U.S. OFFICE OF SPECIAL COUNSEL

U.S. Office of Special Counsel
Report of Prohibited Personnel Practice
OSC File No. [redacted]
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I. INTRODUCTION

This U.S. Office of Special Counsel (OSC) report stems from a case referral from the Equal Employment Opportunity Commission (EEOC).[1] EEOC found that the [redacted], U.S. Department of Justice (DOJ), retaliated against [redacted] ([redacted]) [redacted] Employee A [redacted] for participating in and filing complaints under Equal Employment Opportunity (EEO) procedures. EEOC asked OSC to determine whether disciplinary action is warranted against DOJ employees. After reviewing EEOC's evidentiary record, OSC requests that DOJ take disciplinary action against [redacted] official Manager 1 [redacted] for violating 5 U.S.C. § 2302(b)(9), which prohibits retaliation for engaging in protected activities. OSC also requests that [redacted] management officials receive OSC-provided training on prohibited personnel practices and merit system principles.

II. PROCEDURAL BACKGROUND

On [redacted] Employee A filed a formal complaint alleging discrimination on the bases of sex, age, and retaliation (2010 EEO Complaint). DOJ's Complaint Adjudication Office issued a Final Agency Decision regarding this complaint on [redacted] (DOJ-FAD 1). DOJ-FAD 1 found that DOJ retaliated against Employee A when [redacted] management referred [redacted] twice to DOJ's Office of Professional Responsibility (OPR) and subjected [redacted] to multiple actions that constituted a hostile work environment.[2]

On December 9, 2011 Employee A filed a second formal complaint alleging discrimination on the bases of age and retaliation (2011 EEO Complaint). This complaint stemmed from, among other things, a lengthy critical performance memorandum attached to Employee A 2010 appraisal. On November 10, 2015, EEOC issued a decision finding that the performance memorandum was "an act of retaliatory harassment … for [Employee A] EEO activity" and was "another incident of harassment in the hostile work environment starting in April 2009. It involves the same perpetrators, the same type of harassment – harsh criticism of [Employee A] performance, integrity and candor, and is close in time to previous incidents [of harassment] …."

After finding retaliation related to Employee A 2011 EEO Complaint, EEOC in its order stated that DOJ "shall consider disciplining those responsible for the discrimination … in this case." On [redacted], DOJ provided EEOC with a letter indicating that it was declining to impose discipline against Manager 1 because [redacted] had "already been returned to a non-supervisory line [redacted] position" and "undertook the actions at issue only after close consultation with … General Counsel's Office [OGC]." Thereafter, EEOC referred the matter to OSC to determine whether any [redacted] officials should be disciplined.[3]

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[1] EEOC made the referral to OSC pursuant to OSC's authority in 5 U.S.C. §§ 1214(a), 1215, and 1216(a)(5), (c). OSC and EEOC also have a memorandum of understanding about case referrals.

[2] DOJ-FAD 1 did not find discrimination on the bases of sex or age.

[3] EEOC ultimately awarded Employee A [redacted] in compensatory damages and [redacted] in attorney's fees for [redacted] 2010 EEO Complaint. For [redacted] 2011 EEO Complaint, Employee A received an award of [redacted] in compensatory damages, [redacted] in medical expenses, restored annual and sick leave, as well as the expungement of all copies of the critical performance memorandum.

III. STATEMENT OF EEO FACTS AND FINDINGS[4]

Employee A began [redacted] employment with DOJ in the early 1980s. In 1990, [redacted] transferred to [redacted] and was assigned to the [redacted], where [redacted] worked on major drug enforcement and organized crime cases. [redacted] also served as deputy criminal chief from 1997 to 2000 and as senior litigation counsel from 2002 to 2003. From 2008 to 2011, Manager 1 was the criminal chief and Employee A first line supervisor. During the relevant time, Manager 2 [redacted] served in a number of roles, including first assistant U.S. attorney and acting U.S. attorney; Manager 3 [redacted] served as deputy criminal chief, as well as chief of the appellate division; and Manager 4 [redacted] served as U.S. attorney during some of the relevant time.

From 2004 to 2007, Employee A performance appraisals contained praise for [redacted] work, including [redacted] high productivity. These appraisals did not criticize "any aspect" of Employee A work.

On [redacted], Manager 1 along with Employee A previous supervisor, conducted Employee A mid-year performance review. During this review, Employee A testified that Manager 1 and Employee A previous supervisor told [redacted] that everything was fine, but [redacted] should spend more time on [redacted] prosecution memoranda. In April 2009, Employee A received [redacted] 2008 performance appraisal. Manager 1 and Manager 2, the reviewing official, gave Employee A an overall rating of "Successful," and rated both [redacted] handling of cases and productivity as "Outstanding." The performance appraisal remarked that Employee A needed to adequately prepare before indictment and improve [redacted] prosecution memoranda. Additionally, [redacted] submitted one of Employee A cases as "an important [redacted] case from the [redacted]."

A. Employee A 2010 EEO Complaint

1. Employee A assists [redacted] colleague with challenging his failing performance appraisal and pursuing his EEO complaints.

In April 2009, Employee A colleague, Employee B, received a failing performance appraisal from Manager 1 that required him to be placed on a performance improvement plan (PIP). Employee B, in a run-up to a grievance action, asked [redacted] management to reconsider the appraisal. Employee A represented Employee B in this process, which included negotiations with management. After management declined to revise Employee B appraisal, he filed a grievance and an EEO complaint. Employee A had also earlier assisted Employee B with an EEO matter in 2008 when [redacted] answered questionnaires from an EEO investigator.

Manager 1 knew about Employee B appraisal dispute and EEO activities and Employee A assistance. Manager 1 admitted [redacted] knew that Employee A represented Employee B when he challenged his appraisal, and stated that [redacted] did not discourage the representation. DOJ-FAD 1 found it "significant" that Employee B challenge to his appraisal and EEO complaint appear to have been directed at Manager 1. Thus, although Manager 1 stated that [redacted] was not aware of Employee B EEO activity against [redacted] and Manager 2 corroborated [redacted] claim, DOJ-FAD 1 determined that:

[4] The findings referenced here include testimony from the agency EEO cases, DOJ-FAD 1, and EEOC's decision.

> it is unlikely that Manager 1 would have been entirely unaware of Employee B complainant [sic], particularly as the evidence indicated that an EEO investigator was gathering statements from witnesses no later than March 2008. It is implausible to believe that an EEO investigator never questioned Manager 1 as to [redacted] actions toward Employee B, and equally implausible to believe that no one told Manager 1 that an EEO investigator was asking about an incident or incidents involving [redacted]. These facts tend to support the claim that Manager 1 had a basis for seeking reprisal against Employee A, as [redacted] was helping Employee B in his action against Manager 1.

In addition, Manager 4 testified that [redacted] managers discuss "every type of grievance or EEOC claim that is in the office" during management meetings every Monday. Manager 4 recalled that Manager 1 and Manager 2 informed him "Employee A had represented in some fashion or been involved with the Employee B [redacted] case," and that he had become aware of Employee A allegations of retaliation during one of the management meetings. Manager 2 also acknowledged he "may have" told Manager 1 that Employee B had filed a suit against [redacted].

Further, DOJ-FAD 1 cited Employee A testimony, as well as the testimony of Employee B and a former employee, Employee C [redacted], that [redacted] management began to treat Employee A with hostility shortly after Employee A began to represent Employee B. Employee A also named Manager 1 and Manager 2 as being responsible for the discrimination, and Manager 4 for failing to take corrective measures, when [redacted] filed the 2010 EEO Complaint.

2. Manager 1 and [redacted] management take actions against Employee A after [redacted] assists [redacted] colleague with challenging his failing performance appraisal and pursuing his EEO complaints.

a. Manager 1 *accuses* Employee A *of questionable actions and then restricts* [redacted] *own communications with* Employee A

Employee A stated that shortly after [redacted] represented Employee B, Manager 1 falsely accused [redacted] of soliciting testimony from a sheriff's deputy with a questionable background, and of authorizing the Federal Bureau of Investigation to use a prison inmate as a cooperating witness without supervisory approval. Manager 1 confirmed in [redacted] testimony [redacted] belief that Employee A used a sheriff's deputy who "had a long history of questionable behavior." And [redacted] indicated that while Employee A was productive, [redacted] techniques were suspect.

Manager 1 also began communicating with Employee A via "sticky notes" and email, or in person only if a witness was present. Manager 1 stated that [redacted] communicated this way with Employee A because Employee A gave [redacted] "an uncomfortable feeling." Manager 1 characterized [redacted] as being "like a porcupine and nervous and on high alert" in all interactions with Employee A because [redacted] believed Employee A always had an ulterior motive for [redacted] conversations.

Employee A testified that on September 1, 2009, [redacted] filed a grievance with Manager 2 asserting that [redacted] was suffering from a hostile work environment and discrimination. Employee A stated that [redacted] attempted to speak with Manager 2 about Manager 1 after filing [redacted] grievance, but he was unwilling because he was not comfortable discussing Manager 1 with [redacted].

b. At Manager 1 request, [redacted] management removes Employee A from [redacted] position and gives [redacted] significantly less prestigious work and duties.[5]

On September 8, 2009, Employee A met with Manager 1 and Manager 3. Employee A stated that during the meeting, Manager 1 and Manager 3 told [redacted] they were aware [redacted] had complained to Manager 2 about Manager 1. They informed Employee A that [redacted] would no longer have duties related to [redacted]. According to Employee A, [redacted] new caseload consisted of "low-level cases that [redacted] had no experience prosecuting" and required significantly less responsibility and skill than the cases [redacted] had previously prosecuted. [redacted] new cases included immigration cases, misdemeanor cases, cases that were approaching the statute of limitations, and "cases that had been ignored for over two years." Employee A said [redacted] told Manager 1 that [redacted] was unprepared to prosecute such cases, but Manager 1 declared the decision was final.

Manager 1 and Manager 3 testified that they transferred Employee A because Employee A had mentioned [redacted] might like a transfer to the Civil Division. Manager 1 also stated that part of [redacted] purpose in removing Employee A from [redacted] [redacted] caseload was that [redacted] wanted to get a fresh perspective in [redacted], and because Employee A statistics had "declined" and were "substantially less" than the two other [redacted] attorneys at [redacted]. Additionally, Manager 1 mentioned concerns with Employee A ethics and professionalism, and that Employee A tried to avoid supervision.

Manager 3 recalled that issues related to Employee A productivity were part of the motivation for removing [redacted] from [redacted] Manager 3 stated that he was unaware of Employee A documented history of high productivity, and could not identify when Employee A productivity began to wane.

According to Manager 3 he was the one who suggested that Manager 1 remove Employee A from [redacted] role with [redacted]. Manager 3 said Employee A had many problems in [redacted] cases and required too much supervision. Manager 2 testified that, as acting U.S. attorney, he removed Employee A from [redacted] after Manager 1 "asked for permission to transfer [Employee A from [redacted] to [redacted]."

Once Manager 1 gave Employee A the new assignment, Employee A requested a month to put [redacted] files in order. Manager 1 denied this request because [redacted] was concerned that Employee A would tamper with the files. Manager 1 attributed this fear to [redacted] "inherent mistrust of" Employee A. Manager 1 instructed Employee A to transfer [redacted] [redacted] files immediately. Manager 1 also later became concerned that Employee A was shredding case documents, so Manager 1 searched through the shred box and took

[5] Because Employee A did not report [redacted] removal from [redacted] [redacted] position and assignment to inferior duties within the required EEO timeframes, Employee A was not entitled to relief on this claim in the EEO proceedings. DOJ-FAD 1, nonetheless, considered this claim as background evidence to support Employee A other EEO claims, including [redacted] assertions of a hostile work environment.

items out—a step [redacted] had never taken with any other employee. Manager 1 then emailed [redacted] about the documents, but learned they were duplicates.

DOJ-FAD 1 found that DOJ transferred Employee A to a "less desirable position," that Employee A received different assignments of reduced responsibility in the [redacted], and that little evidence supported Manager 1 and Manager 3 claims that they had transferred Employee A because [redacted] had expressed interest in leaving [redacted] position. DOJ-FAD 1 also stated that even if Employee A "had explored the possibility of a transfer to the [redacted] of [redacted], as some managers indicated, such an exploration was not proof that [Employee A would welcome a removal from [redacted] position and a transfer to a less prestigious and responsible position." Instead, "the evidence indicated that [Employee A] transfer was involuntary, and [Employee A did not want to lose the position [redacted] had held for over twenty years." Further, as DOJ-FAD 1 concluded, "[n]o evidence indicated that [redacted] managers transferred other attorneys in the manner that [Employee A] was transferred."

DOJ-FAD 1 dismissed the contention that [redacted] transferred Employee A because of inadequate productivity: "[Manager 1] claim that [Employee A] was unproductive as an [redacted] attorney was inconsistent with [Manager 1] characterization of [Employee A] as a productive worker." Additionally, DOJ-FAD 1 noted that Employee A's performance appraisal from "2004-2008 contained only praise for [her] productivity," that Employee A had "a good reputation for achievement at [redacted]," and that "no evidence indicated that [Employee A indicted fewer cases or tried fewer cases in 2008 than at any previous time." DOJ-FAD 1 asserted that it was "significant that [Employee A received a generally favorable review from Manager 1 in 2008, but an unfavorable review for 2009," and that the sequence of events "supported [Employee A's] claim that [redacted] managers discriminated against [her] because of [her] connection to and representation of Employee B in his EEO case."

Moreover, DOJ-FAD 1 found evidence supporting the claim that Employee A's work deteriorated in 2009 to be lacking. To illustrate, DOJ-FAD 1 determined that the evidence did not support Manager 2's assertion that Employee A's mid-year review and final review for 2009 were markedly different because [redacted] management had learned additional facts about Employee A's integrity and competence in between the two reviews. Further, DOJ-FAD 1 stated: "[n]o [redacted] manager provided any credible explanation for why the work practices that earned [Employee A's] awards and ratings of "Outstanding" in 2004-2007 had fallen to the level of being unacceptable and unethical as of 2009. No [redacted] manager provided any specific example to illustrate how [Employee A's] work deteriorated so much in 2009."

As to concerns about Employee A's ethics, DOJ-FAD 1 rejected these accusations. "By failing to document promptly [Employee A's] allegedly unethical acts, [redacted] management created significant doubt as to any claim that [[redacted]] had engaged in acts of questionable integrity prior to [her] transfer in 2009."

In sum, DOJ-FAD 1 stated that Employee A's transfer from [her] role with [redacted] was "not related to any recent shortcoming on [Employee A's] part," that the record "failed to show that [redacted] managers had a good-faith basis for finding that [Employee A's] integrity or work as an [redacted]

attorney deteriorated in 2008 or 2009," and that [redacted] management "acted out of retaliatory intent" when they transferred Employee A. DOJ-FAD 1 also found it "troubling that [Employee A] transfer from [redacted] position was consistent with the claims of Employee B, Employee C and [Employee D] that [redacted] management had established a pattern for retaliating against employees who had assisted Employee B with his claim." Specifically, Employee A colleagues stated that [redacted] management had routinely retaliated against employees who assisted Employee B with his EEO case by, for example, giving the employees mediocre or poor performance ratings, assigning them to positions of reduced significance for which they were poorly trained, filing OPR complaints, scrutinizing their work, and cutting off ordinary communication. And "[n]o evidence indicated that [redacted] had engaged in a similar pattern of ostracization toward other employees who had not participated in an employment discrimination claim against [redacted]."

c. Manager 1 refers Employee A twice to OPR.

According to Manager 2, OPR referrals are onerous for the referred attorney, and these referrals can have adverse effects on an attorney's career. On [redacted], Manager 1 referred Employee A to OPR for a 2008 incident where Manager 1 accused Employee A of dropping a gun enhancement charge from an indictment without supervisory permission. Employee A stated that Manager 1 had threatened to report [redacted] to OPR for this incident in September 2009, when Manager 1 told Employee A that [redacted] would no longer be working on [redacted] cases.[6] [Manager 1] referral occurred eight days after Employee A had engaged in an unsuccessful negotiation with [redacted] management to resolve [redacted] EEO issues. Notably, this was the first time DOJ had ever referred Employee A to OPR for alleged infractions.

The gun enhancement charge incident, in the absence of dispositive evidence, devolved into a "[redacted]" situation. Employee A claimed that [redacted] had received authorization by email in 2008 to dismiss the count, and Manager 1 believed that Employee A had not. In [redacted] OPR referral, Manager 1 stated that [redacted] had "learned from IT that a systems update would have deleted any 2008 emails that had not been specifically saved" and "due to the IT update, I could not prove that no such email ever existed." Even though [Manager 1] could not disprove Employee A explanation, Manager 1 referred this matter to OPR. Manager 1 also appended to [redacted] OPR referral a matter that originated in 2005 involving a signed proffer letter.[7] Employee A stated that Manager 1 and Manager 3 had discussed this case with [redacted] in [redacted].

A month after [redacted] OPR referral, on [redacted], Manager 1 referred Employee A to OPR for another incident, which was three years old. In 2007, Employee A allegedly failed to indict a defendant on gun and drug charges that were appropriate for the indictment.

Although Manager 1 was the person listed as making the referrals to OPR, [redacted] consulted with other [redacted] management officials, such as Manager 3 and Manager 4. Ultimately, OPR notified

[6] Employee A also indicated that Manager 1 first accused [redacted] of dropping the gun enhancement charge without [redacted] permission in August 2009.
[7] The defendant in the 2005 case filed a motion about the proffer letter in 2008 and proceedings related to this motion commenced.

Employee A in November 2010 that the allegations against [redacted] did not warrant investigation, and OPR closed both matters.

DOJ-FAD 1 concluded that "the factual bases for the OPR referrals were dubious," the timing "highly questionable," and the proffered explanations "were less than credible." With respect to Manager 1 and Manager 3's statements that they objected to Employee A "misrepresentations about the incidents in question," DOJ-FAD 1 determined that "little evidence corroborated the claim that Employee A] lied about the incidents." Instead, DOJ-FAD 1 indicated that because most of the incidents were not raised until years after they occurred, it was plausible that Employee A "recollection of events might be flawed or incomplete," and that the documentary evidence showed Employee A "had reasonable explanations for the incidents in question that might have allayed any good-faith concerns that Manager 1 or Manager 3 might have had."

As to the long delay between when [redacted] managers threatened to report Employee A to OPR for the gun enhancement charge incident and when they actually did shortly after Employee A had attempted to resolve [redacted] EEO issues, DOJ-FAD 1 indicated that no [redacted] manager provided any explanation. DOJ-FAD 1 concluded that these "facts tended to support the claim that [redacted] managers used the threat of OPR referrals as a means of intimidating | Employee A | because of [redacted] use of the EEO system and [redacted] participation in protected activities."

Last, DOJ-FAD 1 considered Employee B testimony that, like Employee A [redacted] managers retaliated against him by referring him to OPR to be "significant," and found it "disturbing" that between [redacted], three of the five referrals [redacted] managers made to OPR were against Employee B and those who supported him. DOJ-FAD 1 also stated that the record provided "no legitimate explanation" for why [redacted] referrals to OPR coincided with the protected activity of Employee A and the others, and determined that [redacted] managers' legitimate, non-discriminatory reasons for referring Employee A to OPR twice were "pretexts for acts of reprisal."

d. Manager 1 and [redacted] management subjected Employee A to a hostile work environment.

Starting in [redacted], Manager 1 required that Employee A submit [redacted] prosecution memoranda for review a week earlier than other [redacted]. Manager 1 said [redacted] took this step because Employee A memoranda needed frequent revision. Manager 1 acknowledged that even though [redacted] usually met with [redacted] in person to discuss deficiencies in their memoranda, [redacted] did not do so with Employee A because [redacted] did not trust [redacted]. Instead, Manager 1 stated that [redacted] critiqued Employee A memoranda via notes or email, but not personal interaction.

Additionally, in March 2010, Employee A received [redacted] performance appraisal for 2009. A memorandum from Manager 1 to Employee A accompanied the appraisal. The memorandum stated that although Employee A was rated as "Successful," [redacted] had "barely [met] the minimum requirements to receive successful ratings and [was] at risk of being rated "Unacceptable" in one or more of [redacted] performance elements."

While DOJ-FAD 1 did not find discrimination related to the requirement that Employee A submit work earlier than others and the March 2010 criticism, these incidents, as well as a few others, informed DOJ-FAD 1's assessment of Employee A overall claim of a hostile work environment. In analyzing Employee A s overall work environment, DOJ-FAD 1 stated:

> the cumulative evidence indicated that for over two years, and beginning with [Employee A s] representation of Employee B in a protected action, [redacted] managers subjected | Employee A | to unusual criticism of [redacted] work, hostile scrutiny of [redacted] work products, deadlines that no other [redacted] had to meet, and a near-complete termination of communication with management. It is understandable that anyone would find such a work environment to be hostile, and [Employee A] statement indicated that [redacted] did in fact find the work environment to be hostile.

DOJ-FAD 1 also took into account the following:

> [redacted] managers offered marginally legitimate explanations for their actions regarding Employee A]. These reasons were questionable when addressed specifically, but unconvincing when examined in the aggregate. Any one such incident might have been excused as poor management rather than discrimination on the basis of reprisal. But the sheer quantity of poorly-justified negative personnel actions to which [redacted] managers subjected | Employee A over a period of two years, before which [Employee A had not been subjected to such criticism, significantly undermined any claim that the [redacted] managers acted in good faith toward | Employee A |.

DOJ-FAD 1 further elaborated that "all of the incidents … must be considered in light of the prohibited discrimination to which [redacted] managers subjected | Employee A | by transferring [redacted] from [redacted] [redacted] position and by filing questionable OPR claims against [redacted]." The "incidents must also be considered in light of their very close proximity to [Employee A] involvement in Employee B [redacted] claim and [Employee A] own EEO claim …. That proximity further supports a finding that [redacted] managers subjected [Employee A to a hostile work environment out of retaliatory intent."

B. Employee A 2011 EEO Complaint

In [redacted], Manager 1 was moved out of [redacted] role as criminal chief and returned to [redacted] previous position as a non-supervisory [redacted].[8] Manager 2 testified that between February and June 2011, Manager 1 attempted to put Employee A on a PIP, but OGC was not satisfied with the draft PIPs Manager 1 produced. Instead, according to Manager 1 OGC advised [redacted] to address Employee A performance issues in a memorandum.

[8] Per Manager 4 the change in Manager 1 duties was unrelated to any actions [redacted] took against Employee A it occurred because of a range of issues pertaining to Manager 1 failure to follow specific directions from Manager 4 and to maintain good relationships with law enforcement partners.

In July 2011, Employee A received [redacted] 2010 performance appraisal from [redacted] new supervisor, [redacted] Manager 5. The appraisal covered work from [redacted]. Manager 1 signed the appraisal as the rating official and Manager 2 was the reviewing official. Employee A received an overall rating of "Successful" for the period. Manager 1, Manager 2, and Manager 5 initialed a performance memorandum dated [redacted], that accompanied Employee A's 2010 appraisal. This memorandum severely criticized Employee A's work performance in 2010 and raised concerns about [redacted] handling of six separate cases.

EEOC concluded that Manager 1 was "the primary force behind the issuance" of the "highly critical" performance memorandum. Although [redacted] management maintained that the memorandum was not intended to be part of Employee A's "permanent record," Manager 4 noted that a "good degree of personal animosity and mistrust" had developed between Manager 1 and Employee A. Besides Employee A, no other employee that Manager 1 supervised during the 2010 performance year received a similar memorandum with his or her appraisal.

While DOJ did not find that the performance memorandum constituted a hostile work environment, EEOC disagreed. In ruling the memorandum constituted an act of retaliatory harassment against Employee A, EEOC stated that the memorandum grew out of the earlier PIP drafts Manager 1 was unsuccessful in getting OGC to approve and, like the previous acts discussed above, "was caused by a lack of trust" and "coincided with [Employee A's] EEO activity."

As Employee A's new supervisor, Manager 5 wrote [redacted] 2011 performance appraisal. Manager 5 gave Employee A an overall rating of "Outstanding," and ratings of "Outstanding" in four of the five rated elements, including case handling, ethics and professionalism, and productivity.

IV. LEGAL ANALYSIS

Section 2302(b)(9) of title 5 of the U.S. Code prohibits retaliation against federal employees for engaging in protected activity, e.g., the exercise of any appeal, complaint, or grievance right, or testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint, or grievance right.[9] To prove a prima facie case of retaliation under section 2302(b)(9), OSC must show by a preponderance of the evidence that: (1) an employee engaged in protected activity; (2) the agency took a personnel action against the employee; (3) the officials taking the personnel action knew of the protected activity; and (4) there is a causal connection between the protected activity and the personnel action. *See* 5 U.S.C. § 2302(b)(9); *see also Bodinus v. Dep't of the Treas.*, 7 M.S.P.R. 536, 540 (1981) (exercising an appeal right or testifying for or assisting others in the exercise of an appeal right is protected); *In the Matter of*

[9] Specifically, section 2302(b)(9)(A)(i) prohibits retaliation for engaging in protected activity to remedy a violation of 5 U.S.C. § 2302(b)(8). Here, the section 2302(b)(8) violation being remedied is, for example, retaliation for disclosing a violation of Title VII of the Civil Rights Act of 1964 and an abuse of authority. The facts and general legal analysis in this report also support a violation of section 2302(b)(9)(A)(ii), which prohibits retaliation for engaging in protected activity other than to remedy a violation of section 2302(b)(8). Finally, section 2302(b)(9)(B) prohibits retaliation for testifying for or otherwise lawfully assisting any individual in the exercise of any right in section 2302(b)(9)(A)(i) or (ii).

Frazier, 1 M.S.P.R. 163, 190-92 (1979) (retaliation against employee who exercises EEO rights violates section 2302(b)(9)). To establish the causal connection required for disciplinary action, OSC must demonstrate that the protected activity was a "significant motivating factor," even if other factors also motivated the personnel action. 5 U.S.C. § 1215(a)(3)(B).

If OSC proves that the protected activity was a significant motivating factor in the personnel action, the burden shifts to the agency to establish by a preponderance of the evidence that the responsible agency officials would have taken the same personnel action in the absence of the protected activity. *Id.*

A. DOJ violated section 2302(b)(9) when Manager 1 and [redacted] management significantly changed Employee A duties, responsibilities, and working conditions because [redacted] engaged in protected activities.

OSC can show a prima facie case of retaliation by Manager 1 and [redacted] management against Employee A for engaging in activities protected under section 2302(b)(9). OSC can further demonstrate that Employee A protected activities were a significant motivating factor in the retaliatory personnel actions [redacted] suffered as a result.

1. Employee A engaged in protected activities.

Employee A engaged in activities protected under section 2302(b)(9) when [redacted] (1) provided information to an EEO investigator in 2008 for Employee B EEO complaint; (2) represented Employee B when he challenged his performance rating in 2009, which led to Employee B filing a grievance and another EEO complaint; (3) filed a grievance in 2009, complaining of a hostile work environment and discrimination; and (4) filed an EEO complaint in 2010.

2. Manager 1 and [redacted] management took personnel actions against Employee A

[redacted] management officials took personnel actions against Employee A. Specifically, they significantly changed [redacted] duties, responsibilities, or working conditions by (1) removing [redacted] from [redacted] after serving there for close to two decades; and (2) creating a hostile work environment for [redacted] *See* 5 U.S.C. § 2302(a)(2)(A)(xii) (showing that a significant change in duties, responsibilities, or working conditions is a personnel action).

As explained above, Employee A career before [redacted] protected activities focused on major drug enforcement and organized crime cases with [redacted] [redacted] experience and success litigating these types of cases had resulted in consistently favorable performance appraisals. But on September 8, 2009, [redacted] management officials removed Employee A from [redacted] and assigned [redacted] to a "less desirable" and less prestigious and responsible position.

[redacted] management officials also created a hostile work environment. *See Savage v. Dep't of the Army*, 122 M.S.P.R. 612, 627 (2015) (finding that the creation of a hostile work environment is a personnel action). The incidents that constituted a hostile work environment include "unusual criticism of [Employee A] work, hostile scrutiny of [redacted] work products, deadlines

that no other [redacted] had to meet, and a near complete termination of communication with management." [redacted] officials also repeatedly accused Employee A of professional misconduct, referring [redacted] twice to OPR for years-old incidents. As DOJ-FAD 1 observed, the variety of negative actions that [redacted] took against Employee A were "designed to isolate [redacted]" and "to make [redacted] vulnerable to additional adverse personnel actions." Additionally, [redacted] issued Employee A the July 2011 performance memorandum that contained derogatory information about Employee A work. EEOC determined that this memorandum was an act of retaliatory harassment.

3. Manager 1 and [redacted] management had knowledge of Employee A protected activities and these protected activities were a significant motivating factor in the personnel actions.

[redacted] officials, including Manager 1, Manager 2, and Manager 4, had knowledge of Employee A protected activities. Employee A assisted Employee B in his EEO case in 2008 when [redacted], for example, answered questionnaires from an EEO investigator. Employee A also represented Employee B when he challenged his performance appraisal, and Manager 1 acknowledged that [redacted] knew of Employee A representation. Employee B later filed a grievance and another EEO complaint related to this appraisal. In addition, Manager 4 testified that [redacted] managers discuss "every type of grievance or EEOC claim that is in the office" during management meetings every Monday, and recounted that Manager 1 and Manager 2 informed him " Employee A had represented in some fashion or been involved with the [redacted] Employee B case" during one of these meetings. And DOJ-FAD 1 found that the version of events offered by Manager 1 and Manager 2 that Manager 1 was unaware of Employee B EEO complaint to be suspect. Moreover, Employee A filed a grievance about Manager 1 alleged discriminatory behavior with Manager 2, and named Manager 1 and others when [redacted] filed [redacted] 2010 EEO Complaint.

Significant motivating factor causation may be inferred from several different types of evidence, including (1) retaliatory animus or motivation; (2) the proximity in time between the protected activity and the personnel action; (3) inconsistent or contradictory reasons offered by the agency for the personnel action; and (4) examination of similarly situated employees who engaged in protected activity.[10] As discussed below, the totality of the evidence shows that Employee A protected activities were a significant motivating factor in the personnel actions.

a. Manager 1 and [redacted] management had strong retaliatory animus against Employee A for [redacted] protected activities.

Manager 1 and other officials in Employee A management chain had animus against Employee A for [redacted] protected activities. First, Employee A assisted Employee B with challenging his performance appraisal and pursuing his EEO complaints, which were against Manager 1 *See Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 326 (1997) (finding strong motive to retaliate where managers were

[10] This list of factors is similar to those articulated in case law applying the "significant factor" standard under civil service laws and the "motivating factor" standard under the Uniformed Services Employment and Reemployment Rights Act. *See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001); *Marshall v. Dep't of Veterans Affairs*, 111 M.S.P.R. 5, 13 (2008).

subjects of employee's protected disclosures). Employee A later filed both a grievance and an EEO complaint against Manager 1 alleging a hostile work environment and discrimination.

Further, Manager 1 animus is demonstrated by how [redacted] treated Employee A after Employee A engaged in protected activities. To illustrate, Manager 1 and others curtailed communications with Employee A, removed Employee A from [redacted] duties, referred Employee A to OPR for years-old incidents, tried unsuccessfully to place Employee A on a PIP, and attached a derogatory performance memorandum to Employee A 2010 appraisal. [redacted] Manager 1 refusal to give Employee A time to put [redacted] files in order after Employee A was removed from [redacted] position appears to be not only retaliatory, but also contrary to normal professional practice. Given that Employee A had served with [redacted] for almost two decades, [redacted] request for time to put [redacted] files together seems reasonable. The basis for Manager 1 denial was rooted in [redacted] "inherent mistrust" of Employee A so [redacted] feared that notes from the case files would disappear. And, consistent with DOJ-FAD 1's findings, any assertions that Manager 1 and other [redacted] management had concerns about Employee A ethics and professionalism are questionable.

In short, as DOJ-FAD 1 concluded, Manager 1 "had a basis for seeking reprisal against Employee A" and Manager 1 and [redacted] management "acted out of retaliatory intent."

b. There was close timing between Employee A protected activities and the personnel actions.

As stated above, shortly after Employee A assisted Employee B with his protected activities, Manager 1 began to accuse Employee A of taking actions without supervisory approval and soliciting testimony from a questionable witness. Manager 1 further took the extraordinary step to restrict how [redacted] communicated with Employee A By September 1, 2009, Employee A felt compelled to file a grievance about Manager 1 actions. Within a week of that grievance, and only a few months after assisting Employee B, Manager 1 removed Employee A from [redacted] role with [redacted] and threatened to refer Employee A to OPR. Manager 1 threat was not idle; [redacted] later referred Employee A to OPR. As DOJ-FAD 1 succinctly stated when discussing Employee A hostile work environment claims, the incidents' "proximity to [Employee A] involvement in Employee B EEO claim and [Employee A] own EEO claim" further "supports a finding that [redacted] managers subjected Employee A to a hostile work environment out of retaliatory intent." EEOC stated the same about the critical performance memorandum attached to Employee A 2010 appraisal: it was "another incident of harassment in the hostile work environment starting in 2009."

c. Manager 1 and [redacted] management provided inconsistent and illogical reasons for the personnel actions against Employee A

Manager 1 and other [redacted] management officials provided weak or inconsistent reasons for their actions. To illustrate, according to Manager 1, part of the reason Employee A no longer had [redacted] duties was because of Employee A declining productivity. This reasoning is inconsistent not only with Manager 1 and Manager 2 rating of Employee A productivity and case handling as "Outstanding" on [redacted] 2008 appraisal, but also with Employee A appraisals from 2004 to 2007. DOJ-FAD 1 also found that Manager 1 claim that Employee A was "unproductive as an [redacted]

was inconsistent with Manager 1 characterization of Employee A] as a productive worker," and the "evidence did not support the claim that [Employee A] work deteriorated in 2009."

Manager 3 also could not reconcile assertions about Employee A lower productivity with the high productivity ratings found in [redacted] previous appraisals. Indeed, as DOJ-FAD 1 stated:

> [n]o [redacted] manager provided any credible explanation for why the work practices that earned Employee A] awards and ratings of "Outstanding" in 2004-2007 had fallen to the level of being unacceptable and unethical as of 2009. No [redacted] manager provided any specific example to illustrate how [Employee A] work deteriorated so much in 2009.

Another example of [redacted] management officials proffering inconsistent reasons for the actions taken against Employee A pertain to their referral of Employee A to OPR in 2010 for issues dating back years ago. Given that these referrals are serious matters with potentially career-ending consequences, it is noteworthy that DOJ-FAD 1 found the bases for the referrals, and management's subsequent explanations for them, dubious and not credible. One of the referrals was essentially a dispute over whether Employee A had received approval to dismiss a charge in a case, and any emails that would have proven Employee A assertion that [redacted] had received such approval via email were wiped out by an IT update. While Manager 1 acknowledged that [redacted] could not disprove Employee A explanation because of the lost emails, [redacted] still referred this matter to OPR. This thin basis for referral shows that the reasons for referring Employee A to OPR were, as DOJ-FAD 1 stated, "pretexts for acts of reprisal."

Manager 1 and [redacted] management did not have logical or consistent bases for the personnel actions taken against Employee A In fact, "the sheer quantity of poorly-justified negative personnel actions to which [redacted] managers subjected [Employee A over a period of two years, before which | Employee A | had not been subjected to such criticism, significantly undermined any claim that the [redacted] managers acted in good faith toward Employee A]."

d. Similarly situated employees who did not engage in protected activities were treated better than Employee A

Manager 1 consistently treated Employee A differently than employees who did not engage in protected activities. For instance, Manager 1 did not communicate with Employee A in the same way [redacted] communicated with other employees. [redacted] communicated with Employee A only in writing and, if in person, with a witness present. As DOJ-FAD 1 stated, there was "unusual criticism of [Employee A] work, hostile scrutiny of [redacted] work products, deadlines that no other [redacted] had to meet, and a near-complete termination of communication with management." Employee A was also the only one of Manager 1 subordinates whom, despite a rating indicating that [redacted] was successful, received a critical performance memorandum with [redacted] 2010 appraisal.

It is striking that [redacted] management treated Employee A in a manner similar to other [redacted] employees who had engaged in or assisted others with EEO activities. DOJ-FAD 1 found it "troubling that [Employee A] transfer from [redacted] position was consistent with the claims of

[redacted] that [redacted] management had established a pattern for retaliating against employees who had assisted [redacted] with his claim." Additionally, DOJ-FAD 1 noted that [redacted] testimony that [redacted] management retaliated against him by referring him to OPR was "significant," and considered that between 2008 and February 2012, three of the five OPR referrals made by [redacted] managers were against [redacted] and those who supported him.

B. DOJ cannot show by a preponderance of the evidence that it would have taken the same personnel actions against [redacted] in the absence of [redacted] protected activities.

Because the evidence described above demonstrates that [redacted] protected activities were a significant motivating factor in the personnel actions against [redacted], the burden shifts to DOJ to show by a preponderance of the evidence that it would have taken the same personnel actions against [redacted] in the absence of [redacted] protected activities. *See* 5 U.S.C. § 1215(a)(3)(B). DOJ cannot meet this burden. DOJ—in DOJ-FAD 1—determined that [redacted] management twice-referred [redacted] to OPR and created a hostile work environment for [redacted] in retaliation for [redacted] protected activities. EEOC similarly ruled that the critical performance memorandum attached to [redacted] 2010 appraisal was retaliatory harassment for [redacted] protected EEO activities. In so doing, both rejected DOJ's proffered justifications for its actions. And, as explained above, the arguments DOJ offered in defense of the personnel actions are dubious at best, and implausible or contradicted by the facts at worst.

V. CULPABILITY OF RESPONSIBLE DOJ OFFICIALS

A. [redacted]

[redacted] was the primary force behind most or all of the retaliatory personnel actions against [redacted] Even though other [redacted] management officials were involved in the personnel actions, these officials relied heavily on [redacted] account of alleged problems with [redacted] As demonstrated above, [redacted] took multiple actions against [redacted] such as:

- restricted communication with [redacted];
- set deadlines that only [redacted] had to meet;
- subjected [redacted] work product to unusual criticism and hostile scrutiny;
- requested that [redacted] be removed from [redacted] and assigned [redacted] to less prestigious work;
- referred [redacted] to OPR twice for years-old incidents;
- sought to have [redacted] placed on a PIP; and
- added a performance memorandum to [redacted] 2010 appraisal after [redacted] could not place [redacted] on a PIP.

[redacted] lacking justifications for these actions and [redacted] strong animus against [redacted], combined with the timing of [redacted] protected activities, demonstrate [redacted] retaliatory purpose.

In recommending discipline for [redacted] OSC considered information from DOJ that it did not discipline [redacted] because [redacted] had already been returned to a non-supervisory position,

and because [redacted] had consulted closely with OGC in composing the performance memorandum that was attached to Employee A 2010 appraisal. As to the first proposition, DOJ informed OSC that returning Manager 1 to a non-supervisory position was not discipline for retaliation against Employee A Thus, Manager 1 has not been held accountable for [redacted] actions.

As to the second proposition that Manager 1 consulted with OGC, such consultation should not insulate Manager 1 from appropriate discipline for prohibited personnel practices. *Cf. Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962) (no merit to the contention that dismissal of claim because of counsel's unexcused conduct imposes an unjust penalty on the client); *Manescalchi v. U.S. Postal Serv.*, 74 M.S.P.R. 479, n.1 (1997) (stating that although the agency followed advice of an administrative body's general counsel and another entity, "such advice or opinion in no way precludes [concluding] that the agency's actions were in fact improper and the agency relies on such advice at its own peril"); *Jones v. Dep't of Transp.*, 16 M.S.P.R. 495, 499 (1983) (appellants' reliance on advice of counsel was insufficient to rebut prima facie case that absence was in furtherance of strike). Furthermore, Manager 1 consulted with OGC regarding the critical performance memorandum, but as discussed, Manager 1 took a long list of other retaliatory actions against Employee A

OSC also notes that the incidents at issue occurred years ago. However, it took some time for the claims to make their way through the EEO process to finality. Additionally, OSC received the case referral from EEOC in 2016 after DOJ stated that it would not take disciplinary action against Manager 1 or other [redacted] management officials. Moreover, although the events are somewhat dated, the evidentiary record supporting the findings of EEO violations is well-developed, with testimony from Manager 1 and other agency officials and documentary evidence. Further, despite the passage of time, disciplinary action is necessary because of the seriousness of the conduct, the lack of individual accountability for the violations, and the public interest served in holding officials responsible for engaging in prohibited personnel practices.[11]

B. Other [redacted] Management Officials

OSC did not consider, and renders no opinion, on whether disciplinary action would be warranted for Manager 2 and Manager 4, as OSC understands they have both have left federal service. While OSC focuses on Manager 1 conduct and requests discipline for [redacted] DOJ should also consider taking disciplinary action as appropriate against other management officials involved in the personnel actions. One example is Manager 3 who, among other things, conferred with and provided advice to Manager 1 and met with Manager 1 and Employee A

VI. CONCLUSION

Manager 1 and [redacted] management officials retaliated against Employee A in violation of 5 U.S.C. § 2302(b)(9). Holding the responsible agency officials accountable for their actions is necessary to preserve the merit system in federal employment, and to ensure that employees can engage in protected activities without fear of retaliation. Therefore, OSC requests that DOJ take

[11] There is no statute of limitations on disciplinary action for prohibited personnel practices cases.

appropriate disciplinary action against Manager 1 as well as other officials responsible for the retaliation discussed in this report. In addition, OSC requests that [redacted] management officials receive OSC-provided training on prohibited personnel practices and merit system principles.