UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MICHAEL KELLY, Plaintiff,	:	
v.	:	C.A. No. 12-929S
U.S. DEPARTMENT OF HOMELAND SECURITY, Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

This matter is before the Court for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(A) on the motion (ECF No. 65) of Defendant U.S. Department of Homeland Security ("DHS") for summary judgment. The motion challenges the legal viability of Plaintiff Michael Kelly's claim that he was constructively discharged by DHS in retaliation for his complaint of sexual harassment by his supervisor.

Plaintiff's factual proffer establishes that he worked from 2002 until his resignation on February 7, 2011, as a transportation security screener for the Transportation Security Administration ("TSA") at Green Airport in Warwick, Rhode Island ("PVD"), under the auspices of DHS. His evidence is sufficient for a fact finder to conclude that, beginning in approximately 2008, he was subjected to pervasive sexual harassment by his supervisor. In October 2010, he brought her unwelcome advances to the attention of a senior TSA administrator with human resources responsibilities, who directed him to write a formal complaint. After he did so, Plaintiff's job was changed and he was pressured to alter his report by deleting the salacious details, but the supervisor was not disciplined and the investigation of her conduct ended without conclusion.

Less than four months later, Plaintiff was subjected to a lengthy interview by the same senior TSA administrator, assisted by an armed security officer, concerning an after-hours internet posting Plaintiff had made of alleged Sensitive Security Information ("SSI") related to airport security. The TSA officials told Plaintiff that he must immediately resign or face summary termination and a federal criminal prosecution, the investigation of which had already been initiated by the issuance of a subpoena. If Plaintiff's evidence is credited, a fact finder could find that all of this was false, in that no subpoena had issued and the postings, while stupid and discipline-worthy, were not criminal and did not constitute an automatic firing offense. Based on these findings, a fact finder could reasonably infer that TSA's concocted threats were a pretext to force Plaintiff to resign, thereby avoiding the investigation that would inevitably expose TSA's cover-up of his complaint of sexual harassment by his supervisor. The mendacious threats produced the desired result; two days after being told that he would be summarily fired and criminally prosecuted, Plaintiff succumbed to the pressure and resigned.

Based on these events, Plaintiff sued under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*., claiming that he was constructively discharged in retaliation for complaining that he had been sexually harassed (Count III).[1] DHS argues that the undisputed facts establish that it is entitled to judgment on its affirmative defense that Plaintiff failed properly to exhaust administrative remedies. DHS also contends that Plaintiff has failed to develop evidence sufficient to establish either a *prima facie* case or that its actions in response to Plaintiff's internet posting were pretextual. Finding that Plaintiff has presented the Court with ample facts that are sufficient to make this matter trial-worthy, I recommend that DHS's motion be denied.

[1] Plaintiff voluntarily dismissed Count I (*quid pro quo* sexual harassment) and Count II (hostile work environment based on sexual harassment) on September 23, 2016. ECF No. 74. Count III is the only remaining claim.

I. BACKGROUND[2]

A. Sexual Harassment Complaint in October 2010

TSA was created by Congress on November 19, 2001, to ensure civil aviation safety through, *inter alia*, passenger screening. D-SUF ¶¶ 1-2. To carry out this responsibility, TSA employs teams staffed by screeners and screening transportation officers ("TSO"), led by supervisory and lead transportation security officers ("STSO" and "LTSO"). D-SUF ¶¶ 4-8. In 2002, Plaintiff was hired by TSA as a screener and was promoted to TSO in 2007. D-SUF ¶¶ 10-11. He was assigned to the same team as Melissa Comfort in 2008; at the time she either was, or soon after became, an LTSO. D-SUF ¶¶ 13-14. In 2010, Comfort was promoted to STSO and assumed a supervisory role over Plaintiff; she was responsible for his 2010 performance evaluation, which took place in September. P-SUF ¶ 172.

Comfort began making unwelcome sexual overtures to Plaintiff, a married man, as soon as they started working on the same team. After she became his supervisor, her conduct escalated. P-SUF ¶¶ 153-58. The unwelcome behavior included pushy flirtation, inappropriate comments pregnant with sexual innuendo (for example, about her lack of a "gag reflex"), attempts to hug or kiss Plaintiff, invitations to join her in the back of her van, and repeated proposals that he join her on trips (including business trips) so they could be together. P-SUF ¶¶ 155-68. Plaintiff felt she was using sexual harassment to assert power over him. P-SUF ¶ 169. He rebuffed her repeatedly. P-SUF ¶¶ 167, 170. Comfort was displeased by Plaintiff's rejection, finally instructing him to stop turning away when she tried to kiss him. P-SUF ¶ 164.

[2] These facts are drawn from the parties' factual statements filed pursuant to DRI LR Cv 56, as well as from Plaintiff's affidavit (ECF No. 71-11) ("Kelly Aff.") and deposition (ECF No. 71-2) ("Kelly Dep."). Plaintiff's Statements of Undisputed and Disputed Facts are referred to as P-SUF (ECF No. 71) and P-SDF (ECF No. 72). DHS's Statement of Undisputed Facts is referred to as D-SUF (ECF No. 66). As required in considering a motion for summary judgment, the history is told from the perspective of Plaintiff, drawing all inferences in his favor.

In 2010, Comfort was responsible for Plaintiff's evaluation; in contrast with 2009 when he received the highest rating from his previous supervisor, Comfort gave him a lower rating. The parties dispute whether the lower rating resulted in a lower bonus and a smaller raise. P-SUF ¶ 172. Because Plaintiff believed that his job performance had not declined, what he considered to be an unfavorable review convinced him that his refusal of Comfort's advances was affecting her supervision of him and that he needed help. P-SUF ¶¶ 172-73.

In October 2010, Plaintiff reported the sexual harassment to Steve Sheridan, the TSA Administrative Officer in charge at PVD airport. D-SUF ¶ 20; P-SUF ¶¶ 175-76. Sheridan had an extensive background in human resources and was responsible for many aspects of employee relations and benefits at the airport. P-SUF ¶¶ 193-96, 198-200. Among his duties, Sheridan was responsible for ensuring that employee discipline was handled properly; in addition, he frequently walked around the airport to talk with employees about benefits and other human resource issues. Further, with no equal employment opportunity ("EEO") counselors at PVD, Sheridan was the PVD point of contact with the TSA Office of Civil Rights in Virginia; he was involved with facilitating that Office's investigative process. P-SUF ¶¶ 209-10.

Plaintiff asked Sheridan what he should do and how he could stop the aggressive sexual overtures. P-SUF ¶¶ 177-79; D-SUF ¶¶ 47-49; ECF No. 71-2 at 12 (Kelly Dep. at 159: "Basically I made an inquiry of what I should do. I asked him what I should do."). Plaintiff claims that Sheridan told him that other TSA employees had complained that Comfort had engaged in inappropriate sexual behavior in the past. P-SUF ¶¶ 180 (Kelly Dep. at 163-64). In response to Plaintiff's inquiry regarding what to do, Sheridan directed Plaintiff to prepare a formal incident report and to follow up with another TSA manager, Michael Candeias. P-SUF

¶¶ 181-82; Kelly Dep. at 162. On October 8, 2010, Plaintiff filed his written report with Candeias. As its introduction makes clear, the serious nature of the complaint is unambiguous:

> Through previous instances of inappropriate conversations of a sexual nature, sexual innuendo, inappropriate touching and invitations of sexual acts of which were initiated, implemented, inferred by my supervisor STSO Melissa Comfort, I find working under her charge to be a stressful, uncomfortable and intimidating work environment.

P-SUF ¶ 186; Kelly Dep. at 99.

Candeias called Plaintiff and met with him the next day. P-SUF ¶¶ 181-86. During the meeting, Candeias repeatedly said, "I'm not asking you to change your report, . . . but I will let you know that if you file this report, it's going to result in the termination of [Comfort]." Kelly Dep. at 167. Feeling that these comments were being gratuitously repeated to pressure him to change the report, on October 15, 2010, Plaintiff told Sheridan he would revise the report. He resubmitted the formal report to Candeias, this time with less detail about Comfort's graphic sexual comments. P-SUF ¶¶ 187-91. Immediately after, Plaintiff was removed from Comfort's team. P-SUF ¶ 192; D-SUF ¶ 70. After the report was altered, the investigation of Comfort's conduct was closed and she was not disciplined. D-SUF ¶¶ 68-69; P-SUF ¶ 285.

B. TSA Administrative Exhaustion Requirements

For a TSA employee like Plaintiff to satisfy the requirement of exhaustion of administrative remedies before suing for any incident of employment discrimination, as required by the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, and 29 C.F.R. §1614.105(a)(1), the incident must be reported to a Virginia-based EEO counselor in the TSA Office of Civil Rights within forty-five days of the event. D-SUF ¶¶ 73-85. TSA employees are notified of this exhaustion requirement in a variety of ways. D-SUF ¶¶ 73-85. For example, at annual trainings and on posters displayed at various locations throughout all facilities including PVD airport,

employees are told that contact should be made with the "Office of Civil Rights" and that the failure to do so in forty-five days "may result in a loss of your rights." P-SDF ¶ 77 (emphasis supplied); see D-SUF ¶ 90; P-SDF ¶ 90. The annual training text also states: "Informal EEO Complaint Process . . . you must contact TSA's Office of Civil Rights (OCR) within 45 days of the event." D-SUF ¶ 84 (emphasis supplied). A similar notification appears on employee pay stubs, which state that "contact must be made within 45 days" with the "Office of Civil Rights." D-SUF ¶ 73 (emphasis supplied). Plaintiff was exposed to all of these notifications. D-SUF ¶¶ 76, 79, 81, 82, 86.

Throughout October 2010, including during Plaintiff's conversations with both Sheridan and Candeias about Comfort's sexual harassment, no one told Plaintiff that Comfort's sexual harassment triggered the running of a forty-five-day clock within which he must contact an EEO counselor in Virginia or be foreclosed. P-SUF ¶ 211. To the contrary, when Plaintiff asked Sheridan what he should do, Sheridan told him to write a complaint and talk to Candeias. Sheridan did not tell him to contact an EEO counselor; nor did Sheridan explain that presenting the complaint to him did not constitute presentation of it to the TSA Office of Civil Rights. P-SUF ¶¶ 181-82. As a result, Plaintiff believed that he had made a complaint sufficient to bring the matter to the Equal Employment Opportunity Commission ("EEOC"). Kelly Dep. at 172. He did not know that he needed to initiate another EEO process within forty-five days of Comfort's last act of sexual harassment. Kelly Aff. ¶¶ 8-9. He understood from Candeias that there would be an investigation based on the information he supplied. Kelly Dep. at 177. As with Sheridan, Plaintiff expected Candeias to tell him how to proceed. Kelly Dep. at 173.

C. Constructive Discharge in February 2011

A month after Plaintiff formally reported Comfort's sexual harassment, in November 2010, a TSA social media analyst responsible for monitoring the internet came across anonymous postings that referenced TSA screening procedures. D-SUF ¶ 114. Under the name "TongueDepressor," the poster identified himself as a "TSA Occifer." D-SUF ¶¶ 115-17. The public thread discussed TSA screening procedures and was determined by TSA to constitute an SSI breach. D-SUF ¶¶ 118, 125. The analyst's research led him to suspect that Plaintiff may have posted the material.

On December 20, 2010, a TSA special agent from Boston and William Mullen, an airport law enforcement employee, interviewed Plaintiff to determine if he was responsible. D-SUF ¶¶ 129-31. After an initial denial, Plaintiff admitted that he had made the postings and signed a short statement. D-SUF ¶ 132. The TSA special agent wrote up a report of the incident, including the details of the interview. Although the agent testified that he makes a referral to the U.S. Attorney and notes the referral in his report whenever he finds what he considers to be criminal conduct, this report does not suggest that Plaintiff committed any crime either in posting the information or in initially disclaiming the posting. PSUF ¶¶ 229-30. In addition, the special agent did nothing to remove the postings from the public domain, even though he understood that, whenever SSI is made public, "TSA should take all steps necessary to stop the divulgence of SSI to the public." P-SUF ¶ 237.

No further action was taken until February 6, 2011, when Sheridan (the TSA administrator who handled Plaintiff's sexual harassment complaint) and Mullen (the TSA law enforcement officer who assisted with the first interview about the postings) called Plaintiff in on a Sunday afternoon for a special meeting. D-SUF ¶ 138; P-SDF ¶ 138. At the time of the meeting, no disciplinary proceedings had been initiated against Plaintiff. P-SUF ¶ 262. TSA

employment discipline procedures include the right to be notified of the proposed discipline, the right to a due process hearing in which the employee can present his side of the story, and the right to appeal the discipline. P-SUF ¶¶ 262, 307. The February 6, 2011, meeting was recorded (surreptitiously by Plaintiff); the sealed transcript is on file with the Court. ECF No. 80-1.

During the interview, Sheridan and Mullen told Plaintiff that his initial hesitation before admitting he made the internet postings is a federal crime in that he had made "materially false statements" during the December interview in violation of 18 U.S.C. § 1001. P-SUF ¶ 276. Sheridan and Mullen said that criminal prosecution would be pursued unless Plaintiff voluntarily resigned because the postings were a matter of "life and death." P-SUF ¶¶ 277, 281, 306. They informed Plaintiff that TSA had already served a subpoena on the website to find out if there were more postings, because that would be "a continuing criminal enterprise," exposing Plaintiff to charges of conspiracy. P-SUF ¶¶ 278-79. When Plaintiff asked if he could consult an attorney or his representative, Mullen responded that, once the matter was turned over to the U.S. Attorney, it would be "out of their hands." P-SUF ¶¶ 281-82. The interviewers said that even a first offense involving SSI requires mandatory termination, precluding the collection of unemployment. P-SUF ¶¶ 282, 303. Only if he resigned immediately could Plaintiff avoid criminal prosecution and be eligible for unemployment benefits. P-SUF ¶¶ 281-82.

In the midst of the interview, one of the speakers[3] made what a fact finder could conclude is an oblique reference to Plaintiff's sexual harassment complaint, asking, "And is there anything else going on with that other matter that we talked about? . . . And was it, did I get all the truth in that, in that matter or did I get your, your, your side in, in that matter?" Plaintiff responded: "You got exactly what – I, I could have given you more." The unidentified speaker answered, "No, that's okay, I mean, I, I did – I don't want any more at, at, at this point, but I'm asking you

[3] The filed copy of the confidential transcript does not indicate who is speaking.

that question because you weren't accurate with these guys." ECF No. 80-1 at 55-56 (Tr. at 52-53).[4] In context, the reference to whether Plaintiff lied about the "other matter" is linked to the accusation that Plaintiff lied about the postings.

Neither Sheridan nor Mullen told Plaintiff about the TSA discipline process or his rights in connection with that process. Exacerbating the intimidating atmosphere of the interview, Mullen was armed. P-SUF ¶ 266. The confidential transcript of the encounter reveals that Plaintiff was shocked and terrified by all that Sheridan and Mullen said to him and that he believed that he had no choice but immediately to resign.

Plaintiff has presented evidence sufficient to establish that virtually everything said by Sheridan and Mullen during this meeting was either plainly inaccurate (there was no subpoena) or a dramatic exaggeration. No one had concluded that the SSI posting was a criminal act; the special agent who conducted the first interview did not consider Plaintiff's initial prevarication to be criminal or an obstruction of the investigation; and an SSI disclosure requires termination for a first time offense only if it is found to constitute "an intentional act that undermines the security operations and the trust and confidence of the traveling public in the integrity of the nation's transportation system," which no one had yet found Plaintiff's conduct to be. P-SUF ¶¶ 273, 275, 279-80, 302. A fact finder could conclude that Plaintiff's admittedly stupid and crass posts about TSA pat-down procedures did not seriously undermine airport security because the posted information was already publicly known. Perhaps most significant, Plaintiff's proof establishes that TSA was so unconcerned about the posted SSI that, to date, it has taken no action to remove it from the public domain. P-SUF ¶ 306.

[4] While the transcript of the interview has been sealed, this exchange is quoted in an unsealed brief (ECF No. 65 at 27 n.24) and was mentioned in open court during the hearing. Therefore, it is not redacted in this report and recommendation.

Plaintiff resigned two days after the interview. P-SUF ¶ 283. Plaintiff claims that he did not realize or believe that the EEO regulations applied to this incident or that he was required to initiate contact with an EEO counsellor within forty-five days. Kelly Aff. ¶¶ 10-12.

No complaint was filed with a Virginia-based TSA EEO counselor until December 5, 2011, fifteen months after the evaluation that Plaintiff believes was tainted by Comfort's reaction to Plaintiff's rejection of her sexual overtures, fourteen months after Plaintiff's October 2010 complaint to Sheridan and Candeias about Comfort's sexual harassment and nine months after his resignation was compelled by the terrifying February 6, 2011, meeting with Sheridan and Mullen. D-SUF ¶ 149.

II. STANDARD OF REVIEW

Under Fed. R. Civ. P. 56, summary judgment is appropriate if the pleadings, the discovery, disclosure materials and any affidavits show that there is "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Taylor v. Am. Chemistry Council, 576 F.3d 16, 24 (1st Cir. 2009); Commercial Union Ins. Co. v. Pesante, 459 F.3d 34, 37 (1st Cir. 2006) (quoting Fed. R. Civ. P. 56(c)). A fact is material only if it possesses the capacity to sway the outcome of the litigation; a dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. Estrada v. Rhode Island, 594 F.3d 56, 62 (1st Cir. 2010). The evidence must permit the court to conclude that it will be admissible at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). "[E]vidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve." Medina-Monoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990)).

In ruling on a motion for summary judgment, the court must examine the record evidence in the light most favorable to the nonmoving party; the court must not weigh the evidence and reach factual inferences contrary to the opposing party's competent evidence. Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014). The court "must disregard all evidence favorable to the moving party that the jury is not required to believe." Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 151 (2000). Summary judgment is inappropriate if the evidence "is sufficiently open ended to permit a rational fact finder to resolve the issue in favor of either side." Ahmed v. Johnson, 752 F.3d 490, 495 (1st Cir. 2014).

III. ANALYSIS

A. Sufficiency of *Prima Facie* Case and Evidence of Pretext

Mindful that when pretext and retaliatory animus are at issue, "[c]ourts should be especially cautious before granting summary judgment," Harrington v. Aggregate Indus.-Ne. Region, Inc., 668 F.3d 25, 33 (1st Cir. 2012), the Court need not linger long on the sufficiency of Plaintiff's *prima facie* case and evidence of pretext. As to both, the evidence, while disputed, is substantial, permitting a fact finder to conclude that Plaintiff was the victim of sexual harassment by his supervisor and that, when he exercised his protected right to complain, he was forced to resign based on pretextual threats of criminal prosecution and summary termination for conduct that, while perhaps discipline-worthy, was probably not serious enough either for criminal prosecution or for termination after a first offense. Because the intimidation brought to bear by Mullen and Sheridan resulted in his resignation, as they intended, Plaintiff forfeited the protections of the TSA disciplinary and termination policies, which might well have exposed Sheridan's cover-up of the sexual harassment complaint.

The sufficiency of Plaintiff's Title VII retaliation claim must be decided under the familiar burden-shifting framework in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). At step one, the court examines whether the claimant has made out a *prima facie* case, which requires only a minimal showing that Plaintiff undertook protective conduct, such as reporting sexual harassment, and then suffered a causally-related adverse employment action. Ramsdell v. Huhtamaki, Inc., 992 F. Supp. 2d 1, 15 (D. Me. 2014); Drumm v. CVS Pharm., Inc., 701 F. Supp. 2d 200, 208 (D.R.I. 2010). As the First Circuit recently reaffirmed, the plaintiff's burden at this initial stage is a lenient one. Soto-Feliciano v. Villa Cofresi Hotels, Inc., 779 F.3d 19, 30 (1st Cir. 2015). If a plaintiff meets the *prima facie* burden, step two requires the employer to offer a legitimate non-retaliatory reason for the adverse employment action, id. at 30, which shifts the burden back to the plaintiff, at step three, to present evidence from which a fact finder could conclude that the reason is actually a pretext to mask retaliation. To defeat summary judgment, the plaintiff need not prove retaliation by a preponderance; rather, he must show only that there is a material dispute as to whether retaliation was the motive for the adverse employment action. Soto-Feliciano, 779 F.3d at 31.

Plaintiff easily clears step one, the *prima facie* bar. First, DHS concedes that Plaintiff's evidence is sufficient to raise a factual dispute about whether he engaged in protected conduct when he complained to Sheridan about Comfort's behavior. Second, that Plaintiff suffered an adverse employment action is established by the dramatic evidence of the intimidating and coercive interview, during which Plaintiff was forced to resign based on false and misleading information.[5] Third, for purposes of the *prima facie* case, Plaintiff can demonstrate the requisite

[5] While courts are often skeptical whether circumstances are sufficient to convert an employee's decision to resign into constructive discharge, e.g., Gerald v. Univ. of P.R., 707 F.3d 7, 25 (1st Cir. 2013), the facts in this case easily meet the mark. Plaintiff's belief that he had no choice but to resign is expressly stated in the transcript of the confidential interview. See Torrech-Hernandez v. Gen. Elec. Co., 519 F.3d 41, 50 (1st Cir. 2008) ("employee must

causal link by the temporal proximity between the sexual harassment complaint in October and the pretexual events triggered by Plaintiff's internet posting, which was discovered in November, leading to his forced resignation in February. DeCaire v. Mukasey, 530 F.3d 1, 19 (1st Cir. 2008) (quoting Mariani-Colon v. Dep't of Homeland Sec. ex rel. Chertoff, 511 F.3d 216, 224 (1st Cir. 2007) (two-month window between protected activity and termination sufficient to show causation for *prima facie* case)).

At step two in the McDonnell Douglas sequence, DHS readily sustains its burden of presenting a non-retaliatory reason for Plaintiff's constructive discharge – Plaintiff's SSI postings. Plaintiff does not dispute the sufficiency of this proffer.

For the last leg of the analysis, the Court must focus on whether Plaintiff's evidence is sufficient to permit a fact finder to infer that DHS successfully pressured Plaintiff to resign in retaliation for his complaints of sexual harassment. For starters, there is ample evidence to support the finding that Sheridan and Mullen were trying to force Plaintiff to resign, and that their stated reason – the internet posting of SSI – was a pretext. First, there is the material dispute whether the information posted was already public (as Plaintiff believes) and whether the postings were a serious SSI breach. Second, the very troubling threats of criminal prosecution salted through the interview appear to be entirely groundless. Third, the statement that a subpoena had already issued appears to be flatly false. Fourth, it is disputed whether Plaintiff's conduct was a disciplinary matter for which termination is permissible for a first offense. And last, at no time was Plaintiff accurately advised of his rights as a TSA employee to an orderly process before any discipline could be imposed.

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show that, at the time of his resignation, his employer did not allow him the opportunity to make a free choice regarding his employment relationship"); Schultz v. U.S. Navy, 810 F.2d 1133, 1136 (Fed. Cir. 1987) (resignation based on false or misleading information intentionally imparted by employer can constitute constructive discharge; "[i]f an employee can show that the agency knew that the reason for the threatened removal could not be substantiated, the threatened action by the agency is purely coercive").

In the context of this case, these facts are also just enough to permit the critical inference that the pretext masked Sheridan's real reason for forcing Plaintiff to resign – to avoid the revelation of his cover-up of Plaintiff's complaint of sexual harassment. This inference is aided by the otherwise enigmatic linkage of whether Plaintiff was truthful when he complained about Comfort with the charge that his "lie" about the postings would be prosecuted criminally unless he promptly resigned. That is, a fact finder could conclude that, after Sheridan and Candeias effectively suppressed Plaintiff's serious sexual harassment complaint, Sheridan, with the assistance of Mullen, seized the opportunity created by Plaintiff's SSI infraction to threaten, bully and brow-beat Plaintiff into resigning so that Sheridan's cover-up of the Comfort misconduct would evade detection. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (when reasons for forcing employee to resign are tainted by mendacity, fact finder may infer pretext); Soto-Feliciano, 779 F.3d at 29-32 (conduct of employer that departs from proper procedures and instead relies on lies and manipulation to get plaintiff out of the workplace before an orderly investigation can begin gives rise to inference that accusations of disciplinary infractions are pretextual); Brennan v. GTE Gov't Sys. Corp., 150 F.3d 21, 29 (1st Cir. 1998) (pretext established by evidence that employer "did not use standard procedure").

Based on the foregoing, aside from the knotty question of exhaustion of administrative remedies, which is discussed below, I find that Plaintiff has presented evidence that is sufficient to persuade a fact finder both that he has a *prima facie* case and that the reason given for his constructive discharge was a pretext to mask retaliation for his complaint of sexual harassment. Accordingly, I recommend that the Court deny DHS's motion for summary judgment on the merits of his Title VII claim.

B. Exhaustion of Administrative Remedies

As an administrative prerequisite to bringing a Title VII action, a federal employee must comply with the exhaustion requirements imposed by the EEOC regulation that requires a federal employee to "initiate contact with [an EEO] Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the action." 29 C.F.R. § 1614.105(a)(1); see Green v. Brennan, 136 S.Ct. 1769, 1774 (2016).

While the time frame is tight, the regulation is not rigid. Its text provides that the time period may be extended in circumstances where, "despite due diligence [the employee] was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission." 29 C.F.R. § 1614.105(a)(2). This portion of the regulation reflects the long-standing doctrine that equitable tolling is applicable to EEOC suits against the United States, for example "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-6 (1990) (citing Glus v. Brooklyn Eastern Dist. Terminal, 395 U.S. 231 (1959) ("To decide this case we need look no further than the maxim that no man may take advantage of his own wrong.")); see Weick v. O'Keefe, 26 F.3d 467, 470 (4th Cir. 1994) (EEO counselor's "deliberate misconduct had lulled" plaintiff into inaction). Thus, as long as the complainant is diligent in taking action sufficient to put the agency on notice, courts should not be so "subsumed by legal technicalities that Title VII's intent is defeated." Brodetski v. Duffey, 199 F.R.D. 14, 18 (D.D.C. 2001); see Dixon v. Gonzalez, 481 F.3d 324, 331 (6th Cir. 2007) (tolling appropriate if claimant reasonably lacked notice of technical filing requirements, was diligent in pursing his rights, and did not prejudice defendant by delay). "[T]he tolling decision should be made on a case-by-case basis." Id.

DHS's motion asks the Court to grant judgment in its favor because Plaintiff did not exhaust administrative remedies in that he did not present his complaint to a TSA EEO counselor until December 5, 2011.[6] However, this Court has already rejected DHS's failure to exhaust argument at the Fed. R. Civ. P. 12(b)(6) phase based on the doctrine of equitable tolling, as contemplated by the applicable regulation, which provides that the time limit may be extended if the employee was diligent in bringing forward a complaint and putting the employer on notice, but was unaware of the time limits or prevented by circumstances beyond his control from contacting a counselor. Kelly v. U.S. Dep't of Homeland Security, 4 F. Supp. 3d 358 (D.R.I. 2014) (citing 29 C.F.R. § 1614.105(a)(2)) (the "Decision").[7] The Decision emphasizes cases holding that the time limit should be tolled if the federal employee complained of sexual harassment to supervisors, failing only to meet with an EEO counselor. 4 F. Supp. 2d at 362 (citing Briggs v. Henderson, 34 F. Supp. 2d 785 (D. Conn. 1999)). The Decision establishes the law of this case; its holding must be the starting point for the exhaustion analysis at the Fed. R. Civ. P. 56 phase.

In the Decision, the Court focused on the Complaint and held that Plaintiff's allegations were sufficient to render plausible that his obligation to file a complaint about Comfort's sexual harassment with an EEO counselor in Virginia was tolled: he was diligent in presenting the claim to Sheridan and Candeias, the TSA employees connected to the EEO process; he was unaware of the time limits; Sheridan and Candeias failed to "advise [Plaintiff] of his EEO rights or the

[6] DHS successfully raised Plaintiff's failure to exhaust before the EEOC, which affirmed the agency decision dismissing the complaint based on Plaintiff's failure to present a complaint to a TSA EEO counselor within forty-five days of the operative events. ECF No. 71-13.

[7] DHS does not argue that the Decision was wrongly decided or that the Court should reverse course and overrule itself – indeed, DHS does not refer to the Decision at all, relying instead on cases holding that the exhaustion requirement should be strictly applied. Baldwin Cty. Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1992); Zipes v. TWA, Inc., 455 U.S. 385, 393 (1982).

reporting deadline, nor did they refer him to an EEO counselor"; and "both men discouraged Plaintiff from pursuing a course of action that might have resulted in disciplinary action against Melissa Comfort." Id. at 361-62. Noting that the exhaustion requirement is an affirmative defense on which DHS carries the burden of proof, the Court observed, "[s]ince factors in the equitable-tolling analysis include Plaintiff's knowledge, state of mind and intent at the time he met with Sheridan and Candeias, Defendants are up against an insurmountable obstacle to securing a judgment in their favor based only on the allegations in the Complaint." Id. at 362.

Applying this holding of the Decision at the summary judgment phase of the case, I find that the record is now more than sufficient to buttress with competent evidence the factual allegations on which the Court relied. Thus, Plaintiff has presented evidence sufficient to place the following facts in dispute: that Sheridan and Candeias were both involved in PVD's human resources functions; that Sheridan was both the highest ranking TSA administrator at PVD and the point of contact for the EEO counselors in Virginia; that, when Plaintiff asked Sheridan what to do, he told Plaintiff to write a formal report and to talk to Candeias, not to contact the EEO counselors; and that, in asking Sheridan and Candeias for help, Plaintiff was specifically looking for their guidance about what he should do about sexual harassment by the supervisor who had also written his review. Based on these facts, a fact finder could accept both that Plaintiff was diligent in making his complaint and in complying with Sheridan's direction for how to pursue it and that Plaintiff did not understand that the forty-five-day reporting requirement required more, particularly because the posters, trainings and pay stub to which he was exposed were ambiguous. Further, a fact finder could conclude that Plaintiff reasonably believed the presentation of his complaint to Sheridan complied with TSA's vaguely-worded exhaustion requirement, as well as that Sheridan's intentional misdirection constitutes a circumstance

beyond Plaintiff's control. See 29 C.F.R. § 1614.105(a)(2) (exhaustion requirement is tolled if employee prevented from technical compliance due to "circumstances beyond his or her control"). Such findings are sufficient to toll the exhaustion requirement for claims arising from Comfort's sexual harassment.

The wrinkle is that Plaintiff is no longer asserting claims based directly on Comfort's sexual harassment. Rather, his sole remaining claim is retaliation based on his constructive discharge at the beginning of February 2011. In the Decision, the Court analyzed whether the tolling of Plaintiff's time to exhaust the underlying sexual harassment complaint also tolled his time to exhaust the complaint that he was constructively discharged for making the sexual harassment complaint. Citing Clockedile v. N.H. Dep't of Corr., 245 F.3d 1, 6 (1st Cir. 2001), which teaches that "[r]etaliation uniquely chills remedies . . . and discourages the employee from adding a new claim of retaliation," the Decision holds that a claim of retaliation is not time-barred so long as it is reasonably related to and grows out of the discriminatory conduct that was the subject of an exhaustion-compliant complaint. 4 F. Supp. 3d at 363; see Nealon v. Stone, 958 F.2d 584, 590 (4th Cir. 1992) ("We therefore join the other circuits that have spoken to the question in adopting the rule that a separate administrative charge is not a prerequisite to a suit complaining about retaliation for filing the first charge.").

In finding that the lack of a timely complaint to an EEO counselor is not fatal to Plaintiff's retaliation claim, the Decision adverts to a specific complaint allegation – that, during the constructive discharge meeting in February 2011, Sheridan asked Plaintiff to withdraw the Comfort report. 4 F. Supp. 3d at 363. With that fact in the pleading, the Court held that Count III (retaliation) should not be dismissed based on Plaintiff's alleged failure to exhaust administrative remedies. Id. However, that factual foundation has succumbed to the grind of

discovery. Plaintiff's evidentiary proffer of what happened during the interview with Sheridan and Mullen does not establish that Sheridan explicitly asked Plaintiff to withdraw the revised Comfort report. Rather, it reflects only that Plaintiff was asked the ambiguous, but potentially insidious, question whether he was truthful in connection with "that other matter that we talked about," in juxtaposition with the threat that Plaintiff's initial denial that he did the internet postings was a serious federal criminal offense for which he would be prosecuted. The question that controls my recommendation is whether, even though the specific fact on which Judge Lagueux relied has fallen by the wayside, Plaintiff has nevertheless presented sufficient evidence to overcome his failure to report his constructive discharge to an EEO counselor within forty-five days of his resignation. For the reasons that follow, I find that he has.

As the Decision requires, the Court's analysis must focus on whether there is evidence from which a fact finder could conclude that Sheridan's conduct in forcing Plaintiff to resign in February 2011 is "reasonably related" to the sexual harassment claim presented to Sheridan in October 2010. In making this inquiry, the Court must consider the guidance from the Supreme Court, which makes clear that equitable tolling is particularly appropriate when its use is consistent with the "maxim that no man may take advantage of his own wrong." Glus, 359 U.S. at 232-34; see Irwin, 498 U.S. at 95 (equitable tolling protects federal employees who have "been induced or tricked by [their] adversary's misconduct into allowing a filing deadline to pass").

Sheridan is the element common to both the complaint of sexual harassment and the constructive discharge. It was Sheridan to whom Plaintiff turned for help with how to deal with Comfort's sexual harassment. Despite confirming that Plaintiff's report did not surprise him because she had behaved similarly towards others, Sheridan presided over a process that

culminated in Candeias pressuring Plaintiff to reissue his formal incident report in a watered-down version, the removal of Plaintiff from the team, the premature termination of the Comfort investigation without any adverse action against Comfort, and the failure to advise Plaintiff that his complaint must be presented to the TSA Office of Civil Rights, effectively covering up that the complaint had been made. Then, after Sheridan learned in November that Plaintiff had done something that could justify discipline, he met with Plaintiff and again failed to advise Plaintiff truthfully of his rights as a TSA employee. Instead, Sheridan presided over a strong-arm interrogation session during which Plaintiff was told – falsely – that his conduct was so serious as to mandate summary termination and justify criminal prosecution, as well as that an investigation had already been launched by the issuance of a subpoena. During this manipulative meeting, TSA linked the threat of criminal prosecution for lying to whether Plaintiff had told the truth about the "other matter."

Sheridan's direct involvement in both incidents, their temporal proximity and the similarity of Sheridan's tactics – pressure and manipulation to prevent Plaintiff from accessing proper TSA procedures – is enough. Soto-Feliciano, 779 F.3d at 33 (temporal connection between actions to protect employee's rights and firing that followed, coupled with defendants' knowledge of and concern about steps he had taken, enough to avoid summary judgment). A fact finder could draw the inference that the events were linked, in that Sheridan lied to and manipulated Plaintiff in February 2011 to avoid exposure of his own inappropriate management of Plaintiff's complaint of sexual harassment in October 2010. Consideration of why Sheridan hounded Plaintiff into backing away from his complaint of sexual harassment, instead of referring him to the TSA Office of Civil Rights, and why, shortly after, he used the excuse of Plaintiff's internet posting to intimidate him into resigning, instead of advising him of the TSA

discipline procedure, is sufficient to support the inference that the adverse employment action was taken to remove an employee whose protected complaint had wrongly been brushed aside. The enigmatic reference during the coercive interview to the "other matter" cements the link, permitting a fact finder to conclude that the two incidents were related.

Whether DHS will ultimately be able to justify TSA's actions may not be considered at summary judgment. I find that Plaintiff's evidence is sufficient to render trial-worthy his claim that his constructive discharge was reasonably related to and grew out of TSA's mishandling of his complaint about Comfort's discriminatory conduct in October 2010. That causal link is enough to toll the administrative exhaustion requirement arising from the February 2011 constructive discharge. Clockedile, 245 F.3d at 6 ("retaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of"). Further, the misleading and intimidating tactics employed by Sheridan and Mullen to pressure Plaintiff to resign in the face of criminal prosecution provide an independent and compelling basis for equitably tolling the obligation to exhaust within forty-five days of that meeting. Irwin, 498 U.S. at 96. Accordingly, I recommend that summary judgment based on Plaintiff's failure to exhaust administrative remedies be denied.

IV. CONCLUSION

Based on the foregoing, I recommend that Defendant U.S. Department of Homeland Security's motion for summary judgment (ECF No. 66) be DENIED. Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision.

See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
April 11, 2017