THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CARL JACKSON,	)	
	)	
Plaintiff,	)	
v.	)	**Civ. No. 86-1252-M**
	)	
	)	(*On Remand*)
CITY OF ALBUQUERQUE,	)	
	)	
ORLANDO SEDILLO, and	)	
	)	
HENRY "KIKI" SAAVEDRA,	)	
	)	
Defendants.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR ORDERS REQUIRING DEFENDANT CITY TO SHOW CAUSE WHY IT SHOULD NOT BE HELD IN CONTEMPT OF COURT

INTRODUCTION

Plaintiff requests a determination by the Court that Defendant's failure to create the MP-07 position (prior to entry of the *contempt order of June 27, 1991*) violated the provision of the original *settlement agreement order* which prohibits retaliation. In the alternative, Plaintiff requests an evidentiary hearing of approximately three hours in which the parties might offer further proof as to the *prima facie* case of retaliation and the articulated reason for not creating the MP-07 position.

Plaintiff also requests a determination by the Court that Defendant's refusal to notify and mandate compliance by its supervisors and employees in a timely manner (after entry of the Contempt Order of June 27, 1991) violated both that *contempt order of June 27, 1991*, as well as the section of the original *settlement agreement order* which prohibits retaliation. In the alternative, Plaintiff requests an evidentiary hearing of approximately three hours in which the parties might offer further proof as to the *prima facie* case of retaliation and the articulated reason for not distributing information as ordered.

For the Court's convenience, the sub-parts of this Reply correspond to the sub-parts in Defendant's Opposition. Because of the construction of certain of the Defendant's legal arguments, a perfect match was not completely possible.

I. ACTS PRIOR TO THE COURT'S ORDER OF JUNE 27, 1991

A. RETALIATION FOR FAILURE TO CREATE THE MP-07 POSITION.

To explain its *reason* for refusing to create the MP-07 position until *after* an order was entered on a finding of contempt, the City asserts two arguments--arguments intended to explain why (having already been found to be in contempt for its violation of the provision in the Court's Order relating to the creation of the MP-07 position) the City should not also be held in contempt for violation of the anti-retaliation provision of that same Order because of its reason(s) for doing that act:

1. Remedial Measures. First, the City again seeks to rely on its *subsequent* compliance with a *subsequent* contempt order--as a means to excuse its reason for the original act of contempt. The City argues, *sub voce*, that the Court should not look to *why* it was in contempt, but, rather, to its compliance after it was caught, held in contempt, and ordered to create the MP-07 position. This argument has already been rejected by this Court in the first phase of the inquiry as to this same act of contempt. At that initial hearing the City sought to argue that after *Plaintiff's First Motion as to Contempt* was filed, the City 'agreed' to create the MP-07 position. But such compliance came only after a long and steady refusal to comply with the Order, and only after the *Order to Show Cause* issued. And now, the City again attempts the same strategy with the virtually identical argument that

> [i]n precise compliance with the Court's Order of June 27, 1991, the City has created the MP-07 Planner position in Plaintiff's sub-department and interviewed candidates for the position. Interviews of finalists for the position are being conducted as this response is being prepared and a final selection is expected forthwith, all in advance of the 60 day deadline ordered by the Court. [*Emphasis added.*]

Defendants Opposition at 1. The City is merely stating that after it violated the original Court order, it began compliance--following the issuance of the resulting contempt order.

What this assertion has to do with the reason that the City originally acted in contempt--has to do with why it originally refused to create the position as ordered almost six months earlier--is difficult to fathom. How the City's compliance with subsequent, court-ordered remedial measures (the facts of these

subsequent remedial measures are not even admissible as evidence[1] as to the original non-compliance) proves that the City did not intend to retaliate against Plaintiff, is equally unclear. If the City's view were allowed, every contemnor would simply perform as required only after they had been caught in the act and held in contempt. They would then point to their sterling post-order efforts as a means to escape examination of their intent in that original contemptuous act[2]. Thus, this first argument is without merit.

2. Collateral Estoppel.

2a. 'Law of the Case' not 'Collateral Estoppel' Applies. The City next seeks to suggest that Plaintiff's request that the Court apply its own findings (from its prior Order as to contempt with regard to the City's refusal to create the MP-07 position) to the 'sub-issue' of why that refusal occurred, is improper based on the doctrine of *'collateral estoppel'*. The City argues that the Court's prior findings (as to the credibility of the City's articulated reasons for non-creation of the MP-07 position) in its June 27, 1991 Order, cannot be applied to the issue of whether that same act was done with the intent to violate another provision of original Order--cannot be applied in determining whether the City's contempt also violated the original settlement order's prohibition against retaliation.

The City seeks to re-define Plaintiff's position[3], and to reshape it based on the City's view that

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[1] Rule 407, Federal Rules of Evidence.

[2] *In Re Seaspire, Inc.*, 63 B.R. 44 (Bkrtcy. M.D.Fla. 1986) (belated compliance with court's order of sanctions does not purge contempt after non-compliance); *Lelsz v. Kavanagh*, *supra*, ("A party is in civil contempt if she or he is shown...to have failed 'in meaningful respects to achieve substantial and diligent compliance'...with a...court decree"); *Sizzler Family Steak House v. Western Sizzlin Steak House, Inc.*, 793 F.2d 1529, *rehearing denied* 797 F.2d 982 (11th Cir. 1986)(Remedial efforts do not effect fact of initial contempt); *NAACP, Jefferson Co. Branch v. Brock*, 619 F.Supp. 846 (D.D.C. 1985); *U.S. v. McCargo*, 783 F.2d 507 (D.C.La. 1986)(Some late attempts not enough.); *see also Morales Feliciano v. Hernandez Colon*, 697 F.Supp. 26 (D.Puerto Rico 1987).

[3] The City states that

> [i]n paragraph A, page 5, Plaintiff apparently argues the applicability of the doctrine of collateral estoppel. Plaintiff bases this argument on the **magistrate's finding** that the city's reasons for failure to create the position are not credible constitutes a finding that Defendants have failed to articulate a legitimate non-retaliatory reason for not creating the position.

The City seems to believe that the Plaintiff's argument is based on the "magistrate's finding" because some references were made to that document. This is not correct. This is the primary predicate of the City's argument, and is erroneous.

Plaintiff's request that the Court apply prior findings is not, as the City states, based on the Magistrate's Memorandum (although that memorandum was incorporated into the Court's Order based on the Court's own findings) but rather on the finding of the Court in its June 27, 1991 Order. In this Court's Order, issued following briefs and a hearing--which included the City's full "articulation of its reasons for refusing to create the MP-07 Planner position"--the Court clearly stated that

> **6. Defendant's articulated reasons for refusing to create the MP-07 Planner position are not credible.**

two separate actions[4] exist herein. The City's argument (regarding its view that collateral estoppel somehow applies) is that

> [t]his argument [Plaintiff's request that the Court apply its prior findings] does not prevail because the elements of collateral estoppel are not satisfied. The four elements of collateral estoppel are (1) the parties are the same or in privity with the parties **in the original action**, (2) the subject matter or cause of action in the **two suits** were different, (3) the ultimate facts or issues were actually litigated, and (4) the issue was necessarily decided.

Defendant's Opposition at 2. The issue of exactly which "original action" Defendant feels is being referenced is unclear. There is no "original action"--no other proceeding from which Plaintiff seeks to apply a finding. The Plaintiff seeks only the direct application of a prior finding in the same cause as to the identical act of contempt--there simply are not "two suits" here. The doctrine of collateral estoppel does not apply.

Furthermore, the *arguably related* doctrine of *direct estoppel* does not apply to issues within the same action except in two limited classes of fairly unusual cases--where a jury and non-jury trial of the same issue occurs, or where one issue was appealed and another phase of the issue was not. Certainly direct estoppel does not apply to Plaintiff's request for the application of prior findings by this same Court in the same cause as to the same parties in a mere completion of the consideration of the exact same issue (contempt in the non-creation of the MP-07 position). The only reason the Court's review was bifurcated was that the City insisted that it had not had sufficient notice, and now the City seeks to parlay its delaying tactic into an advantage. (Perhaps this doctrine would apply if, for example, Plaintiff sought to obtain relief as to an actual cause of action for retaliation, in this action or a subsequent action. instead of just a further finding as to the same act of contempt.)

LAW. Defendant also refers to "preclusion" in the same discussion. This reference is also incorrect. There are five concepts related to the use of prior findings or judgments in the same or subsequent actions between parties, Plaintiff considers four of these[5]: collateral estoppel, direct estoppel, issue preclusion (a concept related to both direct an collateral estoppel), and *the law of the case*--a

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[4] Defendant seek to make similar arguments to those which the Court noted were "peculiar" in its Opposition to the Plaintiff's First Motion for Orders to Show Cause. There the Defendant argued that two wholly inapplicable citations from the incorrect section of Corpus Juris Secundum proved a 'public necessity doctrine'. In addition, Defendant sought to prove the proposition that Mr. Blumenfeld "personally" was required as a signatory on a document because he had signed another doc in his official capacity.

[5] Because the doctrine of res judicata is completely inapplicable, it is not discussed.

completely distinct theory. An analysis of the distinction between these doctrines is critical to understanding Defendant's view.

a. Issue Preclusion. This is a relatively new concept which was intended to narrow the broad and imprecise definitions of estoppel which had arisen.

> Because the term estoppel encompasses myriad definitions which cut across a number of different areas of the law, we adopt here the somewhat more particularized term of 'issue preclusion' to refer to situations where a later court is bound by a prior determination of an issue. (*Emphasis added.*)

See ex. NLRB v. Donna-Lee Sportswear Co.,, 836 F.2d 31, 33 (1st Cir. 1987). The Tenth Circuit has stated that issue preclusion

> comes into play when an issue involved in a prior decision is the same issue involved in a subsequent action; the issue is actually decided in the first action after a full and fair opportunity for litigation; it was necessary to decide the issue in disposing of the first action; the later litigation is between the same parties; and the role of the issue in the second action was foreseeable in the first action. (*Emphasis added.*)

Butler v. Pollard, 800 F.2d 223, 224-225 (10th Cir. 1986). The Tenth Circuit's decision in Butler affirmed and clarified its decision of just one year earlier, in which that Court stated that issue preclusion

> refers to the principle that "a litigant in one lawsuit may not, in a later lawsuit, assert the contrary of issues actually decided in and necessary to the judgment of the first suit."

Bulloch v. Pearson, 768 F.2d 1191, 1192 (10th Cir. 1985), *certiorari denied* 106 S.Ct. 862, 474 U.S. 1086, 88 L.Ed.2d 901.

b. Direct Estoppel, not Collateral, Arguably Applies. Traditionally it was said that,

> [i]ssue preclusion in a second action on the same claim is designated direct estoppel, while issue preclusion in a second action brought on a different claim is termed collateral estoppel.

In re Duncan, 713 F.2d 538, 541 (9th Cir. 1983). Thus, collateral estoppel need not be discussed further. *Wright and Miller* does, however, make the following observations as to direct estoppel:

> Direct estoppel also may arise from action that is designed to conclude part of a single claim on the merits, but to leave the way open for further action on the balance of the claim. Common issues that have been resolved in the first disposition are precluded in reaching the second disposition. This rule may apply across two independent actions, because the first court has expressly limited the claim preclusion effects of its judgment or because of some exception to the general rules of claim preclusion.(FN19) The most prominent cases applying direct estoppel in this setting, however, have involved questions presented during the course of a single action. Two major variations appear.
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> [The first is where both legal and equitable claims are heard by both a judge and jury--and does not apply herein.]

* * * *

> The second setting of direct estoppel within a single suit presents more troubling questions. Separation of proceedings within a single suit may lead to final rulings on issues that are common both to a concluded portion of the proceedings and to the remaining portions. Failure to appeal part of the proceeding may defeat an appeal of the remainder by issue preclusion.(FN23) This result is appropriate so long as it is clear that the appealing party has failed to preserve the common issue. Civil Rule 54(b) should provide the primary source of guidance. . . .Outside of Rule 54(b), however, preclusion is seldom appropriate.
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> * * * *
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> The most important point to remember is that so long as matters remain within the limits of a single suit, the court's power to change its mind **ordinarily is limited by the more flexible doctrine of law of the case** (FN18) rather than issue preclusion. [*Footnotes noted but omitted.*]

Wright, Miller & Cooper, Fed. Prac. & Proc., *Section 4418-- Issue Preclusion within a Single Claim: Direct Estoppel.* Thus, although there are very limited cases in which the doctrine of direct estoppel might be applied to a single action, the instant cause, involving facts related to contempt as to the act and intent in a single occurrence, is not even remotely close to these cases.

c. The Law of the Case. Because issue preclusion is rarely, if ever, appropriate within a single suit under these circumstances, it is informative to consider *Wright and Miller*'s conclusions as to the *law of the case.*

> Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment. Although a common label is used, at least four distinctive sets of problems are caught up in law of the case terminology. Perhaps the most distinctive problems arise from the desire of a single court to adhere to its own prior rulings without need for repeated reconsideration.
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> The most distinctive law of the case rules are those that **justify refusal by a trial court to reconsider matters once resolved in a continuing proceeding**, or by an appellate court to reconsider matters resolved on a prior appeal. Cases are easily found in which trial and appellate courts have thus adhered to prior rulings as the law of the case
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> * * * *
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> Although courts are often eager to avoid reconsideration of questions once decided in the same proceeding, it is clear that all federal courts retain power to reconsider if they wish. Law of the case principles in this aspect are a matter of practice that rests on good sense and the desire to **protect both court and parties against the burdens of repeated reargument by indefatigable diehards**. In one classic statement, Justice Holmes noted that law of the case doctrine "merely expresses the practice of

courts generally to refuse to reopen what has been decided, not a limit to their power."(FN4)

* * * *

Another set of questions goes to the nature of the issues involved in a prior ruling. Some issues may be particularly suitable for reconsideration, because of intrinsic importance or impact on nonparties. Such matters as subject matter jurisdiction, appellate jurisdiction, or mandatory party joinder are good examples, although even such matters as these may be protected by law of the case.(FN32) Other issues may seem particularly unsuited to reconsideration. **Questions of fact, absent significant new evidence, are primary examples**.(FN33) Finally, it may be important to know how far law of the case principles bind parties who come into the case after an initial ruling. Somewhat surprisingly, late-added parties at times have been swept into law of the case rulings.(FN34) [*Footnotes noted but omitted.*]

Wright, Miller & Cooper, Fed. Prac. & Proc., *Section 4478, Law of the Case.*

ANALYSIS. Defendant has complicated Plaintiff's request to the Court unnecessarily. Plaintiff has simply asked the Court to apply the law of the case. Application of the Court's prior factual finding that Defendant's reasons for not creating the MP-07 position are "questions of fact, absent significant new evidence," and are therefore "issues. . .particularly unsuited to reconsideration." Neither direct estoppel nor collateral estoppel theories would in any way restrain this Court from applying its June 27, 1991 findings (although the Court always retains the general power to not apply the law of the case.) The Plaintiff has maintained (repeatedly) that:

1. The Court entered an Order. (The original settlement order).

2. The Order required that the City create a position.

3. The Order required that the City not retaliate.

4. This Court found that the Order required the City to create the position, but that the City did not create the MP-07 position.

5. This Court found that non-creation of the position was, therefore, contempt. (A failure to follow the Court's Order.)

6. After the Court had issued the Show Cause Order, but prior to the April 29, 1991 hearing, the City said that the Court[6] did not *precisely* give notice to Defendant as to the fact that it would determine whether Defendant was also in contempt of the non-retaliation provision of the original (settlement) Order (as a result of the identical acts as had resulted in the first finding of contempt.)

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[6] Note that the Plaintiff had fully briefed this issue, but upon the Defendant's allegation that the Court's Show Cause Order was not specific, agreed to postpone hearing until another notice was given. This is simply a continuation of that original matter--as stated in the Court's Order of June 27, 1991.

7. For that reason only, the issue of why the City failed to create the MP-07 (and whether that reason was a violation of the non-retaliation provision of the original Order) was not heard by the Court.

8. Thus, the only matter before the Court as to the MP-07 position, is the question of why the City refused to fill the position--whether the Plaintiff has shown an adverse act, and a causal connection between his participation in the civil rights process and that act; and whether the City can articulate a legitimate, non-discriminatory reason for the act.

This second half of the inquiry as to that original contempt is now upon the City following the delay the City caused. This issue comes on before the Court now, after significant additional costs and a delay of more than three months, solely because of that last second insistence by Defendant that somehow the Court's show cause order did not provide the City with notice. Plaintiff now provides that notice however, in the form of this motion, to avoid yet another appeal. The existence of contempt was examined on April 29, 1991. The second half of the inquiry into that identical act (why that act occurred) will be heard separately only because it was put off at that time. (Defendant read Plaintiff's brief on the question, negotiated on the question, and understood that Plaintiff had subpoenaed witnesses regarding the question: Yet, Defendant never notified Plaintiff or the Court, despite a large number of pre-hearing phone calls between all three offices, that it felt it had not been properly noticed). To even *suggest* now that this artifice, this wasteful exercise in redundancy and delay, has somehow created "another action" or a sufficiently separate issue to involve direct estoppel, is either an error or perhaps part of another tactic--designed to either create an issue for another (dilatory) appeal, or seek a more favorable result from the Court by stalling until subsequent remedial measures have been taken, in the hope that sanctions can be avoided.

Assuming, *arguendo*, that the doctrine of direct estoppel was applicable, Defendant's assertions as to what it calls the "third and fourth elements" are also incorrect. Defendant seems to suggest that no prior finding as to the credibility of its reasons for undertaking the contempt should be applied now because the City was not previously heard on the specific issue of retaliation.

> The present state of these proceedings fails to satisfy the third and fourth elements. The ultimate fact in Plaintiff's claim for retaliation is whether Defendants retaliated against Plaintiff. This issue was not actually litigated and was not decided in any previous proceeding. Plaintiff has pointed out that the issue of retaliation was eliminated from the previous proceeding because Defendants did not have notice that the issue was to be heard.

> Therefore, the **Defendants have not had the opportunity to litigate the issue**. Even if the issue could have been litigated at the previous hearing, that would not satisfy the requirement of collateral estoppel, because, accepting Plaintiff's argument, the issue of the reasons for not creating the MP-07 position had previously been found not credible by the adoption of the Magistrate's report to the Court. No hearing was held on this question before the Magistrate issued his report.

Defendant's Opposition at 2 - 3. This is not correct. The Court certainly had the power to make findings as to the City's intent in not creating the position following an evidentiary hearing in which the City sought to exculpate itself from liability for contempt by placing its good faith motives for its acts before the Court. It was the City itself which placed the issue of "why" it did what it did before this Court.

Intent, while not a *necessary* sub-issue for a finding of contempt, can be raised by the contemnor to explain that its acts were not really contemptuous[7]. The City chose to do this--it was the primary defense. Now that its defense based on its "good" motives and valid reasons for acting as it did has failed (see testimony of the CAO), it seeks a "second bite of the apple" by way of its argument that the Court's detailed findings (that those specific, stated motives were not credible) are invalid as to the reason the contempt occurred. The City somehow seeks to argue that because the credibility of those motives was somehow "not actually litigated and was not decided in any previous proceeding" directly on the issue of 'retaliation', those findings cannot be applied. The present proceeding is not an examination of relief pursuant to the cause of action for retaliation--it is a request for relief from contempt--the identical subject of the hearing in which the findings were first made. The City introduced the issue on this identical point--Mr. Campbell's election of a defense based on intent and motive at hearing is dispositive.

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[7] In His Motion and Memorandum papers in this proceeding, Plaintiff noted that this issue of its intent in not creating the MP-07 position had been raised by the City, stating

> The Plaintiff stated a large number of facts in his papers relating to the contempt proceeding as to "why" Defendant refused to created that position. In response to Plaintiff's assertions, Defendant "articulated legitimate non-retaliatory reasons" for its failure to fill the position as required by contract and order. Included in those reasons were:

1. The City did not realize that it had an obligation.
2. The City did not know the obligation was part of a court order, and although it might have been breach, it was not contempt.
3. The Chief Administrative Officer was the only official who could bind the City, and he did not sign the letter agreement which supplemented the settlement.
4. The Chief Administrative Officer knew what was best for the City personnel system, and did not believe that the MP-07 position was necessary.
5. The CAO received legal and other advice that he did not have to fill the position.

Just because the Court did not hear or determine the full issue of retaliation does not mean that it was not invited (by Defendant) to consider the issue of motivation and intent. The sub-issue of the City's reason(s) for refusing to fill the MP-07 position was the subject of *extensive* examination by Mr. Campbell, and full cross-examination by Plaintiff. Mr. Campbell elected to open the door to this matter, ar ` fully litigated the sub-issue of the City's reasons. Therefore, even if direct estoppel applied, Defendant is incorrect in its assertion that the Court's prior finding (as to the lack of credibility of the Defendant's stated reasons for refusal to create the MP-07 position) should not be applied in the instant contempt proceeding.

1. The record on this issue is clear, and it is fixed. The testimony cannot be changed. When asked to show cause, the Defendant asserted that it had acted with good reasons and intent. The City stated this in its briefs, and placed its Chief Administrative Officer on the witness stand to argue this issue. Plaintiff argued that these exculpatory assertions as to the City's intent were contrary to every agreement, to every one of the substantial number of letters between the parties, and to basic logic. The Court then made its (fully litigated) finding.

2. No legal principle requires further evidentiary proceedings as to the validity or credibility of the City's reasons for not filling the MP-07 position, and such a proceeding will be a waste of time, To avoid creating an appealable issue, however, Plaintiff is once again prepared to defer, and to "re-prove" the lack of credibility of the "articulated reasons" at a hearing on this motion. The reason for the existence of the *law of the case* will be evident when Plaintiff simply places the identical witnesses from the first hearing back on the stand (particularly the CAO, Mr. Blumenfeld) and asks (from the transcript) the identical questions that were asked by both parties at the first hearing. This would most probably result in the same finding by the Court. (Though Plaintiff would also ask to be allowed to provide further proof by examining the additional witnesses he had initially sought to question under subpoena).

2(b). Burdens as to retaliation. Again assuming, *arguendo*, that the doctrine of direct estoppel does apply, the City argues that the Court cannot 'jump' to the issue of the employer's reason for the retaliatory act--it must first determine that Plaintiff has met the elements of the cause of action for retaliation. (Defendant's argument assumes a legal proposition which is not apparent to Plaintiff--that the Plaintiff must prove *technical retaliation* at all[8].)

Assuming that Plaintiff must go through an entire showing of technical retaliation and not just what would be understood by a reasonable person to be retaliatory, the City states that Plaintiff has failed to make that *prima facie* showing of retaliation because of

> Plaintiff's absolute failure to put forth evidence that Defendants' failure to create the MP-07 position was motivated by or substantially based on Plaintiff's status as a successful civil rights litigant. Plaintiff having failed to make a prima facie case, Defendants are not yet required to go forward with evidence of reasons for their actions. This being true, the Court is likewise not required to examine the Defendants' reasons. (*Emphasis added.*)

Defendant's Opposition at 4. This is an incorrect statement of the law, and of the burdens--even under the technical cause of action for retaliation. Plaintiff argues that when the allocation of proof under this cause of action are understood, that there is sufficient proof of record to find that the prima facie case has been shown of record. Thus, the Court, on a finding that the prima facie case has been met, can look to its prior findings as to the lack of credibility of the employer's articulated reasons for its acts--and find retaliatory intent. Acting with such intent would be a violation of the original order, and Plaintiff would be entitled to a determination of contempt. This is presently an action for contempt--the finding of retaliation is merely a step along the path to that objective.

To make the ordinary *prima facie* showing, Plaintiff has no initial burden (as the City seeks to argue) to "put forth evidence" that "Defendants' [sic.] failure to create the MP-07 position was motivated by or substantially based on Plaintiff's status as a successful civil rights litigant." This is simply not the law. A correct statement of the 'burdens', order and allocation of proof involved in a retaliation action is:

> i. The Plaintiff adduces evidence to demonstrate: (1) His participation in proceedings related to or arising out of discrimination proceedings (2) adverse action by the employer contemporaneously or subsequent to those proceedings, and (3) a causal connection between such activity and the employer's adverse action[9];
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> ii. It is beyond argument that, as is the case in any disparate treatment action, the *burden to go forward* then shifts to the employer to "articulate a legitimate, non-retaliatory reason for the

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[8] The City's argument takes a huge leap at this point. The City assumes that to find contempt by retaliatory acts under the Court's Order, the Court must read the language of the Order to require a showing of a level of retaliation which would be required pursuant to *Title VII* or *42 U.S.C. 1981*. This would not normally be the case in interpreting an order. The Order simply states that the Defendant shouldn't retaliate and that the City had an affirmative burden to protect Plaintiff from retaliation--which has a perfectly clear English language meaning.

[9] Anderson v. Phillips Petroleum Co., 861 F2d 631 (10th Cir. 1988), rehearing denied, on remand 722 F.Supp. 668, reconsideration denied 736 F.Supp. 239; Sherpell v. Humnoke School Dist. No. 5, 874 F.2d 536 (8th Cir. 1989); EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989).