. 11, lines 2-5.) Halcomb would prepare and send memoranda to the Gallery membership regarding accreditation deadlines, work with other departments to coordinate accreditation logistics, process and file accreditation applications, and input member information into the membership database. (Tr. vol. I, p. 132, lines 1-10 (Robertson testimony).) The other 60 percent of Halcomb's duties was supposed to be comprised of fulfilling the liaison, distribution of information, and management of logistics functions along with the rest of the Gallery staff. (Tr. vol. V, p. 11, lines 6-12.) As explained in Halcomb's March 2003 performance evaluation, Halcomb was below average in fulfilling this 60 percent of her job duties.

The average number of studio/balcony reservations taken by a gallery staffer between March 11, 2002 and March 11, 2003, was 257.5. This employee took 125. The average number of studio slips filled by a gallery staffer between March 1, 2002 and March 1, 2003 was 115. This employee filled out 3 (three).

(R. Ex. 9, p. 4, ¶ 2.) In addition, several witnesses testified that Halcomb was generally unable to answer inquiries regarding Senate process or proceedings, and that she would usually transfer those inquiries to other Gallery staff. (*See, e.g.*, Tr. vol. III, p. 25, lines 7-20 (Kent testimony); Tr. vol. VI, pp. 134-35, lines 15-22, 1-17 (Lawrence testimony).)

10. Throughout Halcomb's employment in the Gallery, Janezich had counseled Halcomb to improve, among other things, her written communications skills and had suggested as far back as the early 1990s that writing courses might be helpful. (Tr. vol. III, p. 84, lines 7-9 (Halcomb testimony).) In 1995, in connection with Halcomb's performance evaluation, Janezich gave Halcomb a written list of 16 ways she could improve her performance. (R. Ex. 4.) First on that list, Janezich wrote, "It is essential that this employee take courses in remedial writing and legislative procedure. Employee will not be able to perform satisfactorily in this office until she can improve writing and comprehension skills." (R. Ex. 4; *see also* Tr. vol. IV, pp. 188-89, lines 3-22, 1-9.) In June 2000, during a mediation session between Halcomb and Janezich mediated by Jean McComish, Senior Human Resources Administrator for the SAA, Janezich stated that he wanted Halcomb to improve her writing skills. (Tr. vol. V, p. 14, lines 6-9; Tr. vol. VI, p. 78, lines 6-7; *id.* p. 77, lines 4-7.) Janezich suggested that Halcomb take a remedial writing course or a writing class through the Senate Office of Education and Training. (Tr. vol. VI, pp. 79-80, lines 17-22, 1-3.) Also in 2000, in connection with Halcomb's annual performance appraisal, Janezich again provided Halcomb with the 1995 list of 16 ways she could improve her performance. (Tr. vol. V, pp. 13-14, lines 18-22, 1-4; R. Ex. 4.) In her May 2001 performance appraisal, Janezich wrote the following:

This employee does not meet standards with respect to routine office functions, *i.e.*, producing logs of floor activity, taking facility reservations, and filling out studio attendance slips. Her logs of Senate floor activity are not accurate, with many errors in fact and in usage of the language. Logs reveal a lack of understanding of basic legislative procedures and a lack of attention to detail. Employee needs . . . to improve her notetaking ability and writing skills."

(C. Ex. 17, p. 4.) Janezich made similar observations in Halcomb's March 2002 performance evaluation but stated more specifically, "Employee has not followed recommendations to take supplementary writing courses." (C. Ex. 17A, p. 6.) In July 2002, Janezich again suggested to Halcomb that she take courses to improve her written work, including "Write it Right" offered by the Senate Office of Education and Training, to help Halcomb improve her logs and to prepare her to take notes at a leadership pre-session press briefing. (Tr. vol. V, p. 14, lines 10-17.) Janezich consulted several times over several years with Doug Fertig, Director of Human Resources, about Halcomb's deficient writing skills. (Tr. vol. V, p. 104, lines 3-11 (Fertig testimony).) Fertig felt that training would be an "important" way to address Halcomb's writing deficiencies. (Tr. vol. V, pp. 104-05, lines 15-22, 1.) Halcomb never took remedial writing courses as Janezich had recommended, however, and her written work never improved while she was employed in the Gallery. (Tr. vol. V, p. 16, lines 2-7.)

11. In Halcomb's March 2003 performance evaluation, under the skill factor heading "Communications," Janezich articulated his assessment of Halcomb's communication skills.

This employee's performance is unsatisfactory/needs improvement with respect to communication both with respect to the accreditation function and with respect to the liaison, distribution of information, and management of logistics functions.

A main example of unsatisfactory performance regarding this factor is the employee's log of Senate floor debate. An examination of the employee's logs reveals a high degree of carelessness, consistent use of non-standard English, errors in grammar, a lack of ability to recognize Senators, a lack of understanding of Senate procedures and political issues. The employee takes an inordinate amount of time to enter log information into the Senate log database and relies too

heavily on the Senate's delayed transcript of floor proceedings to create her own log. Another example of this employee's lack of writing and listening skills is her demonstrated and acknowledged inability to take the notes from Senate leadership briefings. In addition, the employee is not able to write clear and grammatically correct letters, memos, or directives.

(R. Ex. 9, p. 5, ¶ 9.) Respondent placed several documents in evidence that had been drafted by Halcomb, which show the sort of writing deficiencies that were characteristic of Halcomb's work. (*See* R. Exs. 21, 22, 25.)

12. Janezich has encouraged other Gallery staff, sometimes during their performance reviews, to take grammar and writing classes through the Senate Office of Education and Training, and has given Gallery staff time to take those classes during the regular workday. (Tr. vol. I, p. 48, lines 4-8, 16-18 (Mastrian testimony); *id.* p.127, lines 3-13 (Robertson testimony).) Other staff have taken classes to improve their writing skills. For example, Mastrian took the courses "Editing and Proofreading" and "Grappling with Grammar" in 2002. (Tr. vol. I, p. 48, lines 9-18.) Robertson took the course "Write it Right." (Tr. vol. I, pp. 126-27, lines 19-22, 1-2.) There is no charge to employees who take these classes, and the classes can be completed during the workday. (Tr. vol. V, pp. 33-34, lines 9-22, 1-3.)

13. On March 31, 2003, in connection with Halcomb's annual performance review, rather than merely suggesting that Halcomb take writing courses, Janezich assigned to Halcomb as an objective for the coming year that she complete successfully "Grappling with Grammar," "Punctuation Pointers," and "Take Charge of Your Day . . . Managing Time and Priorities," all classes offered through the Senate Office of Education and Training. (Tr. vol. V, p. 19, lines 2-16; R. Ex. 9.) Janezich instructed her to

complete those classes in an effort to address her long-standing deficiencies in written communication and to improve her organizational skills. (Tr. vol. V, p. 19, lines 2-16; *id.* pp. 20-21, lines 2-22, 1-9.) Janezich also required Halcomb to take two classes from the Advanced Legislative Process Series offered by the Senate Office of Education and Training. (Tr. vol. V, pp. 19-20, lines 17-22, 1; R. Ex. 9.)

14. During her performance evaluation meeting, Halcomb objected to taking the writing classes Janezich had specified, stating, “You are not assigning classes to me. If the Sergeant at Arms directs me to take them, I will.” (Tr. vol. V, pp. 30-31, lines 19-22, 1-8.) In response, Janezich gave Halcomb one month to suggest alternative classes that she felt would improve her writing and organizational skills. (Tr. vol. V, pp. 31-32, lines 15-22, 1-7; R. Ex. 9.) Janezich explained why he gave Halcomb the option of suggesting alternative classes:

A. [Janezich]: Because I wanted to provide her as much flexibility as possible It was entirely possible that she would elect to take classes not from the Senate Sergeant at Arms, not from the Secretary of the Senate, but elsewhere at any – in any venue in which they were offered.

If they were more convenient, if she wanted to do it on the weekends, if she wanted to do it after work [B]ut there are a lot of other courses, more challenging ones, that were offered here and if she thought she were ready for more challenging courses, she had the option to select those.

(Tr. vol. III, pp. 231-32, lines 17-22, 1-17.)

15. On May 19, 2003, Janezich still had not received Halcomb’s alternative class list. Consequently, he sent a reminder to Halcomb and gave her additional time to provide her list. (Tr. vol. V, pp. 32-33, lines 21-22, 1-7; R. Ex. 10.) Halcomb responded to Janezich, by memorandum dated may 19, 2003, in which she stated, “I do not need to

attend classes to improve upon my communications skills as you have suggested.” (R. Ex. 11; *see also* Tr. vol. V, pp. 34-35, lines 15-22, 1-4.) In that same memo, Halcomb proposed to attend three classes that, as Halcomb admitted during the hearing, were not aimed at improving her written communication skills. (Tr. vol. III, pp. 124-25, lines 12-22, 1-22.) One of Halcomb’s suggested classes was a computer course that she had just taken the previous month. (*See* R. Ex. 11.)

16. On the morning of May 20, 2003, Janezich informed Halcomb by memorandum that her proposal was unacceptable and that she would be required to complete successfully the three classes he initially specified in her performance evaluation to address her writing and organizational skills. (Tr. vol. V, pp. 38-39, lines 21-22, 1-9; *id.* pp. 39-40, lines 20-22, 1-4; *see* R. Ex. 12.) Also in that memorandum, Janezich warned Halcomb, “Failure to comply with this directive will be considered insubordination and may result in disciplinary action, up to and including termination of employment.” (R. Ex. 12; *see also* Tr. vol. V, pp. 40-41, lines 20-22, 1-6.) Immediately after Janezich gave Halcomb his May 20 memo, she responded by stating repeatedly to Janezich that she would not attend the classes. (Tr. vol. V, p. 40, lines 5-11.) She said that taking the classes would be an admission that she needed them. (Tr. vol. V, p. 40, lines 11-12.) After attempting to persuade her to take the classes by explaining that her coworkers had taken similar classes, Janezich informed Halcomb that there would be serious consequences if she failed to complete the classes. (Tr. vol. V, p. 40, lines 12-17.) She responded by saying, “I’m not going to take them [the assigned classes]. Do what you have to do.” (Tr. vol. V, p. 40, lines 18-19.)

17. According to Janezich, Halcomb returned to his office two more times throughout the day to reiterate her refusal to take the classes he had specified. At 1:00 p.m., Halcomb approached Janezich in his office, stated again that she was not going to take the classes, and insisted that the issue be presented to the Executive Committee and the Sergeant at Arms. (Tr. vol. V, pp. 41-42, lines 18-22, 1-5.) At 6:00 p.m., Halcomb returned to Janezich's office and stated that she intended to call a meeting of the Executive Committee and the Sergeant at Arms regarding his requirement that she take classes to improve her performance. (Tr. vol. V, pp. 42-43, lines 13-22, 1-4.) Although Halcomb denied during the hearing that she told Janezich she would not take the three classes he specified in his May 20, 2003, memorandum (*see* Tr. vol. VI, pp. 246-47, lines 21-22, 1-4), Halcomb's testimony regarding her conversation with Janezich on the subject belies her denial and is consistent with Janezich's version of Halcomb's remarks to him on May 20, 2003.

HEARING OFFICER VON KANN: What did you say on that subject [of the classes]?

THE WITNESS [Halcomb]: Mr. Janezich had asked me if – about the courses, to take the courses. I said to Mr. Janezich, I said I need – it's more important at this point that I have classes, computer courses, and that the classes that he had suggested for me to take were I think I said elementary, and that I think it's just a way of him trying to harass me and embarrass me, and I don't remember what else we said I told him that I was also going to speak with someone on the [Executive] Committee in regard to that, and also someone at Sergeant at Arms in regard to that

(Tr. vol. VI, p. 247, lines 6-22.) Testimony from Joe Johns, then Chairman of the Executive Committee, regarding a conversation that Halcomb had initiated with him

about the classes requirement, also reveals Halcomb's intention to refuse to take the classes and thus supports Janezich's testimony.

A. [Mr. Johns]: . . . I distinctly remember one telephone call in which [Halcomb] asked me to meet with her. And, it was, there was a lot of urgency. And it was to, to inform me that she had been given a letter indicating she'd – it had to – I think she showed it to me and it had to do with, you know, the fact that she had not taken certain remedial classes that Mr. Janezich had required. And I remember, I think that – I don't remember the date of it, but I do remember having a conversation with her asking, well why don't you just take the classes. And she said she couldn't take the classes because it would be an admission that she had done something wrong.

(Tr. vol. II, pp. 112-13, lines 13-22, 1-4.) (emphasis added).

18. Following her third visit to Janezich's office on May 20 to state her refusal to take the classes, Janezich decided that termination of Halcomb's employment was appropriate. (Tr. vol. V, pp. 163-64, lines 17-22, 1-4.) Janezich made this decision based on the events of May 19-20, 2003, as well as Halcomb's disciplinary record and previous warnings given to her about her conduct. (*Id.*) In accordance with SAA policy, Janezich consulted with the Director of SAA Human Resources, Douglas Fertig, regarding Janezich's decision to terminate Halcomb's employment. (Tr. vol. V, p. 164, lines 5-11; *id.* p. 99, lines 10-21.)

19. Fertig is an experienced human resources professional, having worked 27 years in the field. (Tr. vol. V, p. 95, lines 11-13.) As Director of SAA Human Resources, Fertig was responsible for reviewing Janezich's termination decision and determining whether the termination would be in accordance with SAA policy. (Tr. vol. V, pp. 107-08, lines 19-22, 1-12.) Fertig and Janezich discussed the reasons Janezich presented for termination of Halcomb's employment. (Tr. vol. V, p. 107, lines 10-12.) Fertig

concluded with the termination decision and determined that it was in accordance with SAA policy. (Tr. vol. V, p. 108, lines 1-8; *id.* pp. 139-40, lines 22, 1-5.) Fertig testified, “I thought the action was appropriate because he [Janezich] observed a continuing pattern of insubordinate behavior” (Tr. vol. V, p. 141, lines 15-17.) Fertig also instructed Janezich to discuss the proposed termination with Deputy Sergeant at Arms Keith Kennedy. (Tr. vol. V, p. 108, lines 15-17.) As Fertig instructed, Janezich conferred with Kennedy, who did not oppose the termination. (Tr. vol. V, p. 164, lines 12-17.)

20. On May 21, 2003, Janezich informed Halcomb that her employment with the SAA was being terminated for insubordination and he provided her with a memorandum explaining the reasons for her termination. (Tr. vol. V, pp. 164-65, lines 18-22, 1-6; *see* R. Ex. 13.)

D. Halcomb’s History of Insubordination and Unheeded Warnings

21. The May 2003 insubordination by Halcomb was not the first time that she had acted in defiance of Janezich’s instructions or in disregard for higher SAA authority. As discussed below, Halcomb had been warned about insubordination several times prior to her termination.

22. On June 14, 1999, Halcomb was given a written reprimand for insubordination after she refused to attend a mandatory meeting of all Gallery staff called by then-Sergeant at Arms, Jim Ziglar, to discuss Gallery operations. (Tr. vol. III, pp. 158-59, lines 17-22, 1-10; C. Ex. 13.)

23. In June 2000, Jean McComish, Senior Human Resources Administrator for the SAA, conducted a mediation session between Halcomb and Janezich because Halcomb had refused to meet with Janezich to discuss her annual performance evaluation.

(Tr. vol. VI, p. 77, lines 4-18.) During the course of that mediation, which took place well before Halcomb had ever filed a complaint of discrimination against the SAA, either administratively or in federal court, Janezich identified as the two primary problems with Halcomb, her insubordination and performance. (Tr. vol. VI, pp. 77-78, lines 22, 1-14 (McComish testimony).) With regard to Halcomb's performance, Janezich told McComish that Halcomb was not keeping up with the accreditation process, that her writing skills were not adequate and Halcomb had not made sufficient effort to improve her writing skills, and that Halcomb spent a lot of time engaged in personal phone calls and personal conversations with people. (Tr. vol. VI, pp. 77-78, lines 22, 1-14.) Janezich also told McComish that Halcomb had been insubordinate on several occasions by refusing to perform office tasks that he had assigned to Halcomb. (*Id.*) During the mediation, Halcomb voiced several criticisms of Janezich, but she never informed McComish, either during or after the mediation, that she felt her race played a role in Janezich's treatment of her. (Tr. vol. VI, pp. 78-79, lines 15-22, 1-10; *id.* pp. 81-82, lines 10-22, 1-3.)

24. In February 2001, Halcomb was given a counseling memo for taking two days leave after Janezich told staff members that they could only take one day. (Tr. vol. III, p. 172, lines 5-11; *id.* pp. 172-73, lines 20-22, 1-14 (Janezich testimony); Tr. vol. VI, pp. 84-85, lines 11-22, 1-19 (McComish testimony).)

25. In July 2001, Halcomb again refused to perform an office task that Janezich assigned to her, and she received a written warning. (R. Ex. 6.) Janezich had asked Halcomb to obtain a sign for the booth of a new correspondent in the Gallery.

Halcomb's response to Janezich was "[w]hy should I do it" and "[t]he woman upstairs can call the [s]tationery [s]tore and order her own sign." (R. Ex. 6.)

26. In November 2000, Halcomb was counseled for misconduct. (Tr. vol. III, pp. 187-88, lines 21-22, 1-19.)

27. In December 2001, Halcomb was disciplined again for insubordination to Janezich. (Tr. vol. III, p. 217, lines 1-5; R. Ex. 7.) On December 5, 2001, at the start of the Gallery workday, Janezich noticed Halcomb at her desk eating what appeared to be her breakfast. (See Tr. vol. III, p. 116, lines 10-12 (Halcomb testimony).) When Janezich confronted Halcomb about it and expressed his preference that Gallery staff not eat breakfast at their desks, Halcomb challenged Janezich to put that policy in writing. (See Tr. vol. III, p. 116, lines 13-22 (Halcomb testimony).) In response, Janezich issued a memo to all Gallery staff setting forth his policy regarding staff eating breakfast at work after 9:00 a.m. (Tr. vol. III, pp. 116-17, lines 16-22, 1-2 (Halcomb testimony); C. Ex. 16.) Immediately upon receiving Janezich's staff memo, Halcomb went into Janezich's office, where the copier was located, and made numerous copies of the memo; she told Janezich, "we're going to see what the Sergeant at Arms has to say about this;" she called Janezich "buddy" even after he asked her not to refer to him that way; after Janezich informed Halcomb she was being insubordinate and he would have to write her up, Halcomb leaned close to Janezich and stated, "I don't give a good shit [if] you do put it in your notes." (Tr. vol. III, pp. 196-97, lines 19-22, 1-18 (Janezich testimony).) Halcomb then left Janezich's office. (Tr. vol. III, p. 200, lines 4-7.) Halcomb eventually returned to Janezich's office and made more copies of the staff memo. (Tr. vol. III, p. 203, lines 8-17.) Halcomb was very angry; she slammed copies of the memo on the desks of the

Gallery staff and then returned to Janezich's office where she said in a loud voice, "Did you put anything in there about alcohol?" (Tr. vol. III, pp. 203-04, lines 15-22, 1-2.) Janezich subsequently overheard Halcomb discussing the matter in the Gallery studio with members of the Gallery. (Tr. vol. III, pp. 205-06, lines 12-22, 1-3.) John Bisney, then a member of the Executive Committee, called Janezich from the floor above and told him that Halcomb had distributed the staff memo to all of the correspondents' booths upstairs in the correspondents' work area and had faxed the staff memo to the 24 news bureaus. (Tr. vol. III, p. 209, lines 1-18; *id.* p. 210, lines 1-8; *id.* p. 212, lines 17-21.) Janezich also concluded Halcomb had faxed the staff memo to the news bureaus based on his observation of her use of the Gallery's fax machine that morning and a fax report that was issued from that fax machine showing the memo had been faxed to the news bureaus. (Tr. vol. III, pp. 213-14, lines 10-22, 1-14.) McComish drew the same conclusion after speaking with several Gallery staff. (Tr. vol. VI, p. 99, lines 9-20 (McComish testimony).)

28. Although Halcomb denied that she faxed the memo to the news bureaus, she admitted to Doug Fertig that she had distributed Janezich's memo to Gallery correspondents, because they needed to know of Janezich's "pettiness." (Tr. vol. V, pp. 101-02, lines 11-22, 1-2 (Fertig testimony).)

29. The discipline issued for Halcomb's actions on December 5, 2001, a three-day suspension and final warning, was approved by then-Deputy Sergeant at Arms, Ann Harkins, who had spoken with Halcomb regarding her December 5, 2001, misconduct. (Tr. vol. V, p. 62, lines 2-13.) In the disciplinary memo dated December 21, 2001, Halcomb was warned that any future incidents of misconduct would result in a

recommendation of termination. (R. Ex. 7.) Halcomb did not file a grievance to challenge the discipline or the facts underlying the discipline, an option that Fertig had explained to Halcomb was available to her under SAA personnel policies. (Tr. vol. V, p. 132, lines 3-14 (Fertig testimony).)

30. On November 19, 2002, Halcomb told Janezich that she refused to complete a writing assignment Janezich had given to her and another Gallery employee unless she was ordered to do so by the Sergeant at Arms. (Tr. vol. V, p. 161, lines 8-17.) Indeed, Deputy Sergeant at Arms Harkins testified that Halcomb met with her in November 2002 to question the legitimacy of the writing assignment. (Tr. vol. V, pp. 64-65, lines 4-22, 1-10.) In Harkins's opinion, the writing assignment Janezich had given to Halcomb was "[a]bsolutely" appropriate, and Halcomb's challenge to the assignment Janezich had given Halcomb "was not appropriate." (Tr. vol. V, p. 65, lines 7-10, 19-22.) Harkins instructed Halcomb to complete the assignment and warned Halcomb that she must follow the instructions of her supervisor. (Tr. vol. V, p. 65, lines 11-14.)

31. On December 11, 2002, in response to Janezich's request that she print a list of Gallery members alphabetically, Halcomb told Janezich, "You're evil. You're the devil. Coming in here and having to see you every day is the most disgusting thing in my life." (Tr. vol. V, pp. 162-63, lines 11-22, 1-8.) Although Halcomb denied during the Hearing that she made this particular statement to Janezich, (Tr. vol. II, p. 197, lines 1-3), Halcomb admitted that she had referred to Janezich as "very evil" (Tr. vol. II, p. 197, lines 8-10.).

32. On March 31, 2003, Halcomb told Janezich during her annual performance review, "You are not assigning classes to me. If the Sergeant at Arms directs me to take

them, I will.” (Tr. vol. V, pp. 30-31, lines 19-22, 1-5 (Janezich testimony); *see also* Tr. vol. II, pp. 192-93, lines 15-22, 1-5 (“I think I made the statement to [Janezich] that I would check with the Sergeant at Arms to see if this was appropriate, these classes that he asked me to take”) (Halcomb testimony).) Halcomb’s refusal to follow Janezich’s directive also was contrary to Harkins’s instruction to Halcomb in November 2002 that she follow the directions of her supervisor.

33. During Gallery staff meetings, Halcomb would barely participate, often sitting with her back to Janezich or to the meeting. (Tr. vol. V, p. 163, lines 9-16 (Janezich testimony); Tr. vol. VI, p. 138, lines 8-18 (Lawrence testimony).) According to Michael Lawrence, Senior Media Relations Coordinator, no other Gallery staff member misbehaved in this fashion at staff meetings. (Tr. vol. VI, p. 139, lines 3-5.)

34. In March 2003, during Halcomb’s annual performance evaluation, Janezich informed Halcomb that she had shown “NO IMPROVEMENT” in her “tendency to be insubordinate” and listed as an objective for the upcoming performance period that she “[e]liminate insubordinate behavior.” (R. Ex. 9, p. 3.) Finally, on May 20, 2003, in Janezich’s memo to Halcomb requiring her to take educational classes, Janezich warned her that insubordination “may result in disciplinary action, up to and including termination of employment.” (R. Ex. 12.)

E. Halcomb’s Alleged Protected Activity

35. During the course of the hearing, complainant identified two actions that she asserts constituted activity protected by the CAA’s prohibition against reprisal: (1) her filing of a CAA lawsuit in federal district court against the SAA; and (2) her

complaint to members of the Executive Committee in early spring 2003. (Tr. vol. IV, p. 40, lines 15-19; *id.* p. 42, lines 13-17.)

36. In late June 2001, Halcomb filed an employment discrimination complaint in federal district court. (Tr. vol. I, p. 206, lines 11-22.) Janezich was a subject of the district court complaint. (Tr. vol. I, p. 206, lines 11-14.) Janezich first learned of the complaint in July 2001, during a phone call from a reporter for *Roll Call*. (Tr. vol. VI, p. 17, lines 9-19.)

37. In Spring 2003, Halcomb spoke with two members of the Executive Committee, Ed O’Keefe and Joe Johns, about Janezich. (Tr. vol. II, pp. 97-98, lines 18-22, 1-2.) According to Johns, Halcomb complained to him in early 2003 “about the supervision of the galleries.” (Tr. vol. II, p. 98, lines 6-9.) One example cited by Halcomb to Johns was “that there was an employee of the galleries who from time-to-time came to work smelling of alcohol. And that she was, that she [Halcomb], was watched very carefully while this other employee was not disciplined.” (Tr. vol. II, p. 98, lines 11-16.) O’Keefe recalled that Halcomb told him that she believed Janezich “was inappropriately disciplining her” in relation to the other Gallery staff. (Tr. vol. II, pp. 34-35, lines 18-22, 1-4.) Neither Johns nor O’Keefe testified that Halcomb complained to them that Janezich had engaged in conduct that violated the CAA, or more specifically that he was discriminating against her based on her race or some other protected characteristic.

38. After hearing Halcomb’s concerns about Janezich, neither Johns nor O’Keefe disclosed to Janezich that Halcomb had made these complaints. Johns did not recall ever speaking with Janezich about the concerns expressed by Halcomb or any other

Gallery staff member. (*See* Tr. vol. II, p. 109, lines 15-22.) Ed O’Keefe testified that he mentioned only generalized staff complaints to Janezich and never identified Halcomb as having made any particular complaint. (Tr. vol. II, pp. 73-74, lines 19-22, 1-5 (O’Keefe testimony); *see also* Tr. vol. V, p. 169, lines 3-5 (Janezich testimony).)

A. [Mr. Janezich]: . . . [O’Keefe] informed me that three of my staff members had come to him with tears in their eyes, complaining about working conditions in the Gallery, about salaries, and that he thought that I was responsible, that my management and leadership was responsible for that.

(Tr. vol. V, pp. 168-69, lines 19-22, 1-2.)

39. No evidence was presented at the hearing to establish that Janezich was aware that Halcomb had told any member of the Executive Committee that she believed Janezich’s treatment of her was based on her race or was the product of any other form of unlawful discrimination. Indeed, Janezich inferred from O’Keefe’s remarks that Halcomb, along with Gallery staffers Robertson and Mastrian, both of whom are white, had complained about his management style and Gallery working conditions. (Tr. vol. V, pp. 168-69, lines 19-22, 1-10.)

F. Racist Remarks in the Gallery

40. Halcomb testified to two incidents in which allegedly racist remarks were uttered in the Gallery. The first was use of the term “nigger” by a cameraman telling a joke in the Gallery which occurred soon after Halcomb began her employment in the Gallery (1987). (Tr. vol. II, pp. 154-55, lines 18-22, 1-9.) [REDACTED] testified that the cameraman used the offensive term to explain the meaning of an Asian word that he had just overheard then Sergeant at Arms Henry Giugni use to refer to himself. (Tr. vol. V, p. 188, lines 1-17.)

41. The second remark was made by Janezich in 1995 during a conversation with a radio correspondent named George Wilson. (Tr. vol. II, pp. 152-53, 11-22, 1-21.) Halcomb claims to have overheard part of their conversation, but could not recall what the racist remark was. (Tr. vol. II, p. 153, line 18.)

42. Janezich and Wilson both testified that, during a 1995 conversation in his office, in which he told George Wilson that he [Janezich] believed Nation of Islam Minister Louis Farrakhan was a racist, Wilson asked Janezich if he considered himself a racist and that, after some thought, he acknowledged that he did. (Tr. vol. I, p. 74, lines 1-11 (Wilson testimony); Tr. vol. IV, pp. 160-61, lines 1-22, 1-20 (Janezich testimony).)

43. No other witness testified to ever hearing a racist or racially derogatory remark in the Gallery, uttered either by Janezich or anyone else.

G. [REDACTED]'s Employment in the Gallery

44. As of the time of the hearing, [REDACTED] was the [REDACTED] of the Gallery. (Tr. vol. IV, p. 141, line 20.) Janezich and [REDACTED] have worked together in the Gallery since 1970. (Tr. vol. IV, p. 150, lines 11-14.) [REDACTED] has been Janezich's [REDACTED] since 1990. (Tr. vol. IV, p. 150, lines 15-18.) [REDACTED] is in charge of the Gallery when Janezich is not present there, and Janezich trusts her to be in charge in his absence. (Tr. vol. IV, p. 148, lines 18-20; *id.* p. 151, lines 17-19.) [REDACTED] assists Janezich in reviewing accreditation applications for approval. (Tr. vol. V, pp. 175-76, lines 19-22, 1-6.) She also handles Gallery accounting, processes accounts payable and incoming checks from accreditation, and does Chamber logs and fields Gallery phone calls. (Tr. vol. VI, p. 166, lines 1-3.)

45. [REDACTED] often comes to work early and leaves late, and rarely takes time off from work. (Tr. vol. I, p. 39, lines 11-16 (Mastrian testimony); Tr. vol. VI, pp. 165-66, lines 16-22, 1-6 (Lawrence testimony).) She has a well-developed institutional memory, and a deep knowledge of Senate procedure, politics, issues, and Senate history. (Tr. vol. IV, pp. 151-52, lines 22, 1-6 (Janezich testimony); Tr. vol. VI, p. 139, lines 13-16) (Lawrence testimony).) She has excellent proofreading and editing skills. (Tr. vol. IV, p. 152, lines 3-4 (Janezich testimony).) She has excellent news judgment, i.e., knowing what is important to broadcast news organizations and knowing what the reporters covering the Senate want or need to know. (Tr. vol. IV, p. 152, lines 10-17 (Janezich testimony); Tr. vol. VI, p. 140, lines 5-14 (Lawrence testimony).)

46. Janezich uses [REDACTED] as a sounding board. (Tr. vol. IV, p. 157, lines 6-8.) He discusses Gallery operations with her, about which they have sometimes had disagreements in which [REDACTED] has raised her voice or used curse words. (Tr. vol. I, p. 40, lines 3-12 (Mastrian testimony); *id.* p.144, lines 2-12 (Robertson testimony); Tr. vol. IV, pp. 150-51, lines 19-22, 1-5 (Janezich testimony).) According to Gallery staff members Mastrian and Robertson, these arguments “don’t happen often,” “perhaps two – three or four times,” and took place in Janezich’s office. (Tr. vol. I, pp. 125-26, lines 18-22, 1-2 (Robertson testimony); *id.* p. 145, lines 8-17 (Robertson testimony); *id.* p. 40, lines 13-19 (Mastrian testimony).) Janezich has given [REDACTED] counseling memos as well as formal discipline for speaking inappropriately to him. (Tr. vol. IV, page 151, lines 6-12; *see also* Tr. vol. V, p. 187, lines 2-6.) Janezich also disciplined [REDACTED] in 2001 for falling behind in her accounting duties. (Tr. vol. V, p.186, lines 6-11.)

47. According to several witnesses, [REDACTED] wore the same outfit to work for many months every day and her personal hygiene has been, at times, offensive. (*See, e.g.*, Tr. vol. I, p. 96, lines 13-20; *id.* p. 97, lines 7-9 (Robertson testimony); *id.* p. 20, lines 9-16 (Mastrian testimony).) Janezich testified that issues regarding [REDACTED]'s appearance and hygiene have existed since the mid-1980s; since that time there have been periods of improvement and periods of lapse in her appearance and hygiene. (Tr. vol. IV, p. 154, lines 10-19.) Janezich has counseled [REDACTED] regarding her appearance in the workplace, for example, requiring her to wear a new outfit or new shoes, and giving her deadlines to make those changes. (Tr. vol. IV, pp. 149-50, lines 18-22, 1-2.) [REDACTED] has complied with Janezich's instructions. (Tr. vol. IV, p. 150, lines 3-10; *see also* Tr. vol. I, p. 97, lines 9-13 ("After roughly around inauguration 2003 [sic] she has been alternating between approximately three outfits. One gray, one navy blue, and one that has a multi-colored shirt and matching black pants.") (Robertson testimony).)

48. Janezich admits to having been protective of [REDACTED] at times and attributes that to his long working relationship with her and his belief that she is smarter than he is. (Tr. vol. IV, pp. 152-53, lines 20-22, 1-3.) Janezich considers [REDACTED] to be a loyal and reliable member of the Gallery staff. (Tr. vol. IV, pp. 156-57, lines 20-22, 1-5.)

H. Complainant's Credibility

49. Halcomb's credibility was severely impeached during the Hearing.

50. As discussed below, Halcomb falsified her educational credentials on the employment application she submitted to the SAA in 1987 despite certifying they were

true, testified falsely in open court to a federal district court judge in 2003, testified falsely under oath in 2004 during her deposition in this case and in 2003 during a deposition in unrelated litigation in federal district court, and testified falsely under oath during the hearing.

51. Halcomb submitted a resume to the SAA when she applied for a position in the Gallery in 1987. (Tr. vol. VI, p. 211, lines 9-17; C. Ex. 29.) The resume, which Halcomb prepared prior to August 1986, indicated that she “[e]xpected August 1986” to receive a B.A. in journalism from the University of the District of Columbia (“UDC”). (C. Ex. 29; Tr. vol. VI, pp. 213-14, lines 20-22, 1-9.) On Halcomb’s SAA employment application dated June 11, 1987, Halcomb represented that she had obtained a degree in journalism from UDC in 1986. (R. Ex. 18.) On the employment application, which Halcomb signed, she certified that the information on the application was “true, complete and correct.” (See R. Ex. 18.)

52. Contrary to her SAA employment application, Halcomb testified during the hearing that she has a Bachelor of Arts degree in mass communications from UDC. (Tr. vol. III, pp. 132-33, lines 18-22, 1-4.) Halcomb had difficulty recalling in what year she was awarded her college degree.

Q. [Ms. Kostel]: You were awarded that degree in 1987?

A. [Ms. Halcomb]: Around that time, yes. Let’s see. I had just started my job with the Senate. I was going to school. I think it was around ‘88, ‘89, something.

(Tr. vol. III, p. 133, lines 5-9.) During her deposition weeks earlier, however, Halcomb stated unequivocally that she had received a B.A. from UDC in 1987 and her major was

mass communications. (Tr. vol. III, pp. 139-40, lines 16-22, 1-9; R. Ex. 29, p. 191, lines 10-21.)

53. Sandra Harrison, Program Manager in the Office of the Registrar at UDC for the past 17 years (Tr. vol. IV, p. 98, lines 12-15), testified that Halcomb did not earn a college degree from UDC in 1987 or any other year (Tr. vol. IV, p. 101, line 18-22; *id.* p. 107, line 11-15; *see also* R. Ex. 19). Harrison also testified that UDC does not offer a degree in mass communications. (Tr. vol. IV, p. 107, lines 2-5.)

54. During her rebuttal case, Halcomb showed photographs of herself dressed in cap and gown and testified that those photos were taken on the day of her graduation from UDC. (Tr. vol. VI, p. 221, lines 11-18.) Those photos, however, fail to establish that Halcomb in fact received a degree from UDC. Harrison testified that students have been permitted to participate in graduation ceremonies at UDC even though they have not yet fulfilled all of their degree requirements. (Tr. vol. IV, p. 116, lines 5-13.) Moreover, Halcomb testified that those photos were taken in May 1990 (Tr. vol. VI, p. 221, lines 13-18), which directly contradicted her previous testimony that she had received her degree from UDC in 1987.

55. On June 26, 2003, Halcomb spoke untruthfully in open court to Judge Reggie Walton of the United States District Court for the District of Columbia. During the hearing on Halcomb's motion for a temporary restraining order, when Judge Walton asked Halcomb to state her educational attainment, Halcomb responded by saying that she had graduated from UDC in 1980 as a communications major. (Tr. vol. III, p. 141, lines 6-18; R. Ex. 26, p. 10, lines 5-13.)

56. On February 13, 2003, while testifying under oath during her deposition in Civil Action No. 02-1362 (D.D.C.), Halcomb stated, “I have a degree from Howard University, a B.S.” (Tr. vol. III, p. 134, lines 8-15; R. Ex. 28, p. 5, lines 8-11.) Yet, Halcomb conceded during the Hearing that she has never taken a single degree – credited course offered by Howard University. (Tr. vol. III, p. 134, lines 20-22.)

57. Halcomb also was unable to recall significant facts from her former employment with the SAA. For example, although Halcomb was responsible for accreditation throughout her 16-year SAA career, Halcomb could not describe the eligibility rule for Gallery membership during the Hearing. (Tr. vol. III, p. 105, lines 3-12.) Halcomb did not recall receiving a \$7,000-plus salary increase as a direct result of her job title change from Fourth Assistant to Media Relations Coordinator. (*Compare* Tr. vol. IV, p. 89, lines 5-14 (Halcomb testimony) *with* Tr. vol. VI, p. 75, lines 4-21 (McComish testimony) *and* Tr. vol. V, pp. 9-10, lines 22, 1-10 (Janezich testimony).) Halcomb also did not remember that she was promoted from Fifth Assistant to Fourth Assistant by Janezich in 1990. (*Compare* Tr. vol. IV, pp. 87-88, lines 21-22 (Halcomb testimony), 1-9 *with* Tr. vol. VI, p. 58, lines 9-14 (Janezich testimony) *and* Tr. vol. V, p. 178, lines 4-9 ([REDACTED] testimony).)

58. As the foregoing examples show, Halcomb’s memory is sometimes faulty or worse, and she has sometimes testified falsely under oath concerning matters about which she must surely know the truth.

II. CONCLUSIONS OF LAW

At the close of the hearing, the following two claims remained for adjudication: (1) racially disparate treatment of complainant compared to [REDACTED], which included, ultimately, complainant's discharge on May 21, 2003; and (2) retaliatory termination resulting from complainant's filing an employment discrimination lawsuit in June 2001 and making complaints to the Executive Committee and the respondent about Janezich. (Tr. vol. IV, p. 58, line 10 through p. 61, line 22.) Respondent's motion for directed verdict on complainant's hostile work environment claim was granted. (Tr. vol. IV, p. 59, lines 17-19.)

A. Conclusions of Law Regarding the Disparate Treatment Claim

1. "McDonnell Douglas [*Corp. v. Green*, 411 U.S. 792 (1973),] and subsequent decisions have 'established an allocation of the burden of production and an order for the presentation of proof in . . . discriminatory-treatment cases.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993)). "First, the plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

2. If the plaintiff succeeds in proving a *prima facie* case, the burden shifts to the employer to "produc[e] an explanation to rebut the *prima facie* case." *Hicks*, 509 U.S. at 506-07. The burden placed on the employer is "one of production, not persuasion." *Reeves*, 530 U.S. at 142; *see also Burdine*, 450 U.S. at 256-57. The employer must simply "articulate some legitimate, nondiscriminatory reason for the [employment decision]." *McDonnell Douglas*, 411 U.S. at 802; *see also Burdine*, 450 U.S. at 257 ("to

satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus”).

3. If the employer successfully articulates a legitimate, nondiscriminatory reason for the challenged employment action, then the *McDonnell Douglas* framework disappears and the plaintiff must prove by a preponderance of the evidence that the employer’s reason is merely a pretext for unlawful discrimination. *Burdine*, 450 U.S. at 256; *see also Carter v. Rubin*, 14 F. Supp. 2d 22, 37 (D.D.C. 1998) (“The Supreme Court has defined pretext in this context as a showing that the employer’s stated reason is false and that the real reason for the adverse employment decision is in fact discrimination.”) (citing *Hicks*, 509 U.S. at 515).

4. “The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Burdine*, 450 U.S. at 253; *see also Hicks*, 509 U.S. at 507 (same); *Reeves*, 530 U.S. at 143 (same).

5. Complainant claims that respondent engaged in disparate treatment of her based on her race which led to the termination of her employment. (Tr. vol. IV, pp. 39-40, lines 18-22, 1-2.) To establish a prima facie case of race discrimination, complainant must demonstrate that (1) she is a member of a protected class, (2) she was terminated or suffered other adverse employment action, and (3) such action gives rise to an inference of race discrimination. *Stella v. Mineta*, 284 F.3d 135, 145 (D.C. Cir. 2002); *Hopkins v. Women’s Div., General Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003).

6. Although complainant's burden to establish a prima facie case is "not onerous," *Burdine*, 450 U.S. at 253, it is not clear that complainant has met her burden here. While complainant is a member of a protected class who was discharged and not replaced, she was only arguably performing her duties at or near respondent's legitimate expectations. Assuming, *arguendo*, that complainant has established a prima facie case, respondent produced ample evidence that complainant's discharge was for legitimate reasons.

(1) **The SAA Met its Burden of Articulating a Legitimate, Non-Discriminatory Reason for the Termination Decision**

7. It is well-established that insubordination is a legitimate, non-discriminatory reason for termination of employment. *See McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789, 797 (7th Cir. 1997) (employer met its burden of articulating a legitimate non-discriminatory reason for discharge by asserting that plaintiff's termination resulted from insubordination); *Hibbler v. Reg'l Med. Ctr.*, No. 00-6205, 2001 WL 700829, at *3 (6th Cir. June 12, 2001) (documented insubordination constitutes legitimate, non-discriminatory reason for firing); *Mustafa v. Park Lane Hotel, Inc.*, 12 F. Supp. 2d 360, 362 (S.D.N.Y. 1998), *aff'd*, 182 F.3d 900 (2d Cir. 1999) (insubordination is legitimate non-discriminatory reason for termination). The employment discrimination law "is meant to shield employees from the discriminatory actions of their employers, not to excuse an employee's poor job performance, impudence, or insubordination." *Gregg v. Hay-Adams Hotel*, 942 F. Supp. 1, 9 (D.D.C. 1996).

8. The evidence at the hearing established that Janezich terminated complainant's employment for refusing to take classes as he instructed, in light of prior incidents of insubordination by complainant and after repeated warnings. Complainant

had received several warnings for her insubordination through formal and informal disciplinary measures, and from SAA officials other than Janezich, such as Human Resources personnel and the Deputy Sergeant at Arms.

(2) **Complainant Failed to Prove that the SAA's Proffered Reason for Disciplining and Ultimately Discharging Her was Simply a Pretext for Discrimination**

9. Complainant has failed to prove by a preponderance of the evidence that the SAA's explanation for its discipline and termination of her is a pretext and that the real reason for the SAA's actions were complainant's race.

10. One way that a complainant alleging disparate treatment can establish pretext is by proving that the employer treated similarly situated employees not in complainant's protected class differently than complainant. To prove that she is similarly situated to such an employee, complainant must prove that "all of the relevant aspects of her employment situation were 'nearly identical'" to that of the non-protected employee. *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995) (quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994)). In addition, complainant must demonstrate that she and the other employee "were charged with offenses of 'comparable seriousness.'" *Holbrook v. Reno*, 196 F.3d 255, 261 (D.C. Cir. 1999) (quoting *Lynn v. Deaconess Med. Ctr.*, 160 F.3d 484, 488 (8th Cir. 1998)). In the D.C. Circuit, "the showing of similarity is demanding." *Coles v. Perry*, 271 F. Supp. 2d 157, 163 (D.D.C. 2003). Complainant "must show a near identity of circumstances between her situation and that of the person to whom she compares herself." *Id.*; see also *Hopkins*, 284 F. Supp. 2d at 28 (D.D.C. 2003) (rejecting plaintiff's race discrimination

claim because there was no evidence that any white employee engaged in misconduct similar to plaintiff's).

11. Halcomb asserted during the hearing that Janezich's treatment of [REDACTED], a female member of the Gallery staff who is white, is evidence that Janezich's reasons for terminating Halcomb are a pretext for race discrimination. [REDACTED] and Halcomb, however, were not similarly situated in any way. The *Neuren* case is instructive regarding the flaws in Halcomb's comparison of herself to [REDACTED]. The plaintiff in *Neuren*, a senior associate attorney, attempted to demonstrate that her former law firm's justification for firing her was a pretext for gender discrimination by offering evidence that the firm had retained a male associate who had writing and billing issues. *Neuren*, 43 F.3d at 1513-14. Affirming the trial court's decision, the D.C. Circuit concluded that plaintiff had not established pretext because (1) the male associate was lower in seniority than plaintiff, and (2) the problems with the male associate's work, writing and billing issues, were entirely different from plaintiff's problems, which included repeated failure to meet deadlines and problems in her interpersonal relations with staff, and the male associate's problems were viewed as less serious problems than the plaintiff's. *Id.* at 1514.

12. First, [REDACTED] and Halcomb were not similarly situated because they held different jobs and had different responsibilities. *See id.*; *see also Jones v. Denver Post Corp.*, 203 F.3d 748, 753 (10th Cir. 2000) (holding plaintiff's comparison to a supervisory employee was not legally relevant because plaintiff was not a supervisor.) [REDACTED] was the [REDACTED] of the Gallery who had supervisory and

accounting responsibilities and served in an advisory role to Janezich, none of which were responsibilities of Halcomb, who held the position of Media Relations Coordinator.

13. Second, [REDACTED] did not engage in the same type of misconduct as Halcomb. Halcomb engaged in repeated acts of insubordination, but there is no evidence that [REDACTED] was insubordinate to Janezich. Janezich testified that he could not recall a time when [REDACTED] refused to do as he asked. Rather, the evidence at the hearing established that on a handful of occasions [REDACTED] had raised her voice and used curse words with Janezich. There is no evidence in the record that those arguments involved [REDACTED]'s refusal to take direction from Janezich. Indeed, the only evidence regarding the subject matter of those arguments supports the conclusion that when Janezich would confer with [REDACTED] in her role as [REDACTED], they sometimes disagreed about Gallery operations. That is not insubordination.

14. The evidence also shows that [REDACTED] had serious deficiencies in personal hygiene, apparently stemming from psychological problems and perhaps alcohol abuse. On the other hand, [REDACTED] had extensive experience and knowledge concerning Gallery operations, wrote well, and was a long-time, loyal employee nearing retirement. Janezich did discipline her on occasion but did not terminate her employment. Whether or not Janezich properly weighed the considerations in declining to terminate [REDACTED]'s employment, it is clear that those considerations were entirely different from the situation of Halcomb, a much junior, non-supervisory employer who did not write well and was repeatedly insubordinate when directed to take actions designed to address that deficiency in her performance.

15. Because complainant has failed to prove that respondent's reason for disciplining and terminating her are pretextual, respondent is entitled to judgment in its favor on complainant's race discrimination claim.

(3) Conclusions of Law Regarding Alleged Racist Remarks in the Gallery

16. The use of a racially derogatory term by a cameraman in 1987 and the statement by Janezich in 1995 that he considered himself a racist are not evidence of pretext or discriminatory intent of respondent. "To be probative, remarks by the decision maker must have some nexus to the adverse employment decision." *Waterhouse v. District of Columbia*, 124 F. Supp. 2d 1, 12 (D.D.C. 2000). The first remark was not made by an employee of respondent, let alone a decision maker. The 1995 statement by Janezich was not uttered in the context of any employment action involving Halcomb. Moreover, the remark appears to have been a commendably honest recognition that vestiges of racism remain in many Americans (black and white). Such a candid self-diagnosis is at least as consistent with a determination not to allow racial considerations to influence one's management actions as it is with a pre-disposition toward biased treatment.

B. Conclusions of Law Regarding the Retaliation Claim

17. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), sets forth the basic allocation of burdens and orders of proof for retaliation cases. See *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002) (stating that *McDonnell Douglas* burden-shifting scheme is applicable to retaliation claims).

18. First, complainant bears the burden of establishing a prima facie case of retaliation. The three elements of the prima facie case are: (1) that complainant engaged

in activity protected by § 1317 of the CAA; (2) that complainant was subjected to an adverse employment action; and (3) that there was a causal link between the protected activity and the employer's action. See *Brown v. Brody*, 199 F.3d 446, 452-53 (D.C. Cir. 1999). Complainant "may establish a causal connection 'by showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity.'" *Baker v. Potter*, 294 F. Supp. 2d 33, 41 (D.D.C. 2003) (quoting *Cones v. Shalala*, 199 F.3d 512, 521 (D.C. Cir. 2000)).

19. After a prima facie case is established, the burden of production shifts to respondent, who must offer evidence that the adverse employment action was taken for non-retaliatory reasons. To meet this burden, respondent need only articulate a legitimate, non-retaliatory reason for the adverse employment action. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981); see *Carter v. Rubin*, 14 F. Supp. 2d 22, 37 (D.D.C. 1998). The articulation of a legitimate, non-retaliatory reason for the adverse employment action shifts the burden of proof to complainant to show that respondent's reason is merely a pretext for unlawful retaliation. *Burdine*, 450 U.S. at 256.

20. At all times, complainant bears the ultimate burden of persuading the trier of fact that respondent intentionally retaliated against her because of her protected activity. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Carter*, 14 F. Supp. 2d at 37.

(1) Complainant Has Not Established a Prima Facie Case of Retaliation

21. Complainant asserted during the hearing that Janezich recommended her termination in retaliation for (1) complainant's complaint to members of the Executive

Committee and the SAA about Janezich, and (2) complainant's discrimination lawsuit in federal district court. (Tr. vol. IV, p. 40, lines 15-19; *id.* p. 42, lines 13-17.) As the evidence at the hearing proved, however, respondent did not retaliate against complainant because she engaged in any activity protected by the CAA.

(a) **Halcomb's Complaints to Members of the Executive Committee and the SAA Do Not Constitute "Protected Activity"**

22. To establish that her complaints were activity protected by § 1317 of the CAA, complainant was required to prove that she opposed an employment practice made unlawful by the CAA. *See* 2 U.S.C. § 1317(a) ("It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this Act . . ."). Halcomb asserts that she engaged in protected activity when she complained in early 2003 to Johns and O'Keefe, then members of the Executive Committee, about Janezich's management practices. These complaints, however, are not protected activity under the CAA. General complaints about working conditions are not considered protected activity. *See Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701-702 (3d Cir. 1995); *Gautney v. Amerigas Propane, Inc.*, 107 F. Supp. 2d 634, 646 (E.D. Pa. 2000). Similarly, the record is devoid of evidence of any complaints by Halcomb to the SAA regarding discriminatory acts by Janezich. Where protected activity is lacking, a claim of retaliation cannot prevail.

23. Even if the meaning of protected activity were stretched to include Halcomb's generic complaints about Janezich to Johns and O'Keefe, her retaliation claim must fail because she has not established any causal link between these complaints and

adverse employment action. The evidence shows that Janezich inferred from O'Keefe's remarks that Halcomb, along with Robertson and Mastrian, both of whom are white, had complained about his management style and Gallery working conditions. Yet, no adverse employment actions were taken against Robertson or Mastrian, thus undercutting the inference that these complaints must have been the cause of the adverse action taken against Halcomb.

(b) Complainant's June 2001 Filing of an Employment Discrimination Lawsuit is too Temporally Remote from the Termination Decision to Create an Inference of Retaliatory Animus

24. Although Halcomb failed to establish the exact date on which she filed her district court lawsuit against the SAA, there was evidence during the Hearing indicating that Halcomb's lawsuit was filed in late June 2001. Filing an employment discrimination lawsuit is protected activity under the CAA. *See* 2 U.S.C. § 1317. Janezich testified that he learned of Halcomb's district court litigation shortly after it was filed, when a reporter from *Roll Call* newspaper called Janezich in early July 2001 for comment about the lawsuit. Halcomb's employment was terminated on May 21, 2003, almost two years later. Halcomb has not offered any evidence linking her lawsuit to her termination other than the fact that the lawsuit was filed prior to her termination. The temporal proximity of these two events, however, is not sufficient to establish a causal link between them.

25. To accept "mere temporal proximity" between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality requires that the temporal proximity be "very close." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (noting that three- or four-month gap is insufficient evidence of causality and that 20-month period suggests "no causality at all"); *see also Baker*, 294 F.

Supp. 2d at 41 (finding two-month gap is not sufficient evidence of causality); *Ball v. Tanoue*, 133 F. Supp. 2d 84, 91 (D.D.C. 2001) (holding that 10-month gap between protected activity and adverse action is too great to provide causal nexus). The temporal proximity between complainant's district court lawsuit in June 2001 and her termination in May 2003 is not close at all. With a causal connection lacking between her protected activity and her termination, complainant cannot establish a prima facie case of retaliation.

(2) **The SAA Met Its Burden of Production By Articulating a Legitimate, Non-Retaliatory Reason for Complainant's Termination**

26. Even if complainant had established a prima facie case of retaliation, respondent need only articulate a legitimate, non-retaliatory reason for her termination. *Burdine*, 450 U.S. at 255; *see Carter*, 14 F. Supp. 2d at 37.

27. It is well-established that insubordination is a legitimate, non-retaliatory reason for termination of employment. See Conclusion of Law No. 7, supra.

28. The evidence at the hearing established that Janezich terminated complainant's employment for refusing to take classes as he instructed, in light of prior incidents of insubordination by complainant and after repeated warnings. Complainant had received several warnings for her insubordination through formal and informal disciplinary measures, and from SAA officials other than Janezich, such as Human Resources personnel and the Deputy Sergeant at Arms.

(3) **Complainant Failed to Prove that the SAA's Proffered Reason for Her Termination Was Simply a Pretext for Retaliation**

29. Because respondent met its burden of production, the presumption of a retaliatory motive created by the prima facie case disappears. *See Hicks*, 509 U.S. at

510-11.

30. To prove that her termination was due to a retaliatory motive, complainant is required to demonstrate that the proffered reason for termination was pretextual. Specifically, she must prove that respondent's proffered reason of insubordination is false and that the real reason for her termination is because she engaged in protected activity. *Carter*, 14 F. Supp. 2d at 42 (citing *Hicks*, 509 U.S. at 515).

31. When examining an employer's actions for pretext, the question is whether the employer honestly believed the proffered reason for its actions. *Essex v. United Parcel Serv., Inc.*, 111 F.3d 1304, 1310 (7th Cir. 1997). "The fact that the employer was mistaken or based its decision on bad policy, or even plain stupidity, goes nowhere as evidence that the proffered explanation is pretextual." *Id.*; see also *Carter*, 14 F. Supp. 2d at 44 ("The federal anti-discrimination laws do not entitle this court to sit as a 'super-personnel department' that reexamines an agency's decision whether to terminate an employee. . . . The sole concern of this court is whether the reason for which the defendant discharged [the employee] was discriminatory. In essence, when an employer articulates a reason for the termination of an employee not forbidden by law, this court is precluded from considering whether the reason was fair or correct, so long as it is the true reason for the discharge."); *Olsen v. Marshall & Ilsley Corp.*, 267 F.3d 597, 602 (7th Cir. 2001) ("[I]t is not enough for a plaintiff to show that his employer's explanation was based on an inaccurate assessment of [his] performance. . . . [E]vidence that shows that an employer incorrectly assessed its employee's abilities does not shed light on whether the employer is lying about that assessment. . . . And without proof of a lie, no inference of discriminatory motive can be drawn.") (citations omitted); *Waterhouse v. District of*

Columbia, 124 F. Supp. 2d 1, 10 (D.D.C. 2000) (“Once the employer has articulated a non-discriminatory explanation for its action, . . . the issue is not the correctness or desirability of the reasons offered but whether the employer honestly believes in the reasons it offers.”) (internal quotations and citations omitted), *aff’d*, 298 F.3d 989 (D.C. Cir. 2002).

32. Respondent amply established at the hearing that its actions with respect to Halcomb were consistent before and after the filing of Halcomb’s district court lawsuit in June 2001. The three-day suspension of December 2001 and the termination of her employment each resulted from acts of insubordination by her. These were not the first or only occasions, however, on which Janezich had to address insubordinate behavior by Halcomb. There were several occasions prior to June 2001 when Halcomb’s insubordinate conduct was the subject of disciplinary action. In June 1999, Halcomb was given a written reprimand for refusing to attend a mandatory meeting of all Gallery staff called by the Sergeant at Arms to discuss Gallery operations. In June 2000, SAA Human Resources had to conduct a mediation between Halcomb and Janezich because she had refused to meet with Janezich to discuss her annual performance appraisal. Halcomb was given a counseling memo warning her about insubordination in February 2001. That respondent took disciplinary action against complainant for insubordination both before and after she filed her District Court lawsuit cannot be refuted by complainant and belies the notion that either complainant’s District Court lawsuit or her complaints to Johns and O’Keefe was the impetus for her discharge.

33. Complainant’s argument that Janezich did not have third-party witnesses to Halcomb’s misconduct is insufficient to establish that her misdeeds did not occur or

that Janezich did not truly believe that Halcomb was being insubordinate. The evidence at the hearing proved that respondent had warned this marginally performing employee on several occasions over several years that she must put an end to her insubordinate behavior, that Halcomb continued to defy Janezich despite those warnings, and that Janezich, with the concurrence of Fertig and Kennedy, determined that termination was the appropriate disciplinary action to take.

34. Complainant has failed to prove that Janezich did not have a good faith belief in Halcomb's insubordination, therefore, she has failed to prove pretext. Because complainant has failed to establish her termination was for retaliatory reasons, her claim must be denied.

ORDER

Because complainant has failed to prove her claims (1) that respondent treated her in a disparate fashion from a similarly situated white employee, or (2) that she was terminated in retaliation for engaging in activity protected by the CAA, it is hereby ordered as follows:

- (1) Complainant has failed to establish liability of respondent for any claim presented in this proceeding.
- (2) The damage phase of the proceeding, which would have followed a determination of respondent's liability, is cancelled as moot.

October 14, 2004

Curtis E. von Kann
Hearing Officer

