



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, D.C. 20013

[REDACTED]
Jazmine F.,¹
Petitioner,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Office of the Secretary of Defense),
Agency.

Petition No. 0320170007

MSPB No. DC-0752-14-0739-I-1

DECISION

On October 7, 2016, Petitioner filed a timely petition with the Equal Employment Opportunity Commission (EEOC or Commission) asking for review of a Final Order issued by the Merit Systems Protection Board (MSPB) concerning her claim of discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the reasons stated below, we DIFFER with the MSPB decision.

ISSUES PRESENTED

The issues presented are:

1. Whether Petitioner's third-level supervisor's comments about Petitioner's prior EEO activity were reasonably likely to deter her and other employees from engaging in protected activity.
2. Whether the Agency violated the Commission's anti-retaliation regulations by using, among other things, her responses made during discovery concerning a pending EEO complaint to affect her removal.

¹ 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.

3. Whether Petitioner's chain of command made comments that constitute direct evidence of discrimination regarding her removal.

BACKGROUND

Petitioner worked as a Program Analyst, GS-14, at the Department of Defense, Financial Management Division (FMD), Washington Headquarters Service (WHS) in Washington, D.C. She began working in 2009. In 2010, she filed her first complaint, EEO Complaint #1, alleging that her former immediate supervisor (FS) created a hostile work environment. She also named her then-current supervisors S1 and S2 in this complaint.²

Also in 2010, Petitioner began a two-year detail to the Agency's Office of the Comptroller (OOC) working under A1. Towards the end of the detail, Petitioner sought a permanent position with the OOC so that she did not have to return to the FMD. On April 27, 2012, S3, Petitioner's third-level supervisor, told A1 about Petitioner's EEO activities. S3 claimed that she spoke to A1 because she was trying to find a position for Petitioner in order to settle her complaint but that it was difficult to find something Petitioner would accept.

Petitioner thereafter filed a second EEO complaint, EEO Complaint #2, alleging that S3 retaliated against her and interfered with her employment prospects. The Agency initially dismissed EEO Complaint #2 on the grounds that it did not state a claim.³ S3 also, at this time, contacted the Department of the Air Force to determine, according to S3, whether there were any problems when Petitioner worked for that agency. She was informed that Petitioner had filed EEO complaints while there.

On April 25, 2012, Petitioner was deposed as part of the discovery process concerning EEO Complaint #1. After the deposition, several attorneys who were representing the Agency met with S3 regarding Petitioner's deposition testimony and her answers to several interrogatories.

² According to the record, a hearing was held on this complaint in September 2016, and the parties are awaiting a decision in EEOC Hearing No. 570-2011-00386X. We note that, as this petition has been pending, EEO Complaint #1 has been addressed by the Commission on appeal in Stormy M. v. Dep't of Def., EEOC Appeal No. 2019003363 (Jan. 22, 2020), req. for recon. den'd., EEOC Request No. 2020002692 (Sept. 10, 2020).

³ On appeal, the Office of Federal Operations reversed the Agency's final decision after finding that a reasonable person in Petitioner's position may have been deterred from engaging in protected EEO activities by the type of actions attributed to S3. See EEOC Appeal No. 0120130316 (Mar. 27, 2014), req. for recon. den., EEOC Request No. 0520140325 (Feb. 13, 2015). Upon remand, the Agency, after an investigation, issued a final decision finding no discrimination. In Jazmine F. v. Dep't of Def., EEOC Appeal No. 0120162132 (June 22, 2018), we found that Petitioner had been subjected to unlawful retaliation when the Director of FMD contacted her detail supervisor (S2) and informed them that Petitioner had engaged in settlement discussions for an EEO complaint.

Petitioner had been asked a series of questions regarding whether she had been a party to any Civil or Tax Court actions. Petitioner had maintained that she had not been a party to any such activities. The Agency performed a search of public records, however, and found that Petitioner had multiple appearances in the U.S. Tax Court and the Maryland State Courts.

In a June 8, 2012, email to the Human Resources Division Manager (HRDM), S3 asked if Petitioner could be removed from her employment based on her deposition answers. S3 wrote, in pertinent part:

[A]ttached is the information on [Petitioner] that we discussed. See outline from [General Counsel] below. The question is, since it appears she has lied under oath about not having tax issues, what disciplinary action is appropriate? As a result of this EEO complaint, we have found that she has made a career of filing EEO complaints. She has done so in several agencies. She admits to it at Commerce and an intel organization. But I know for a fact that she has filed EEO complaints at Joint Staff and AF as well. Based on the attached information is dismissal possible? If not, what is appropriate[?]

S3 suggested that HRDM speak with C1, an HRD employee who had worked with FS in the past to discipline Petitioner. Ultimately, C1 was enlisted to advise on Petitioner's current situation. She recommended that Petitioner be removed. On June 11, 2012, S3 emailed S2. She forwarded him an email from HRDM, and asked him, "Please come see me on this tomorrow AM [sic]. Save reading the attachments until after the meeting. This will take a while thanks [sic]."

During the course of its investigation, the Agency also determined that Petitioner had provided erroneous responses on two Standard Forms 86, dated 2003 and 2009 which are, respectively, applications for, or to renew, a security clearance.

S3 met with S2 and told him what the Agency's Office of General Counsel attorneys had discussed with her. She also told him that Petitioner had filed a number of EEO complaints at other agencies. According to S2, he subsequently received a proposal to remove Petitioner. S1 was the proposing official. S2 acknowledged that S3 periodically checked on the status of the removal action.

S3 acknowledged that she met with S2 about the situation but maintained that she told him that the disciplinary process needed to be handled by the first- and second-line supervisors. S3 indicated that she did not think that Petitioner had filed an EEO complaint against her, but she did recall that Petitioner was "unhappy" with her because she was unable to find a permanent position where Petitioner had been detailed.

Petitioner maintained that she did not recall her prior court activity and therefore responded in the negative when she was asked about it during her EEO complaint investigation. She described her memory as being like "a bucket that overflowed with information when it got full."

Petitioner also argued that the information that she provided should not have been used against her in support of her termination, and that she had over thirty years of service and had earned good performance evaluations.

The Agency issued Complainant a Proposal of Removal. S1 noted therein, in pertinent, part:

On March 1, 2012, you provided written responses to the Agency's discovery requests in connection with your Equal Employment Opportunity (EEO) complaint, EEOC No. 570-3022-00386X, which alleged, inter alia, a hostile working environment. You certified that your responses were "... true to the best of my memory and belief." A copy of your salient responses to the agency's written discovery requests are attached to this proposal.

On April 25, 2012, you gave testimony in a deposition conducted by an Agency attorney in connection with the same EEO Complaint cited in the above paragraph. In connection with that deposition, you were "duly sworn" to tell the truth by a Notary Public for the District of Columbia. A copy of salient portions of your sworn deposition is attached to this Proposal.

S1 cited seven specifications under the charge of Lack of Candor:

1) Specification One

In your response to the Agency's discovery request, dated March 1, 2012, you responded as follows:

QUESTION 20. In the past 5 years, have you been involved in any civil and/or criminal legal proceedings? If so, describe the circumstances surrounding the proceedings and the outcome.

RESPONSE. Nol. [sic]

2) Specification Two

Additionally, in your April 25, 2012, sworn deposition, you responded as follows.

Question: Have you been a party to any lawsuits before this complaint?

Answer: Not that I'm aware of.

3) Specification Three

Section 28 of the 2009 SF-86 asks as follows: "In the last seven years . . . have you ever been a party to a public record civil court action(s) not listed elsewhere on this form?"

On October 14, 2009, you answered, "No." Nowhere else on your 2009 SF-86 do you reference the July 2008 lawsuit between you and [a law firm].

As evidenced by the Maryland Judiciary records detailed above, you were sued by [a law firm] in July 2008 and were also sued by [a business] in February 2010. Additionally, you sued [another business] in the Circuit Court for Montgomery County on September 28, 2000. That case was dismissed on July 18, 2001. Consequently, your sworn responses in the three specifications above lacked candor.

4) Specification Four

In your April 25, 2012, sworn deposition, you responded as follows. Question: Have you ever had any judgments against you in civil or administrative court?

Answer: Not that I am aware of.

5) Specification Five

In your April 25, 2012, sworn deposition, you responded as follows.

Question: Do you have any tax problems?

Answer: No.

Question: Have you ever?

Answer: No, not that I'm aware of.

6) Specification Six

In your April 25, 2012, sworn deposition, you responded as follows.

Question: Have you ever been in tax court?

Answer: I don't recall being in tax court.

7) Specification Seven

Question 40 of the 2003 SF-86 asks as follows: "In the last seven years, have you ever been a party to a public record civil court action(s) not listed elsewhere on this form?" On October 14, 2003, you answered, "No." Nowhere else on your 2003 SF-86 do you reference the 1999 Tax Court case detailed above.

S2, the deciding official, sustained each specification in the proposal.⁴ He maintained that removal was appropriate based on Petitioner's "untruthful statements in the course of [her] deposition and in [her] responses to written discovery." As an aggravating factor, S2 listed, among other things, that Petitioner's "[a]ttempting to block the Agency from discovering potential damage set-offs in [her] lawsuit is directly connected to [her] stated efforts to claim \$300,000 in damages from the Agency."

After her removal, Petitioner filed a mixed-case complaint. The Agency issued a decision that found no discrimination. Petitioner then filed an appeal with the MSPB. Petitioner alleged that the Agency discriminated against her on the bases of race (African-American), sex (female), disability (forgetfulness, memory impairment), and reprisal for prior protected EEO activity when, on August 13, 2012, the Agency proposed her removal based on a charge of Lack of Candor with seven specifications. The Agency maintained that it did not charge her with falsification but rather with inaccuracy and therefore a showing of intent to defraud or deceive was not required.

A hearing was held and thereafter an MSPB Administrative Judge (AJ) issued an initial decision finding that the Agency's penalty of removal was reasonable and promoted the efficiency of the service. The AJ also found that Petitioner did not prove her affirmative defenses that she was subjected to reprisal, race, sex, and disability discrimination. Specifically, the AJ found that, with respect to Petitioner's claims of discrimination based on race, sex, and disability, she did not establish a prima facie case of discrimination as she failed to identify any other employees that had lied under oath and were allowed to retain their jobs. Notwithstanding, assuming that Petitioner had established a prima facie case of discrimination as to all bases, the AJ found that the Agency articulated legitimate, nondiscriminatory reasons for its actions, i.e., Petitioner was removed because it was discovered that she had repeatedly lied on official forms and in her EEO complaint documents. The AJ also found that Petitioner did not show that the Agency's actions were pretext for discrimination.

With respect to Petitioner's reprisal claim, the AJ specifically found that the charged misconduct had a direct relationship to Petitioner's duties and her service with the Federal government. The AJ also found that Petitioner was unable to establish that her removal was taken because of her protected activity. The AJ found that, although S2 and S1 were aware of Petitioner's prior EEO activity, the severity of Petitioner's misconduct outweighed any retaliatory motive. According to the AJ:

In this case, I find that the appellant's false statements, repeated multiple times in several forums, including her deposition, her sworn interrogatory responses, and her statements on the SF-86, twice, under penalty of perjury were all so egregious, that their significance overwhelms any possible motive to retaliate.

⁴S2 indicated that the original plan was to reassign Petitioner, until after the discovery of her repeated false statements.

In light of all the evidence, I find that the appellant has failed to show preponderant evidence that the agency's action was based on retaliation for protected EEO activity.

Thereafter, Petitioner sought full review by the Board. The Board, however, was unable to reach a determination because the two sitting Board members could not agree on the appropriate disposition. Accordingly, the initial decision became the final decision of the MSPB. Petitioner then filed the instant petition.

On petition for review, Petitioner, among other arguments, questions whether statements made during an EEO proceeding may later be used to fire an employee and/or whether the use of said statements would have a "chilling effect" on EEO complainants. She also maintains that the AJ made multiple errors in his analysis concerning her claim of retaliation; for example, applying a "but for" burden of proof standard, instead of asking whether retaliation was a motivating factor in her termination, and by finding that S3 did not influence the termination decision. Petitioner also maintained that the AJ misapplied the "mixed motive" analysis.

ANALYSIS AND FINDINGS

EEOC regulations provide that the Commission has jurisdiction over mixed-case appeals on which the MSPB has issued a decision that includes 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).

At the outset, we note that Petitioner did not specifically challenge the MSPB's determination that the Agency did not discriminate against her based on race, sex, and disability. In fact, we note that, on petition for review, she maintained that this was a retaliation case. Because Petitioner did not specifically challenge the MSPB's final decision with respect to race, sex, and disability, we exercise our discretion not to address in our decision its decision as to those bases. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Ch. 9, § IV.A.3 (Aug. 5, 2015) (Commission has the right to review all issues in a complaint on appeal, but also has discretion not to do so and may focus only on issues specifically raised).

I. The Comments by S3

In its enforcement guidance on retaliation, 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, the ADEA, the EPA, the ADA, the Rehabilitation Act, or GINA.

This language, known as the “participation clause,” provides protection from retaliation for many actions, including filing or serving as a witness for any side in an administrative proceeding or lawsuit alleging discrimination in violation of an EEO law. The participation clause applies even if the underlying allegation is not meritorious or was not timely filed. 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. Although the Supreme Court has not addressed this question, the participation clause by its terms contains no limiting language, and protects from retaliation employees' participation in a complaint, investigation, or adjudication process.

EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice 915.004 (Aug. 25, 2016) (Retaliation Guidance).

The Commission further states:

The Supreme Court has reasoned that broad participation protection is necessary to achieve the primary statutory purpose of anti-retaliation provisions, which is “maintaining unfettered access to statutory remedial mechanisms.” The application of the participation clause cannot depend on the substance of testimony because, “[i]f a witness in [an EEO] proceeding were secure from retaliation only when her testimony met some slippery reasonableness standard, she would surely be less than forth-coming.” These protections ensure that individuals are not intimidated into forgoing the complaint process, and that those investigating and adjudicating EEO allegations can obtain witnesses’ unchilled testimony. It also avoids pre-judging the merits of a given allegation. For these reasons, the Commission disagrees with decisions holding to the contrary.

Id.

We find that the actions and comments by S3 were clearly in violation of the anti-retaliation provisions of our regulations. As noted above, in deciding whether the comments by S3 were retaliatory, the test is whether her comments and actions were reasonably likely to deter protected EEO activity by Petitioner or other employees. We note in this regard S3’s comments to the HRDM while seeking advice on whether to remove Petitioner, that because of EEO Complaint #1, “we have found that she has made a career of filing EEO complaints.” S3’s comments to the HRDM further indicated that she had researched Petitioner’s EEO activity at other agencies. We also note that when S3 discussed Petitioner’s conduct with S2, she again mentioned Petitioner’s EEO activity.

We have held that the actions of a supervisor are discriminatory based on reprisal where the supervisor acts to intimidate an employee and interfere with his or her EEO activity in any manner.

See Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998); Yubuki v. Dep't of the Army, EEOC Request No. 05920778 (June 4, 1993); see also Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999). The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter a complainant or others from engaging in protected activity. *Id.*; Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997). Accordingly, we find that the comments and actions of S3 were retaliatory against Petitioner separate and apart from her subsequent removal because they would have deterred a reasonable person from engaging in protected EEO activity.

II. *The use of Petitioner's discovery responses*

Likewise, we find that the Agency, by using Petitioner's EEO discovery responses to support her removal, also violated our regulations. As the Commission's guidance states:

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 (emphasis added).

To the extent that management felt that Petitioner's responses during the EEO discovery process were untruthful, they could have brought the matter to the attention of the EEOC Administrative Judge and sought sanctions. Instead, the Agency punished Petitioner, in large part, because of her participation in EEOC Complaint #1 and other EEO activities.

III. Petitioner's Termination

Direct Evidence of Reprisal

The Commission has held:

Direct evidence of a retaliatory motive is any written or verbal statement by an Agency official that he or she undertook the challenged action because the employee engaged in protected activity. Such evidence also includes a written or oral statement by an Agency official that on its face demonstrates a bias

toward the employee based on his or her protected activity, along with evidence linking that bias to the adverse action.

Feder v. Dep't of Justice, EEOC Appeal No. 0720110014 (May 14, 2013).

In this case, Petitioner engaged in protected activity under Title VII when she participated in the discovery process regarding EEO Complaint #1. S3 was aware of Petitioner's EEO activity. After being informed about several of Petitioner's EEO discovery responses, S3 contacted HRDM in June 2012, and asked if dismissal was possible. Shortly thereafter, on August 13, 2012, S1 initiated a proposal to removal Petitioner, which was sustained by S2. Given S3's negative comments about Petitioner's EEO activity; management's use, in part, of her EEO discovery responses as a justification for her removal; S3's discussion with S2 of Petitioner's EEO history; and the fact that S2 cited as an aggravating factor that Petitioner's actions might have affected the Agency's ability to off-set her claim of \$300,000 in damages in her EEO complaint, we find that the facts of this case patently demonstrate a bias against Petitioner based on her protected activity, along with evidence linking that bias to the adverse action. Accordingly, we find direct evidence of discrimination.

Mixed-Motive Analysis

In light of our finding that Petitioner's removal was motivated by reprisal, we further find that this matter should be reviewed under a mixed-motive analysis because the deciding official also provided a non-retaliatory reason for removing Petitioner, i.e., her responses on the 2003 and 2009 Standard Forms 86.

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, that is, damages, reinstatement, hiring, promotion, and/or back pay. But the employee nonetheless may be entitled to declaratory relief, injunctive relief, attorneys' fees or 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.⁵ 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.

⁵ See Price Waterhouse, 490 U.S. at 252 ("[I]n most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive").

A mere assertion of a legitimate motive, without additional evidence proving that this motive was a factor in the decision and that it would independently have 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). The employer’s alleged legitimate explanation for the action will be undercut if there is evidence that this reason would also have justified taking the same action against another similarly-situated employee, but the employer declined to do so. Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, EEOC Notice No. 915.002 (July 14, 1992).

There is no question that the Agency could have removed Petitioner based on her providing false or misleading information on her application for, or to renew her security clearance. However, we are not looking at this matter in a vacuum. We cannot say, based on the record before us, that the Agency would have taken the same action, i.e., removal, absent the retaliatory motivation of Petitioner’s managers, especially S3. According to the record, D1, an Agency attorney advising management on Petitioner’s removal, obtained copies of Petitioner’s Standard Forms 86 from the Office of Personnel Management (OPM) on August 9 and August 10, 2012, pursuant to an earlier conversation. D1’s actions were not part of a suitability review regarding whether Petitioner should maintain her security clearance. Although clearly the Agency was aware of Petitioner’s conduct at the time S1 issued the proposed removal on August 13, 2012, we do not find it likely that the Agency would have contacted OPM for copies of these forms absent S3’s apparent motive to retaliate against Petitioner, as evidenced by S3’s June 8, email wherein, as noted by Petitioner, S3 stated that Petitioner “[a]dmits” to filing EEO complaints at other agencies,” as if engaging in protected EEO activity was a negative act to which Petitioner had confessed. In view of the foregoing, we find that the Agency has not satisfied its burden of proof to avoid providing personal relief.

CONCLUSION

We find that Petitioner’s termination was motivated by reprisal for engaging in protected EEO activity and that the Agency has not demonstrated that it would have terminated her employment in the absence of the impermissible motivating factor. Accordingly, we find that Petitioner is entitled to full, make-whole relief. Therefore, based upon 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 discrimination based on retaliation. The MSPB’s decision erred in its interpretation of the laws, rules, regulations, and policies governing this matter. Petitioner’s reprisal 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 Complainant’s Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

July 5, 2023
Date