

I, ¶¶ 40–41), but argues that MEP’s Motion should be denied with respect to all other claims.

For the following reasons, Defendant’s Motion for Partial Dismissal is **GRANTED** in part and **DENIED** in part.

II. BACKGROUND

MEP is an Ohio for-profit corporation that provides language and interpretation services. Osman was born in Afghanistan and is a naturalized United States citizen and resident of Kentucky. She was employed with MEP and its predecessor as a Pashto linguist and was deployed to Afghanistan in December, 2007, to support United States military operations. Osman had already been in Afghanistan for the preceding three years, however, in a similar role, but employed by a different contractor. She holds Top Secret/SCI clearance and was the only female linguist with this clearance in her office in Bagram. Plaintiff excelled at her position and had an exemplary work record. She was often cited as a top producer in her section, and the United States personnel with whom she worked were satisfied with her performance.

Osman alleges that during the last several months of her employment with MEP, she was harassed because of her gender by a co-worker, Kashef Khan, and MEP management. For example, Osman’s Complaint alleges that Khan made a false report to MEP management in January, 2009, that she had flown to an Arab state, Qatar, without telling anyone and in violation of security regulations. While investigations were pending for a month, MEP pulled Plaintiff off the mission and prohibited her from working. MEP was unable to verify the allegations made by Khan, but did not return Plaintiff to the mission until she asked United States Counter Intelligence to intervene. Once Counter Intelligence questioned the basis for the investigation, MEP returned Osman to her assignment.

Plaintiff also alleges that MEP tried to discipline her for unfounded reasons, such as

filing a counseling report for “shirking her duties” on her day off. (Compl. ¶ 13.) MEP allegedly locked Osman out of her room by changing the locks when she was in the shower, and she was humiliated because she had to seek assistance while in her damp shower clothing. The MEP supervisor who changed Osman’s lock, Sebrena Minter, refused to provide Osman with a combination to the new lock and informed Osman that she had changed the lock because she had the power to do so. Osman complained about the lock incident in an email dated March 6, 2009, to MEP’s theater director, Ron Chaney, and to others as well, but MEP allegedly took no action.

The harassment by Osman’s co-worker, Khan, continued. He falsely accused Plaintiff of seeking personal favors from military and supervisors in order to avoid work. Khan referred to Plaintiff as a “scammer.” (*Id.* ¶ 15.) Osman complained about Khan’s harassment to MEP’s deputy director of human resources, Lisa McMahon, in a March 14, 2009, email, but again, no action was taken. Plaintiff alleges that Khan harassed other women in the office by making sexual advances at and comments to them. They were not directed towards Plaintiff, but she heard them and they made her uncomfortable working around Khan. For example, on one particular occasion, Osman heard Khan refer to Pakistani women as “whores.” (*Id.* ¶ 17.)

Osman brought this alleged gender and national origin harassment occurring at MEP to the attention of Lieutenant Colonel James Wetzel, who was the most senior military person in charge of Plaintiff’s office and its mission. She asked to speak to Wetzel about the importance of overcoming racial and gender animosities to improve moral and unit cohesion. Wetzel spoke with Osman, but MEP took no action thereafter to stop the harassment.

In July, 2009, a MEP recruiter, David Slovina, asked for assistance recruiting linguists with uncommon skills. There was a shortage of linguists who could speak Waziri, Pashto, Urdu, and Arabic and could accompany soldiers into combat. Osman alleges that Waziri linguists, in

particular, were crucial to the war effort, and not many MEP linguists spoke Waziri.

Consequently, Plaintiff wrote a July 10, 2009 email to Slovina recommending Khan, as he was from Wazirstan and a Waziri linguist. She also informed her direct military supervisor of this fact. Osman believed Khan was hiding his ethnicity because he did not want to work on Waziri missions to “inform against his own people,” and she further believed that Khan’s subterfuge had national security implications. (*Id.* ¶ 20.)

Shortly after Osman sent the email, on July 18, 2009, a new MEP theater director, Fred Lynch, called Plaintiff into a meeting with a number of other individuals and accused Plaintiff of “committing a crime” and “violating the 14th Amendment.” (*Id.* ¶ 21.) When Plaintiff asked for an explanation regarding the accusations, Lynch replied: “Stop, you are not allowed to speak.” (*Id.*) Without providing any further explanation, Lynch asked her if she was guilty of the accusations and she said no. Osman was fired and told that MEP considered her a “troublemaker” and that “this sort of behavior will not be tolerated.” (*Id.*)

After her termination, Plaintiff needed to arrange transportation from Bangram to Fort Benning. She contacted the theater linguist manager and “CRC” for help with this, but was allegedly berated for doing so by the human resources managers for MEP. (*Id.* ¶ 23.) Her living quarters were moved to a tent on the other side of the base. MEP also allegedly held Osman’s back pay and required her to check in twice a day, but did not arrange for her transportation back to the United States. MEP threatened to have Osman’s Top Secret/SCI clearance revoked.

Plaintiff contracted United States Counter Intelligence for assistance, and thereafter, MEP transferred her to another base in Kabul. At the new base, MEP monitored Plaintiff’s phone calls, continued to threaten to revoke her security clearance, confiscated her phone, and warned her not to speak to anyone in the military. MEP was transferred back to Bagram without

explanation. Both the trip to and from Kabul were without military escort, which caused Plaintiff anxiety about her safety.

Furthermore, MEP's chief of staff, Jim Walker, allegedly confiscated and destroyed Plaintiff's United States passport. Prior to her termination, Plaintiff had sent her passport to the State Department to be renewed, but Walker retrieved the passport and destroyed it. He told Plaintiff she could leave the country on some other form of a travel document, but she feared she would be unable to re-enter the United States without her passport. Osman asked Walker to allow her to wait for her passport to show up, and according to the allegations in the Complaint, he replied: "I don't care what happens to you once you are on the plane out of here." (*Id.* ¶ 27.)

Osman alleges that at one point, she was forced to board a vehicle after an MEP employee told her that they were headed to get Osman on a plane back to the United States. Osman still did not have her United States passport. She was dropped off at MEP's main office and instructed to wait outside. She waited for ten hours without food or water. She was then told to board another vehicle, which headed out of Bagram toward Kabul, and she was dropped off at another base.

Plaintiff was told her passport was lost and to go to the United States consulate to get a new passport. She had difficulty obtaining a new passport, but was eventually issued one by the consulate. MEP's travel coordinate told Plaintiff that the new passport was invalid, and told her to go to Walker (the person who allegedly destroyed her initial passport) and ask for a new one. Osman explained to the travel coordinate that she did not want to go speak with Walker, and the travel coordinate replied: "You want to go home, don't you? Now, let's not make this complicated. I understand you have TS [Top Secret clearance]. That's something you want to keep, right?" (*Id.* ¶ 32.) Another MEP employee entered the office and informed Osman that

her passport had been destroyed. When she expressed dismay and disbelief, MEP threatened to call the military police.

Osman was allowed to return home in early August, 2009. She alleges that she was not paid for the time she spent waiting to be sent home, for the last week she worked, July 13–18, 2009, or her completion bonus that she earned as of July 1, 2009. She filed a charge with the United States Equal Employment Opportunity Commission (“EEOC”) on May 26, 2010, (Doc. 8-1), and received a determination from the EEOC on January 12, 2011, explaining that all requirements for coverage had been met and that available evidence established a violation of Title VII, (Doc. 1-1). On April 1, 2011, Osman received a Notice of Right to Sue. (*Id.*)

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of a complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). Although a plaintiff need not plead specific facts, the complaint must “give the defendant fair notice of what the claim is, and the grounds upon which it rests.” *Nader v. Blackwell*, 545 F.3d 459, 470 (6th Cir. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)).

The plaintiff’s ground for relief must entail more than “labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The plaintiff has satisfied Rule 12(b)(6) if he or she pled enough facts “to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). Additionally, the Court must accept as true allegations of fact, and the complaint must be construed in the light most favorable to the party opposing the motion to

dismiss. *Davis H. Elliot Co. v. Caribbean Util. Co., Ltd.*, 513 F.2d 1176, 1182 (6th Cir. 1975).

IV. LAW AND ANALYSIS

A. Failure to Timely File a Charge with the EEOC

MEP's first argument is that Osman's Title VII claims fail because she did not timely file an EEOC charge. MEP contends that the deadline for Plaintiff to file her charge was 300 days from the date of her termination. Because Osman was terminated on July 18, 2009, the deadline to file a timely charge was May 14, 2010, and she missed that deadline when she waited until May 26, 2010, to file her charge. As a result, she should be precluded from bringing her Title VII claims.

Osman counters that filing a timely EEOC charge is not a jurisdictional requirement for pursuing Title VII claims, and it may be subject to waiver, estoppel, and equitable tolling. Osman points out that MEP failed to raise any concerns related to the timeliness of her charge; in fact, MEP did not respond to the charge at all. MEP waived any argument related to timeliness because it failed to raise the issue in front of the EEOC. Osman also argues that her charge was timely filed because MEP's discriminatory conduct continued for another three weeks after her termination until she was sent home on August 5, 2009, and therefore, the charge was timely filed as long as it was filed before June 2, 2010.

A plaintiff must typically file a timely discrimination charge with the EEOC prior to bringing a Title VII lawsuit. *Amini v. Oberlin Coll.*, 259 F.3d 493, 498 (6th Cir. 2001); *Alexander v. Local 496, Laborers' Int'l Union of N. Am.*, 177 F.3d 394, 407 (6th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000). The applicable statute of limitations begins to run from the date of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). The Sixth Circuit has explained that Title VII has a dual statute of limitations, and that claims are typically barred "if

the alleged discrimination occurred more than 180 days prior to the plaintiff's filing of an EEOC charge," but "if the alleged unlawful practice occurs in a 'deferral state,' in this case Ohio, which has enacted its own laws prohibiting discrimination in employment, the plaintiff must file suit within 300 days of the alleged discriminatory act."¹ *Alexander*, 177 F.3d at 407 (citations omitted).

In *EEOC v. United Parcel Service, Incorporated*, the Sixth Circuit held that the limitations period begins to run "[o]nce the employee is aware or reasonably should be aware of the employers' decision." 249 F.3d 557, 561–62 (6th Cir. 2001) (citations omitted). Moreover, "the proper focus when determining the starting point of the limitations period 'is upon the time of the discriminatory acts, not upon the time at which the *consequences* of the acts became most painful.'" *Amini*, 259 F.3d at 499 (quoting *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)).

As a threshold issue, this Court must determine when exactly the discriminatory act took place. MEP argues that discriminatory act took place on July 18, 2009, when Osman was terminated, which makes the deadline for filing her EEOC charge May 14, 2010. Osman argues that the discriminatory conduct did not actually end when she was terminated, but continued on for another three weeks until she was finally sent back to the United States on August 5, 2009. Therefore, Osman's EEOC charge was timely filed as long as it was filed before June 2, 2010.

While Osman's Complaint contains allegations about how MEP employees allegedly

¹ Although Osman's actual termination occurred in Afghanistan, neither party raises an issue related to whether, for purposes of Title VII, this Court should treat the termination as having occurred in Ohio; both parties appear to assume the 300-day period applies. Because MEP is an Ohio for-profit corporation, and because the parties do not raise the issue, the Court will also assume the 300-day statute of limitations applies here.

prevented her from returning back to the United States shortly after her termination—for example, one MEP employee allegedly destroyed her passport—it is nevertheless evident from Osman’s EEOC charge that she considered MEP’s discriminatory act to be her termination. Her charge indicates that the latest “Date Discrimination Took Place” was July 18, 2009.² (Doc. 8-1.) She also indicates on the charge that she “believe[s] my termination was because of my gender and/or national origin rather than any legitimate reason.” (*Id.*) Therefore, Osman missed the charge filing deadline by 12 days when she filed her charge on May 26, 2010.

The Supreme Court has held, however, that “filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppels, and equitable tolling.” *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *see Dixon v. Gonzales*, 481 F.3d 324, 330–31 (6th Cir. 2007) (Marbley, J., sitting by designation) (“[I]n the Title VII context, the limitations period begins to run when the adverse employment decision is communicated to the plaintiff, but may be tolled by equitable circumstances.”) (citations omitted). Equitable tolling relief should be granted sparingly. *See, e.g., Dunlap v. United States*, 250 F.3d 1001, 1008–09 (6th Cir. 2001). Courts in this Circuit consider five factors when determining whether equitable tolling of an EEOC filing period is appropriate: (1) lack of notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one’s rights;

² This Court can properly consider Osman’s EEOC charge because it is a document that is properly considered part of the pleadings. *Weiner v. Klais and Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997) (explaining that documents are to be considered as part of a pleading if they are referred to in a plaintiff’s complaint and are central to the plaintiff’s claim); *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443, 445 (6th Cir. 1997) (noting that where extrinsic materials merely “add nothing new, but, in effect, reiterate the contents of the complaint itself,” they may be considered without converting a motion to dismiss to a motion for summary judgment).

(4) absence of prejudice to the defendant; and (5) plaintiff's reasonableness in remaining ignorant of the particular legal requirements for filing his claim. *Truitt v. Cnty. of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998) (citing *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988)). These five factors are not comprehensive, nor is each of the five factors relevant in all cases. *Amini*, 259 F.3d at 501; *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560 (6th Cir. 2000). The "propriety of equitable tolling must necessarily be determined on a case by case basis." *Truitt*, 148 F.3d at 648.

Neither party in this case analyzed the five factors set forth above, nor does this Court have any information with respect to factors (1), (2), (3), or (5). There appears to be no reason, however, why equitably tolling the 300-day period would prejudice Defendant. Osman missed the 300-day deadline by only 12 days. *Cf. Doan v. NSK Corp.*, 97 F. App'x 555, 558 (6th Cir. 2004) (affirming lower court's decision to not to toll equitably the time period for filing an EEOC charge where the plaintiff waited more than three years beyond the 300-day limitation period). While this Court takes deadlines associated with the filing of EEOC charges seriously, the facts of this case present a particularly strong case in favor of exercising equitable powers to toll the filing deadline where Plaintiff has set forth allegations that her departure from Afghanistan was delayed almost three weeks as the result of MEP employees' behavior. Osman's efforts to investigate and compile the necessary information associated with her EEOC charge very well could have been thwarted by her delayed return to the United States. Given Osman suffered a three-week delay at the hand of MEP, this Court finds that MEP was not prejudiced by a 12-day delay in filing an EEOC charge. MEP's argument that Osman's Title VII claims should be dismissed as a result of her failure to timely file an EEOC charge is unpersuasive.

B. Failure to Include a Hostile Work Environment Claim in EEOC Charge

MEP's next argument is that Osman's Title VII hostile work environment harassment claim must be dismissed because Osman did not assert that claim, or factual allegations supporting that claim, in her EEOC charge. MEP argues she only asserted a discrete act of alleged discrimination in her charge—her termination. Osman does not contest dismissal of her hostile environment claim under Title VII. Osman's hostile work environment claim contained in Count I, ¶¶ 40–41 is hereby **DISMISSED**.

C. Extraterritorial Effect of O.R.C. Chapter 4112

MEP contends that Plaintiff does not have standing to bring claims for gender discrimination (Count II), national original discrimination (Count IV), and retaliation (Count V) under O.R.C. Chapter 4112 because she is a citizen of Kentucky, the alleged discrimination and retaliation took place in Afghanistan, and O.R.C. Chapter 4112 does not and should not apply extraterritorially. Plaintiff counters that despite MEP's contention to the contrary, the Ohio Supreme Court has addressed the issue of whether O.R.C. § 4112.02(A) applies extraterritorially, and has answered that question in the affirmative. (Doc. 11) (citing *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm'n*, 562 N.E.2d 1383 (Ohio 1990)).

This Court believes that the reasoning articulated by the Ohio Supreme Court in *Natalina* applies to the facts of this case. In *Natalina*, Ohio-based employer sought a writ of prohibition to prevent the Ohio Civil Rights Commission ("OCRC") from conducting an administrative hearing on an OCRC complaint that alleged the employer had discharged a former employee because of his age and handicap in violation of O.R.C. § 4112.02(A). *Natalina*, 562 N.E.2d at 1383. The employer argued that the OCRC lacked jurisdiction to decide the discrimination claims because the former employee was a West Virginia resident whose employment occurred principally in

West Virginia, not Ohio. *Id.*

The Ohio Supreme Court rejected the employer's reasoning, noting that it cited "no statutory or constitutional authority that definitely prevents the OCRC from exercising jurisdiction over the claim of a nonresident employee who works outside of Ohio for an Ohio employer." *Id.* at 1385. Examining the text of O.R.C. § 4112.02(A), the Court noted that it broadly prohibits "any employer" from discriminating in employment matters against "any person" on the basis of "race, color, religion, sex, national origin, handicap, age, or ancestry." *Id.* Moreover, O.R.C. § 4112.05(B) allows "any person" to file a charge with the OCRC. *Id.* Given that the employer met all of the statutory prerequisites under O.R.C. § 4112, the Court held that "OCRC ha[d] basic statutory authority to consider [the former employee's] charge of discrimination." *Id.* The Court declined to adopt the employer's position that O.R.C. Chapter 4112 does not have an "extraterritorial" effect, as doing so would require the Court to "subvert the plain meaning of O.R.C. § 4112.01(A)(1) [definition of person]." *Id.*

In arguing the contrary position, MEP relies on *Judkins v. Saint Joseph's College of Maine*, 483 F.Supp.2d 60 (D. Maine 2007). First, that case is out of the District Court of Maine and does not create any precedential authority. Second, the *Judkins* court applied Maine law, and the statute at issue had language indicating it applied to practices within the state of Maine.

This Court finds the *Natalina* reasoning persuasive. MEP is an Ohio for-profit corporation, and Osman was an employee of MEP, and therefore, has standing to bring claims under O.R.C. Chapter 4112.

D. Failure to Meet Twombly Pleading Standard

MEP's next argument is that Osman's allegations are conclusory and the type of statements that the *Bell Atlantic v. Twombly* Court deemed insufficient. 550 U.S. 544, 570

(2007). This Court will examine each of Osman's claims in turn.

1. Gender Discrimination Based Upon Termination (Count I, II)

Osman has alleged gender discrimination based upon her termination under Title VII and O.R.C. § 4112.02(A). The Ohio Civil Rights Act is analyzed under the same standard as Title VII, and federal case law interpreting Title VII applies to alleged violations of O.R.C. Chapter 4112. *Little Forest Med. Ctr. v. Ohio Civil Rights Comm.*, 575 N.E. 2d 1164, 1167–68 (1991); *see Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 332 (6th Cir. 2008) (“All references throughout this opinion to Title VII are therefore equally applicable to plaintiffs’ claims under Ohio Revised Code § 4112”).

To establish a prima facie case of discrimination, Osman must show: (1) she was a member of a protected class; (2) she suffered adverse employment action; (3) she was qualified for the position; and (4) she was replaced by someone outside the protected class or was treated differently than similarly situated, non-protected employees. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006). As is often the case in discrimination lawsuits, MEP challenges only the fourth element. *See, e.g., Guinn v. Mount Carmel Health*, No. 2:09-cv-226, 2012 WL 628519, at *8 (S.D. Ohio Feb. 27, 2012) (“Defendants take issue only with the fourth element”); *Johnson v. Scotts Co.*, No. 2:11-CV-0020, 2011 WL 6415521, at * (S.D. Ohio Dec. 21, 2011) (Marbley, J.) (“As is often that case, however, it is the fourth requirement of a prima facie case of discrimination . . . that Mr. Johnson’s Complaint struggles to allege sufficiently.”). MEP argues that Osman has pled no facts that she was replaced by someone outside of her protected class, a male, or that she was treated differently than a similarly-situated male.

The parties devote a portion of their briefs to a discussion about whether the Supreme

Court's decision in *Swierkiewicz v. Sorema, N.A.* 534 U.S. 506 (2002) remains good law in light of *Twombly*, 550 U.S. 544 and *Iqbal*, 556 U.S. 662. In *Swierkiewicz*, the Supreme Court held that “[t]he prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement.” 534 U.S. at 510. The Court explained further: “Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.” *Id.* at 512.

It is unnecessary for this Court to opine here on whether *Swierkiewicz* remains good law—that issue is not before this Court.³ As Judge Edmund Sargus has explained, we “review[] the prima facie case standard in the Rule 12(b)(6) context to determine whether a plaintiff has given the defendant fair notice of his or her claim and the grounds upon which it rests—not to determine if the standard is met.” *Guinn v. Mount Carmel Health*, No. 2:09-cv-226, 2012 WL 628519, at *8 n.4 (S.D. Ohio Feb. 27, 2012). This Court need only to determine whether Osman's Complaint contains sufficient factual allegations, when accepted as true, to state a claim for relief that is plausible on its face. This Court finds it does.

Osman explicitly alleges in Count I of her Complaint that “Defendant replaced Plaintiff with a male employee, and/or treated similarly situated employees better than Plaintiff,” and her

³ The dilemma surrounding *Swierkiewicz* was discussed in *Lindsay v. Yates*, 498 F.3d 434, 439–40 n.6 (6th Cir. 2008). The Circuit explained the “[a]lthough *Swierkiewicz* was discussed extensively by the dissent in the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*” and the dissent argued that “the *Twombly* majority had devised a ‘new pleading rule’ that called into question the continued vitality of *Swierkiewicz*. . . . Because the Supreme Court majority distinguished *Swierkiewicz* and nowhere expressed an intent to overturn it, we have no basis for concluding that *Swierkiewicz* is no longer good law.” *Id.*; see also *HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 614 (6th Cir. 2012) (discussing *Swierkiewicz*, *Twombly*, and *Iqbal* and finding “it inaccurate to read these cases [*Twombly* and *Iqbal*] so narrowly as to be the death of notice pleading and we recognize the continuing viability of the ‘short and plain’ language of Federal Rule Civil Procedure 8”); *Davis v. Kroger Co.*, No. 1:09-cv-789, 2010 WL 5882114, at *2 (S.D. Ohio Sept. 15, 2010) (“It remains an open question in the Sixth Circuit whether *Twombly* and *Iqbal* have effectively abrogated the portion of *Swierkiewicz* [prima facie standard enunciated in *McDonnell Douglas* was an ‘evidentiary standard’ rather than a ‘pleading requirement’]”).

Complaint contains sufficient facts to support these assertions. (Compl. ¶ 38.) Osman alleges that she was the only female linguist that held Top Secret/SCI clearance in her office in Bagram. After Khan falsely reported to MEP that she violated security regulations and she was pulled off of a mission for a month while an investigation pended, Osman alleges that MEP continued to harass her by trying to discipline her for unfounded reasons, and on one occasion, locked her out of her room while she was in the shower. As a result, “she was forced to seek assistance by trekking all over the camp in her damp shower clothes,” and as a woman, she was particularly humiliated by the incident. (*Id.* at ¶ 13.) Plaintiff also alleges that Khan harassed women in the office by making sexual advances at and comments to them, and referred to Pakistani women as “whores,” but when Plaintiff brought this harassment to the attention of MEP, it took no action to stop the harassment. (*Id.* at ¶ 18.)

These allegations, when taken together, present enough facts to conclude that Osman has met her burden with respect to element (4). The fact that Osman was the only female linguist in her office with Top Secret/SCI clearance, and that she was specifically targeted by Khan, a male employee who had a history of harassing women in the MEP office, appears suspect. At the summary judgment stage, Plaintiff will need to present evidence to support these allegations, but at this stage in the litigation, her Complaint contains enough facts to support her claim. MEP’s argument that Osman has failed to plead sufficiently gender discrimination based upon her termination, therefore, is not well taken, and MEP’s Motion for Partial Dismissal of that claim in Count I is **DENIED**.

2. General Discrimination Based upon Hostile Work Environment (Count II)

Osman does not contest dismissal of the hostile work environment claim under Title VII (Compl. ¶¶ 40–41), but does contest dismissal of her hostile work environment claim under

O.R.C. Chapter 4112. As explained above, the Ohio Civil Rights Act is analyzed under the same standard as Title VII, and federal case law interpreting Title VII applies to alleged violations of O.R.C. Chapter 4112. *Little Forest*, 575 N.E. 2d at 1167–68; *Hawkins*, 517 F.3d at 332.

To state a hostile work environment claim based on gender harassment, Osman must show that: (1) she is a member of a protected class; (2) she was subjected to unwelcomed harassment; (3) the harassment was based on gender; (4) the harassment was severe or pervasive enough to interfere unreasonably with her work performance by creating an intimidating, hostile, or offensive work environment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. *See, e.g., Newman v. Fed. Express Corp.*, 266 F.3d 401, 405 (6th Cir. 2001); *Fara v. General Motors Corp.*, 163 F. Supp. 2d 894, 905 (S.D. 2001). MEP argues that Osman has not alleged enough facts to support elements (3) and (4).

Osman counters that as to element (3), MEP is really arguing about whether Osman has sufficient evidence to support her claim that the harassment was based on her gender, which is not the appropriate inquiry at this stage in the litigation. As to element (4), Osman rebuts that she has adequately pled that the harassment was severe and pervasive because: the harassment made it more difficult for her to perform her job when she was removed from her assignment for over a month; she was humiliated when she was locked out of her room while showering; and she was intimidated when she had to defend against unwarranted complaint by her coworker.

For the same reasons that Plaintiff has alleged a claim for gender discrimination based upon her termination, she has alleged enough facts to support element (3), that the alleged harassment was based on Osman's gender. *See supra*, IV.D.1. This Court must examine closely, however, whether Plaintiff has alleged enough facts to support element (4) of her hostile

work environment claim.

The protections of Title VII extend to a hostile work environment in which “the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The standard includes both objective and subjective elements:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.

Id. at 21–22; *Lovelace v. BP Products N. Am., Inc.*, 252 F. App’x 33, 39 (6th Cir. 2007). The alleged harassment must be evaluated based on the totality of the circumstances, which means courts can consider “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris*, 510 U.S. at 25.

This Court finds that Osman’s Complaint contains sufficient allegations that MEP’s conduct was severe and pervasive enough to create a hostile work environment, and her hostile work environment claim under Ohio law withstands MEP’s Motion for Partial Dismissal. Khan made false allegations that Osman violated security regulations, which prevented her from working. He also harassed other women in the office by making sexual advances and comments towards them, and although these remarks were not made directly towards Plaintiff, she heard them and made her uncomfortable at work. Taken together, these facts indicate Khan was creating a work environment that targeted women and was one in which it was uncomfortable for

women to work. Osman also alleges fellow MEP employees retaliated against her by changing the locks to her room when she was in the shower, forcing her to seek assistance in her damp shower clothing. When faced with accusations that she had committed a crime, Osman was directed not to speak.

This Court finds these allegations, when taken together, are enough to show that the gender harassment at MEP was severe and pervasive enough to interfere with Osman's work. Osman has alleged more than just one isolated incident of discrimination, but rather a number of incidents that could indicate the work environment at MEP was hostile towards women. She has alleged that she perceived the work environment to be abusive, and this Court thinks a reasonable person would also find the environment to be hostile. Therefore, MEP's Motion for Partial Dismissal Count II based on a hostile work environment is **DENIED**.

3. National Origin Discrimination Claims (Count III, IV)

Similar to MEP's argument with respect to Osman's gender discrimination claim based on her termination, MEP argues that Osman's national origin discrimination claims based upon her termination should be dismissed because she has not alleged any facts supporting the fourth element of that claim: that she was replaced by or treated differently than a similarly situated non-Afghan-born employee. Osman counters that it is enough that she has asserted her country of origin is Afghanistan, and that she was terminated because of her national origin. She also states that her allegations related to the destruction of her United States passport demonstrate that MEP discriminated against her because of her national origin.

Plaintiff has not alleged more than a "formulaic recitation of the elements" of her national origin discrimination claim. *See Twombly*, 550 U.S. at 555. Unlike Osman's gender discrimination claim based on her termination, there are no factual allegations in her Complaint,

that when taken together, support her blanket statement that she was treated differently because she was Afghan. Nor has Osman provided this Court with any logic as to why the allegations related to the destruction of her passport support her claim that she was discriminated against because she is Afghani. Therefore, this Court **GRANTS** MEP's Motion for Partial Dismissal with respect to Counts III and IV.

4. Retaliation (Count V)

O.R.C. § 4112.02(I) states that it is unlawful for an employer to “discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section.” To demonstrate a prima facie case of retaliation, Osman must demonstrate: (1) she engaged in a protective activity; (2) MEP knew of her exercise of the protected activity; (3) MEP subsequently subjected her to an adverse employment action; and (4) there was a causal connection between the adverse employment action and the protected activity.⁴ *Ladd v. Grand Trunk W. R.R., Inc.*, 552 F.3d 495, 502 (6th Cir. 2009); *Powell v. Time Warner Cable, Inc.*, No. 2:09-cv-600, 2011 WL 2604802, at *7 (S.D. Ohio June 30, 2011) (Marbley, J.).

MEP contends that Osman has not alleged facts to support elements (2) and (4) of her retaliation claim. With respect to element (4) of Osman's claim, MEP argues that merely alleging that her termination took place four months after she engaged in a protected activity is not enough—temporal proximity is not alone sufficient to raise an inference of retaliation where there is no other compelling evidence. MEP also contends that Osman has not alleged Lynch

⁴ Osman brings a retaliation claim under the Ohio Civil Rights Act, but does not bring a retaliation claim under Title VII. Nevertheless, the Ohio Civil Rights Act is analyzed under the same standard as Title VII, *see Little Forest*, 575 N.E. 2d at 1167–68; *Hawkins*, 517 F.3d at 332, and therefore, Title VII case law remains instructive with respect to Osman's retaliation claim.

had knowledge of Osman's harassment complaints at the time he terminated her.

Osman counters that she has adequately pled her retaliation claim because she has alleged: that she complained of gender and national origin discrimination to various MEP and military officials, and then MEP took adverse action against her when it terminated her without a legitimate reason. She also points out that her Complaint contains allegations that Lynch called her a "trouble maker" when he fired her, leading to a reasonable inference that he was firing her because of her protected activity.

This Court finds that Osman has met her pleading burden with respect to elements (2) and (4). Osman alleges that she engaged in a protected activity when she complained about gender and national origin discrimination to MEP. She has alleged facts supporting the allegation that MEP knew that she engaged in this activity because she told MEP employees about the alleged gender and national origin discrimination. For example, she alleges that she complained about the instances when she was locked out of her room while in the shower in a March 6, 2009 email to MEP's theater director at the time, Chaney, (Compl. ¶ 14); she complained about harassing remarks made by her co-worker Khan in a March 14, 2009 email to human resources director McMahan, (*id.* ¶ 16); and that she spoke with the most senior military person in charge of the office and its mission, Wetzel, about the importance of overcoming racial and gender animosities in the unit, (*id.* ¶18). Just because Osman's Complaint does not contain a specific allegation that she told Lynch directly about harassment occurring in MEP, does not mean that Osman has not sustained her pleading burden. It is doubtful that Lynch single-handedly made the decision to terminate her without any knowledge of her emails regarding harassment. Indeed MEP does not make this argument. Osman need only to allege that MEP, her former employer who terminated her, knew that she had engaged in a protected activity.

Osman has met this pleading burden as she has set forth facts about a number of different occasions where she complained about harassment in the workplace to senior employees of MEP.

Osman has also met her burden with respect to element (4) of her retaliation claim. She alleges her termination occurred just a few months after she made a series of complaints about harassment occurring in MEP. MEP's reliance on *Verecke v. Huron Valley Sch. Dist.* is misplaced. 609 F.3d 392 (6th Cir. 2010). First, while the Sixth Circuit did state that it has "rarely found a retaliatory motive based only on temporal proximity," the *Verecke* case was at the summary judgment stage. As such, the Court was determining whether, given the evidence on the record, there was a genuine issue of material fact, not whether the plaintiff had met his pleading burden. *Id.* at 399. Moreover, temporal proximity is not Osman's only allegation supporting element (4). Osman also alleges she was told MEP considered her a "troublemaker" and that "this sort of behavior will not be tolerated." (Compl. ¶ 21.) These facts support her allegation that there was a causal connection between her protected activity and her termination.

Osman has alleged sufficient facts to support her retaliation claim, and MEP's Motion for Partial Dismissal Count V is **DENIED**.

5. Wrongful Discharge in Violation of Public Policy (Count VI)

Although employment relationships in Ohio are generally governed by the common-law doctrine of employment-at-will, Ohio law recognizes "a cause of action in tort for wrongful discharge in violation of public policy." *Wiles v. Medina Auto Parts*, 773 N.E.2d 526, 529 (Ohio 2002) (plurality opinion). The Ohio Supreme Court has defined this tort with four elements: (1) that a clear public policy existed and was manifested in a state or federal constitution, statute, or administrative regulation, or in the common law (the clarity element); (2) that dismissing

employees under certain circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element); (3) that plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and (4) the employer lacked overriding legitimate business justification for the dismissal (the overriding justification element). *Collins v. Rizkana*, 652 N.E.2d 653, 657–58 (Ohio 1995); *Noble v. Genco I, Inc.*, No. 2:10-CV-648, 2010 WL 5541046, at *4 (S.D. Ohio Dec. 30, 2010).

MEP argues that Osman has alleged no facts to support the clarity and jeopardy elements because she does not identify which public policy her claim is based upon in her Complaint. Osman counters that she has adequately pled the clarity element because under the Code of Federal Regulations, she had a duty to advise her supervisor or a security official when she became aware “of information with potentially serious security significance regarding someone with access to classified information or employed in a sensitive position.” 32 C.F.R. § 154.60(e). Osman further contends that “[b]ecause Kahn worked alongside Osman, and Osman’s job required a Top Secret/CSI clearance, it is reasonable to infer that Kahn also held some sort of security clearance, and also had access to classified or sensitive information.” (Doc. 11) (internal citations omitted). Osman argues the jeopardy element is met because 32 C.F.R. § 154.60(e) does not provide a remedy if Osman is terminated as a result of fulfilling her obligation under this regulation.

Osman’s rebuttal is unpersuasive. In her Complaint, she alleges “[t]he public policy of Ohio encourages employees to identify and report national security risks to their employers,” but she does not identify 32 C.F.R. § 154.60(e) as having created this policy. (Compl. ¶ 71.) The allegation in her Complaint indicates she is referring to a state policy, whether the Ohio constitution, a state statute, or state regulation. While an Ohio public policy claim can be based

on a federal statute or regulation, Osman's Complaint does not provide any indication as to what policy she is alleging MEP violated. *See Collins*, 652 N.E.2d at 657-58. She cannot now do so in her Memorandum in Opposition. Therefore, because she did not properly allege the clarity element of her public policy claim because she failed to give MEP fair notice of the specific policy in her Complaint, MEP's Motion for Partial Dismissal as to Count VI is **GRANTED**.

V. CONCLUSION

For the foregoing reasons, MEP's Motion for Partial Dismissal is **GRANTED** in part and **DENIED** in part. Osman's hostile work environment claim in Count I; national original discrimination claims in Counts III and IV; and violation of public policy claim in Count VI are **DISMISSED**. MEP's Motion for Partial Dismissal is **DENIED** with respect to Osman's gender discrimination based on termination claim in Counts I and II; hostile work environment claim in Count II; and retaliation claim in Count V.

IT IS SO ORDERED.

s/ Algenon L. Marbley
Algenon L. Marbley
United States District Judge

Dated: September 21, 2012