



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office Of Federal Operations**  
**P.O. Box 77960**  
**Washington, DC 20013**

[REDACTED]  
Jarvis M.,<sup>1</sup>  
Petitioner,

v.

Xavier Becerra,  
Secretary,  
Department of Health and Human Services  
(National Institutes of Health),  
Agency.

Petition No. 0320170006

MSPB No. DC-0752-14-0797-I-1

DECISION

On October 14, 2016, Petitioner filed a timely petition with the Equal Employment Opportunity Commission asking for review of a final decision issued by the Merit Systems Protection Board (MSPB) concerning his claim of retaliation in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.<sup>2</sup> For the reasons stated below, the Commission DIFFERS with the MSPB's final decision.

ISSUES PRESENTED

The issues presented are: (1) whether Petitioner's email to an employee relations official and a supervisory official, in which he raised allegations of sexual harassment and requested assistance in filing an EEO complaint, was protected EEO participation; (2) whether Petitioner proved

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Petitioner's name when the decision is published to non-parties and the Commission's website.

<sup>2</sup> Petitioner also alleged that the Agency discriminated against him on the basis of sex (male). The MSPB found no sex discrimination and Petitioner did not contest that finding in his petition. Accordingly, the Commission exercises its discretion to focus only on the issue specifically raised on appeal and will not address Petitioner's sex discrimination claim in this decision. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Ch. 9, § IV.A. (Aug. 5, 2015).

retaliatory disparate treatment through direct evidence when the Agency used his email, among other things, as justification for his removal; and (3) whether the Agency established that it would have removed Petitioner absent his email.

### BACKGROUND

At the time of the events giving rise to this matter, Petitioner worked as a Computer Scientist, GS-1550-14, at the Agency's National Institute of Allergy and Infectious Diseases (NIAID), Bioinformatics and Computational Biosciences Branch (BCBB), in Bethesda, Maryland. Petitioner's first-level supervisor was the Chief, BCBB (S1). Petitioner's second-level supervisor was the Chief Information Officer (S2). Petitioner's third-level supervisor was the Deputy Director for Science Management, NIAID (S3).

On January 31, 2014, Petitioner emailed an Employee Relations Specialist (ERS) and S2 about filing an EEO complaint against S1. In his email, which had the subject line "Request for assistance," Petitioner accused S1 of engaging in "a clear and continuing pattern of sexual and verbal abuse" against him and described alleged conduct by S1 involving sexual language, sexual innuendo, provocative gestures, inappropriate touching, and attempts at physical intimacy. Petitioner stated that he had tried his best to keep all exchanges with S1 as least adversarial as possible but ended his email by stating: "However, now I conclude that it is necessary to take formal action. Therefore[,] I am requesting the assistance of the Employee & Labor Relations Branch in filing an EEO complaint and/or a sexual harassment complaint against [S1]." In response, ERS emailed Petitioner with the contact information for the EEO Office. On February 12, 2014, Petitioner contacted the EEO Office to complain about the alleged sexual harassment.

On February 20, 2014, S2 issued Petitioner a notice of proposed removal for: (1) inappropriate behavior towards his supervisor; (2) failure to follow supervisory instructions; (3) inappropriate behavior in the workplace; and (4) making false allegations. Charges 1 and 2 cited Petitioner's alleged conduct during a meeting with S1 on December 17, 2013. Charge 3 cited Petitioner's alleged conduct during an encounter with a coworker later in the day on December 17, 2013. Charge 4 (five of the six specifications)<sup>3</sup> cited statements from Petitioner's January 31, 2014, email alleging sexual harassment by S1. Regarding charge 4, S2 stated in the notice that he did not find Petitioner's statements at all credible.

On May 8, 2014, S3 issued Petitioner a decision to remove him, effective May 16, 2014. Petitioner then filed a mixed-case appeal with the MSPB alleging that the Agency discriminated against him on the basis of retaliation for prior protected EEO activity when it removed him.

On September 25, 2015, after a two-day hearing, an MSPB Administrative Judge (AJ) issued an initial decision affirming Petitioner's removal and finding no retaliation. First, the MSPB AJ found that the Agency established its charges by preponderant evidence.

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<sup>3</sup> The remaining specification cited a statement from Petitioner's January 6, 2014, email to S1 and S2.

Regarding charge 4, the MSPB AJ credited S1's hearing testimony denying the alleged sexual harassment over Petitioner's hearing testimony about the alleged sexual harassment. In addition, the MSPB AJ determined that Petitioner most likely fabricated the sexual harassment allegations as a defense to potential disciplinary action resulting from his conduct towards S1 on December 17, 2013. Second, the MSPB AJ found that Petitioner did not establish his affirmative defense of retaliation. Specifically, the MSPB AJ found that Petitioner's removal was warranted regardless of any protected EEO activity because the Agency had established its charges against Petitioner and most of the charges were based on conduct before he engaged in any protected activity.

Petitioner sought review by the full Board. On September 15, 2016, the Board issued a final order denying Petitioner's petition. Petitioner then filed the instant petition.

### ARGUMENTS ON PETITION

In his petition, Petitioner argues that the Agency retaliated against him when it used his January 31, 2014, email as justification for his removal. Specifically, Petitioner asserts that, because his email requesting assistance in filing an EEO complaint was sent to a management official logically connected to the EEO process, it was sufficient to initiate the informal EEO process and therefore was participation. In addition, Petitioner asserts that, because the participation clause does not include a reasonableness standard, the statements in his email were protected even if the Agency believed that they were false. Moreover, Petitioner asserts that the Agency's use of the email to support his removal was direct evidence of retaliation. Finally, Petitioner asserts that the Agency was liable for full relief because hearing testimony showed that it would not have removed him absent the email.

In its opposition, the Agency argues that Petitioner could not demonstrate that his removal was retaliatory. Among other things, the Agency asserts that Petitioner's email did not fall within the scope of the participation clause because participation commences when an EEO Counselor is contacted. In addition, the Agency asserts that Petitioner's email was a threat to initiate EEO action, rather than the initiation of the EEO process itself. Further, the Agency asserts that there is a critical distinction between what is sufficient to constitute timely contact for purposes of 29 C.F.R. § 1614.105(a)(1) and what is sufficient to constitute participation for purposes of Title VII's anti-retaliation provision. Moreover, the Agency asserts that extending the definition of participation to cover the email would effectively give Petitioner immunity for deliberately fabricating sexual harassment allegations for the purpose of manufacturing a line of defense against discipline for other misconduct. Finally, the Agency asserts that, assuming the email would constitute participation under the EEOC Enforcement Guidance on Retaliation and Related Issues,<sup>4</sup> use of the Retaliation Guidance was inappropriate because it was not issued until after the events occurred in this case.

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<sup>4</sup> EEOC Notice No. 915.004 (Aug. 25, 2016) (Retaliation Guidance).

### STANDARD OF REVIEW

EEOC regulations provide that the Commission has jurisdiction over mixed case appeals on which the MSPB has issued a decision that makes determinations on allegations of discrimination. 29 C.F.R. § 1614.303 et seq. The Commission must determine whether the decision of the MSPB with respect to the allegation of discrimination constitutes a correct interpretation of any applicable law, rule, regulation, or policy directive, and is supported by the evidence in the record as a whole. 29 C.F.R. § 1614.305(c).

### ANALYSIS AND FINDINGS

#### *Participation – Petitioner’s January 31, 2014, Email*

As an initial matter, the Commission finds it appropriate to use the Retaliation Guidance as it communicates the Commission’s current position on what constitutes participation. The Commission notes that the Retaliation Guidance specifically states, “OBSOLETE DATA: This document supersedes the EEOC Compliance Manual Section 8: Retaliation (1998).” Accordingly, this decision will analyze Petitioner’s retaliation claim under the Commission’s Retaliation Guidance.

Regarding the participation clause, the Commission states:

The anti-retaliation provisions make it unlawful to discriminate because an individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII ... This language [is] known as the “participation clause” ... The participation clause applies even if the underlying allegation is not meritorious ... The Commission has long taken the position that the participation clause broadly protects EEO participation regardless of whether an individual has a reasonable, good faith belief that the underlying allegations are, or could become, unlawful conduct ... This does not mean that bad faith actions taken in the course of participation are without consequence. False or bad faith statements by either the employee or the employer should be taken into appropriate account by the factfinder, investigator, or adjudicator of the EEO allegation when weighing credibility, ruling on procedural matters, deciding on the scope of the factfinding process, and deciding if the claim has merit. *It is the Commission’s position, however, that an employer can be liable for retaliation if it takes it upon itself to impose consequences for actions taken in the course of participation.*

Retaliation Guidance, at II.A.1 (emphasis added).

The Commission further states:

Although courts often limit the participation clause to administrative charges or lawsuits filed to enforce rights under an EEO statute, and instead characterize EEO complaints made internally (e.g., to a company manager or human resources department) as “opposition,” the Supreme Court in Crawford v. Metropolitan Government of Nashville & Davidson Cty. explicitly left open the question of whether internal EEO complaints might be considered “participation” as well. The Commission ... ha[s] long taken the view that participation and opposition have some overlap, in that raising complaints ... or otherwise participating in an employer’s internal complaint or investigation process, whether before or after an EEOC ... charge has been filed, is covered under the broad protections of the participation clause, although it is also covered as “opposition.” The plain terms of the participation clause prohibit retaliation against those who “participated *in any manner* in an investigation, proceeding, or hearing” under the statute. 42 U.S.C. § 2000e-3(a) (emphasis added). As courts have observed, these statutory terms are broad, unqualified, and not expressly limited to investigations conducted by the EEOC. Similarly, *contacting a federal agency employer’s internal EEO Counselor under 29 C.F.R. § 1614.105 to allege discrimination is participation.*

Id. (emphasis added).

Regarding the federal sector EEO complaint process, the Commission’s guidance states that it begins when a person who believes he has been aggrieved meets with an EEO Counselor. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Ch. 2, at I.A (Aug. 5, 2015). The Commission has consistently held that a person may satisfy the criterion of EEO Counselor contact by initiating contact with any agency official logically connected with the EEO process, even if that official is not an EEO Counselor, and by exhibiting an intent to begin the EEO process. Id. at n.2. In addition, the Commission has held that in the case of sexual harassment, contact with a supervisory official, who was not an EEO Counselor, was sufficient to constitute EEO Counselor contact. See Buckli v. Dep’t of the Army, EEOC Request No. 05970223 (Oct. 8, 1998).

Upon review of the record, the Commission finds that Petitioner’s January 31, 2014, email was protected EEO participation.

First, the Commission finds that the email was sufficient to constitute EEO Counselor contact because: (a) Petitioner initiated contact with an employee relations official (ERS) and a supervisory official (S2) about the alleged sexual harassment; and (b) Petitioner exhibited an intent to begin the EEO process by explicitly requesting assistance in filing an EEO complaint (“However, now I conclude that it is necessary to take formal action. Therefore[,] I am requesting the assistance of the Employee & Labor Relations Branch in filing an EEO complaint and/or a sexual harassment complaint against [S1].”).

Although the Agency asserts that Petitioner did not have the requisite intent to begin the EEO process, the Commission disagrees. Petitioner plainly indicated in his email his intent to file an EEO complaint, Petitioner requested assistance in his email from ERS to do so, Petitioner received the contact information for the EEO Office from ERS, and Petitioner contacted the EEO Office approximately two weeks later.

Second, the Commission finds that, because the email was sufficient to constitute EEO Counselor contact, the email was protected EEO participation. Although the Agency asserts that there is a critical distinction between what is sufficient to constitute EEO Counselor contact for purposes of 29 C.F.R. § 1614.105(a)(1) and what is sufficient to constitute EEO Counselor contact for purposes of Title VII's participation clause, the Commission disagrees. The Commission emphasizes that neither EEO MD-110 nor the Retaliation Guidance makes such a distinction. Although the Agency asserts that including the email as participation would give Petitioner immunity for deliberately fabricating sexual harassment allegations, the Commission notes that the Commission's position on this issue is clear. In the Retaliation Guidance, the Commission states that: (i) the participation clause broadly protects EEO participation regardless of whether the actions were taken in good or bad faith; (ii) bad faith actions taken in the course of participation can have consequences within the EEO process; and (iii) an employer can be liable for retaliation if it takes upon itself to impose consequences for actions taken in the course of participation. Therefore, even if the allegations in Petitioner's email were made in bad faith, the email would still be broadly protected by the participation clause.

#### *Disparate Treatment – Direct Evidence*

A petitioner may prove disparate treatment through direct evidence. See Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, § III (Jan. 16, 2009). Direct evidence of discriminatory motive may be any written or verbal policy or statement made by an agency official that on its face demonstrates a bias against a protected group and is linked to the complained-of adverse action. See id.

Upon review of the record, the Commission finds that Petitioner proved disparate treatment through direct evidence. Here, Petitioner engaged in protected activity under Title VII when he sent the January 31, 2014, email to ERS and S2 alleging sexual harassment and requesting assistance in filing an EEO complaint. Shortly thereafter, on February 20, 2014, S2 issued Petitioner a notice of proposed removal, which was sustained by S3. The notice of proposed removal charged Petitioner with, among other things, making false allegations and cited the sexual harassment allegations in his email. Given the Agency's use, in part, of Petitioner's EEO activity as justification for his removal, the Commission finds that the facts of this case demonstrate a bias against Petitioner based on his protected activity, along with evidence linking that bias to the adverse action. See, e.g., Rigoberto A. v. Env't Prot. Agency, EEOC Appeal No. 0120180363 (Sept. 17, 2019) (finding direct evidence of discrimination where record showed that agency accused complainant of making false allegations and cited to those statements as a basis for proposing his removal).

#### *"Mixed Motive" Analysis*

In light of our finding that Petitioner's removal was motivated by retaliation, the Commission further finds that this matter should be reviewed under a mixed-motive analysis, because the Agency also provided a non-retaliatory reason for removing Petitioner, *i.e.*, his inappropriate behavior towards his supervisor (charge 1), his failure to follow supervisory instructions (charge 2), and his inappropriate behavior in the workplace (charge 3).

Cases such as this, where there is evidence that discrimination was one of multiple motivating factors for an employment action, that is, the employer acted on the bases of both lawful and unlawful reasons, are known as "mixed motive" cases. Once an employee demonstrates that discrimination was a motivating factor in the employer's action, the burden shifts to the employer to prove, by clear and convincing evidence, that it would have taken the same action even if it had not considered the discriminatory factor. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 249, 258 (1989); *Tellez v. Dep't of the Army*, EEOC Request No. 05A41133 (Mar. 18, 2005). If the employer is able to meet this burden, the employee is not entitled to personal relief, *i.e.*, damages, reinstatement, hiring, promotion, and/or back pay. But the employee nonetheless may be entitled to declaratory relief, injunctive relief, attorneys' fees, and costs. *See Walker v. Soc. Sec. Admin.*, EEOC Request No. 05980504 (Apr. 8, 1999).

To meet its burden, the employer must offer objective evidence that it would have taken the same action even absent the discrimination. In this showing, the employer must produce proof of a legitimate reason for the action that actually motivated it at the time of the decision. A mere assertion of a legitimate motive, without additional evidence proving that this motive was a factor in the decision and that it would have independently produced the same result, is not sufficient. The employer must prove "that with the illegitimate factor removed from the calculus, sufficient business reasons would have induced it to take the same action." *Price Waterhouse*, 490 U.S. at 276-77 (O'Connor, J., concurring).

Upon review of the record, the Commission finds that the Agency did not establish that it would have removed Petitioner absent the retaliation. Specifically, the following testimony from S2 reflects that the Agency would not have taken the same action, removal, absent Petitioner's January 31, 2014, email:

- Q. Okay. Now, this is an email to [ERS]. You say that this changed things. What specifically changed as a result of this email?
- A. At that point, I completely lost trust in all of the statements that [Petitioner] was making. I didn't see – couldn't see how he can continue to work in the organization ...
- Q. So is it fair to say at that point in time you made a decision as to what the penalty would be, or what action you would take with regard to [Petitioner]?

A: I wouldn't say it was exactly the same day. But at that point, yes, within the next few days it became absolutely clear to me that I would be proposing removal from the federal service.

\* \* \*

Q. Would you agree that before January 31st and before [Petitioner's] January 31 email, at that point you were considering issuing him a letter of counseling or a suspension?

A. I was consider -- I didn't decide on what penalty. But it definitely was not a proposal to -- I was not considering removal at that particular time.

Q. And it was the January 31st email that sort of pushed you over the edge on that?

A. I would say so, yes.

Hearing Transcript Day 1, at 203-04, 235-36.

In addition, S3 testified that he probably would not have sustained a removal action based only on Petitioner's alleged conduct on December 17, 2013 (charges 1 - 3). Hearing Transcript Day 2, at 244-45.

In view of the foregoing, the Commission finds that the Agency did not satisfy its burden of proof to avoid providing personal relief.

### CONCLUSION

The Commission finds that Petitioner's removal was motivated by retaliation for engaging in protected EEO activity and that the Agency has not demonstrated that it would have removed him from employment in the absence of the impermissible motivating factor. Accordingly, the Commission finds that Petitioner is entitled to full, make-whole relief. Therefore, based on a thorough review of the record, it is the decision of the Commission to DIFFER with the final decision of the MSPB finding no discrimination with regard to Petitioner's claim of retaliation. The MSPB's decision erred in its interpretation of the laws, rules, regulations, and policies governing this matter. Petitioner's retaliation claim will be returned to the MSPB for further processing.



PETITIONER'S RIGHT TO FILE A CIVIL ACTION (V0610)

Your case is being referred back to the Merit Systems Protection Board for further consideration and the issuance of a new decision. You will have the right to file a civil action in the appropriate United States District Court, based on the new decision of the Board:

1. **Within thirty (30) calendar days** of the date that you receive notice of the decision of the Board to concur in this decision of the Commission; or,
2. If the Board decides to reaffirm its original decision, **within thirty (30) calendar days** of the date you receive notice of the final decision of the Special Panel to which your case will then be referred.

You may also file a civil action if you have not received a final decision from either the Merit Systems Protection Board or the Special Panel **within one hundred and eighty (180) days** of the date you filed this Petition for Review with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Petitioner's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



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Carlton M. Hadden, Director  
Office of Federal Operations

July 5, 2023  
Date