are identical. Claims II and IV, for disparate treatment in segregation pursuant to 42 U.S.C. § 2000e-2(a)(2), are also identical. Although these claims are not at issue in any of the instant motions, the court finds that Claims III and IV may be stricken from Lewis' complaint as duplicative of Claims I and II, respectfully. Claim V, which is the subject of Lewis' motion at docket 118, addresses retaliation pursuant to 42 U.S.C. § 2000e-3(a). Claim VI, which is not at issue in the instant motions, alleges that Lewis was unlawfully removed from employment under 5 U.S.C. § 7702. Lastly, Claims VII though IX, Lewis' state law claims, seek to establish that defendants negligently and intentionally caused her emotional distress and that defendants negligently supervised their employees. These claims are the subject of the government's motion at docket 97. Finally, in Claim X, which is not at issue in the instant motions, Lewis seeks punitive damages. The court considers the parties's motions pertaining to Claims V and VII through IX below.

A. Government's Motion to Dismiss Lewis' Tort Claims

1. Preemption

The government argues that Lewis' tort claims are preempted on the ground that Lewis' proper recourse for inappropriate personnel actions and workplace discrimination lies under the Civil Service Reform Act ("CSRA") and Title VII, respectfully. With respect to CSRA preemption, because Lewis has filed appropriate administrative actions with the EEO and the Merit Systems Protection Board ("MSPB"), and exhausted those remedies, the government contends that her tort claims are entirely duplicative of her federal claims and therefore preempted. Lewis counters that not all of her employer's actions fall under the umbrella of "personnel action," as required for CSRA preemption. Moreover, Lewis contests the government's characterization of the types of personnel action taken against her and the authenticity of core personnel documents submitted by the government. The government opposes Lewis' arguments in its reply brief and, in addition, moves for leave to file additional factual materials in opposition to Lewis' authenticity objections. With respect to Title VII preemption, the government argues that Title VII preempts Lewis' claims because her superiors acted within the outer perimeter of their authority and did not commit "highly personal wrongs," as required for Title VII preemption. Lewis counters that her employer's actions constituted a "highly personal violation" beyond the meaning of discrimination. Because preemption arguments attack the jurisdictional sufficiency of Lewis' claims, the government's preemption arguments are assessed under Rule 12(b)(1).

a. CSRA Preemption

The government first argues that Lewis' tort claims are preempted by the CSRA because the factual basis for Lewis' claims fall within the purview of "prohibited personnel practices," with which the CSRA is concerned. Congress enacted the CSRA in 1978 to replace the old civil service system, which was an "outdated patchwork of statutes and rules built up over almost a century." The heavily criticized pre-existing system involved "haphazard arrangements for administrative and judicial review of personnel action" depending on an employee's classification and the type of personnel decision.¹⁶ By enacting the CSRA, Congress created "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration."17

This court described the CSRA's remedial scheme in its order at docket 55 as follows:

"The CSRA provides a remedial scheme through which federal employees can challenge their supervisor's 'prohibited personnel practices.' If the conduct that plaintiff challenges in this action falls within the scope of the CSRA's 'prohibited personnel practices,' then the CSRA's administrative procedures are plaintiff's only remedy, and the federal court cannot resolve plaintiff's state law tort claims. 'The CSRA defines 'prohibited personnel practices' as any 'personnel action' taken for an improper motive by someone who has authority to take personnel actions. 'The CSRA reaches 'prohibited personnel practices' by '[a]ny employee who

¹⁵United States v. Fausto, 484 U.S. 439, 444 (1988) (internal quotation marks and citation omitted).

 $^{^{16}}Id$

¹⁷*Id.* at 445.

has authority to take, recommend, or approve any personnel action' 'with respect to an employee in ... a covered position in an agency."¹⁸

The CSRA further defines "prohibited personnel practices" as any "personnel action" taken by someone in authority that violates one of the enumerated practices.¹⁹ "Personnel action" is "defined comprehensively to include any appointment, promotion, disciplinary or corrective action, detail, transfer, reassignment, reinstatement, restoration, reemployment, performance evaluation, pay or benefits decision, mandatory psychiatric examination, or any other significant change in duties, responsibilities, or working conditions."²⁰ A co-worker may commit a personnel action by recommending a course of action to a superior.²¹ An employee's personnel-related complaints may be preempted even if no remedy is available under the CSRA.²²

The questions before the court, therefore, are (1) whether Lewis' tort claims are based on any of the "prohibited personnel actions" within the CSRA's purview and (2) whether those actions were taken by someone with the authority to do so.²³ As an initial matter, the court agrees that Lewis' complaint is prolix and that categories of behavior must be defined. The court therefore overrules Lewis' objections to the government's characterization of her allegations and adopts the categories set forth in the government's brief at docket 97, which accurately summarize the allegations in Lewis' complaint. The first nine categories of purported "personnel actions" are summarized as follows: making hiring decisions based on race; giving Lewis negative

¹⁸Docket 55 at 7 (citing *Mahtesian v. Lee*, 406 F.3d 1131, 1134 (9th Cir. 2005) and Orsay v. U.S. Dept. of Justice, 289 F.3d 1125, 1128 (9th Cir. 2002)).

¹⁹Mangano v. United States, 529 F.3d 1243, 1247 (9th Cir. 2008) (citing 5 U.S.C. § 2302(b)).

²⁰Mangano, 529 F.3d at 1247 (citing 5 U.S.C. § 2302(a)(2)(A)(i)-(xi)).

²¹*Mahtesian*, 406 F.3d at 1134.

²²Mangano, 529 F.3d at 1246 (citations and internal quotations omitted).

²³Based on the nature of Lewis' allegations, it is undisputed that each alleged action was prohibited. Lewis does not contend otherwise.

evaluations without providing feedback on how she can improve; giving better treatment to white employees; disciplining or criticizing Lewis when she did nothing wrong or disciplining her more severely than other employees; refusing to grant leave or forcing Lewis to find coverage when it was not her responsibility; giving Lewis too much work, making her perform tasks that should have been done by someone else, or failing to reassign work while she was on leave; forcing Lewis to supervise and/or discipline problem employees; refusing to accept medical certification for Lewis' leave and disciplining her for taking leave that was medically substantiated; and excluding Lewis from events and decisions she was entitled to participate in. Lewis does not dispute that the behavior encompassed in these nine categories falls within the definition of "personnel action."24

The government points to three additional categories of behavior that "do not immediately relate to personnel action listed in the CSRA" - (1) commanding officers refusing to investigate Lewis' allegations; (2) employees refusing to provide information that would expose misconduct; and (3) employees dealing with Lewis in a confrontational manner.²⁵ However, the government contends that these categories of behavior are nevertheless "work-related," arguing that categories (1) and (2) are workrelated because they involve officers and employees failing to do what their jobs required and that category (3) is work-related because confrontations by management and employees were due to "disagreements about work issues and managerial decisions." Lewis responds that these actions could not be personnel actions because they constitute "highly personal" wrongs that have "the propensity to cause significant damage to the person above and beyond harm to his or her job." As an initial matter, by referencing "highly personal wrongs," Lewis conflates the Title VII and CSRA preemption standards. Whether an alleged personnel action is "highly personal" does not bear on CSRA preemption analysis. Regardless, category (3) allegations that Lewis was confronted or yelled at by management and employees constitute "personnel

²⁴Docket 106 at 18.

²⁵Docket 97 at 22.

actions" that were disciplinary or corrective in nature and related directly to Lewis' employment. The court does not believe, on the other hand, that Lewis' category (1) and (2) allegations - involving the failure of management to investigate and the failure of other employees to participate in the investigation of Lewis' complaints - constitute "personnel actions."²⁶

The court must still consider whether the "personnel actions" discussed above were taken by individuals with authority. As an initial matter, the United States Attorney certified under 28 U.S.C. § 2679(d) that all of the then-individual defendants were acting within the scope of their employment.²⁷ Moreover, Lewis acknowledges that Fallon, DeShaiser, Bartz, Kobussen, Col. Dzubilo, Col. Lewis, Col. Douglas, and Lt. Col. Borgert, among others, held positions superior to her own and had authority to take personnel action. Although not in positions of authority, actions taken by Lewis' coworkers likewise constitute "personnel action" where their behavior influenced or affected the "personnel action" of one of Lewis' superiors. 28 Thus, to the extent Lewis' FTCA claims for intentional and negligent infliction of emotional distress and negligent supervision are based on behavior constituting "personnel action," those allegations are preempted by the CSRA.

b. Title VII Preemption

With respect to the remaining two categories of behavior that do not constitute "personnel action" - involving commanding officers refusing to investigate Lewis' allegations and employees refusing to provide information that would expose misconduct - the court concludes that these allegations are nevertheless preempted by Title VII because they fall into the category of alleged retaliatory workplace action. As a federal employee, Lewis' exclusive remedy for claims of workplace discrimination lies within Title VII. As this court previously noted, an "official of the Government, acting

²⁶These categories of behavior will be discussed further in the context of Title VII preemption. See infra.

²⁷Docket 57.

²⁸*Mahtesian*, 406 F.3d at 1134.

within the outer perimeter of his or her line of duty, is absolutely immune from state or common-law tort liability."29 One exception to his rule exists where such action constitutes a "highly personal" wrong that would support separate actionable relief.³⁰ This court previously declined to rule on Title VII preemption "because doing so requires resolution of questions of fact" pertaining to whether federal employees were acting within the perimeter of his or her authority. However, given that Lewis has presented no evidence in opposition to the government's factual attack on jurisdiction under Rule 12(b)(1) that would support claims that her superiors or co-workers were acting outside the outer perimeter of their authority, the court concludes that there are no longer factual questions standing in the way of Title VII preemption.

As noted above, the United States Attorney has now certified under 28 U.S.C. § 2679(d) that all of the then-individual defendants were acting within the scope of their employment.³¹ Such a certification is conclusive unless challenged.³² "[T]he party seeking review bears the burden of presenting evidence and disproving the Attorney General's decision to grant or deny scope of employment certification by a preponderance of the evidence." Lewis attempts to challenge the United States Attorney's certification in her affidavit at paragraphs 3-6 and 15-16, which essentially operates as an objection to the authenticity of Fallon and DeShasier's core personnel documents. However, Lewis' affidavit, together with the other evidence submitted with her opposition brief, is plainly insufficient to rebut the presumption established by the United States Attorney's certification that the named defendants were acting within the scope of their employment. Moreover, and more importantly, Lewis fails to allege any conduct that could be construed as falling outside "the outer perimeter of any

²⁹Docket 55 (quoting *Otto v. Heckler*, 781 F.2d 754, 758 (9th Cir. 1986), *amended by* 802 F.2d 337 (9th Cir. 1986)).

³⁰Brock v. United States, 64 F.3d 1421, 1424 (9th Cir. 1995).

³¹Docket 57.

³²Orsay, 289 F.3d at 1132 (citing Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1994)).

³³ *Green*, 8 F.3d at 698.

employee's duty" or cite any authority that would support her claim that any of the alleged actions of her supervisors or co-workers amounted to a "highly personal wrong."34 Lewis' attempts to liken her claims to the rape described in Brock and the assault described in Orsay simply fail. Because the court does not find it necessary to rely on the core personnel documents to find that Fallon and DeShasier were acting within the scope of their employment, the government's motion for leave to file additional factual materials at docket 123 is denied as moot. The court concludes that Lewis' remaining allegations - i.e., those which do not constitute "personnel action" by a federal employee - are preempted by Title VII.

2. Remaining Arguments

Because Lewis' FTCA claims are preempted by the CSRA and Title VII, the court need not consider the government's statute of limitations defense or arguments relating to the sufficiency of Lewis' tort claims.

B. Lewis' Retaliation Claim

Lewis also moves for summary judgment on her retaliation claim under 42 U.S.C. § 2000e-3(a). Specifically, Lewis argues that Col. Lewis' letter of September 19, 2005 amounted to retaliation for her EEO claims in that it discouraged her from seeking redress through the chain of command or engaging in the EEO process. Lewis also alleges that Air Force policies specifically permit an employee subject to potentially adverse employment action to use the chain of command to seek redress. The government points out that Lewis not only did not follow the appropriate chain of command, but that Col. Lewis encouraged her to use the EEO process to her advantage. To establish a prima facie case of retaliation, Lewis must prove that (1) she engaged in activity protected by Title VII; (2) she suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action.³⁵ If Lewis meets her burden, the government must then articulate

³⁴*Brock*, 64 F.3d at 1423-24.

³⁵Davis v. Team Elec. Co., 520 F.3d 1080, 1093-94 (9th Cir. 2008); Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000).