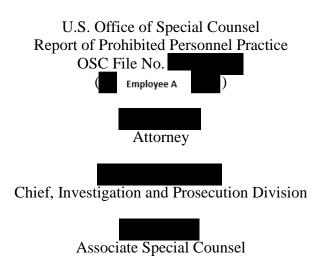


U.S. OFFICE OF SPECIAL COUNSEL



July 12, 2018

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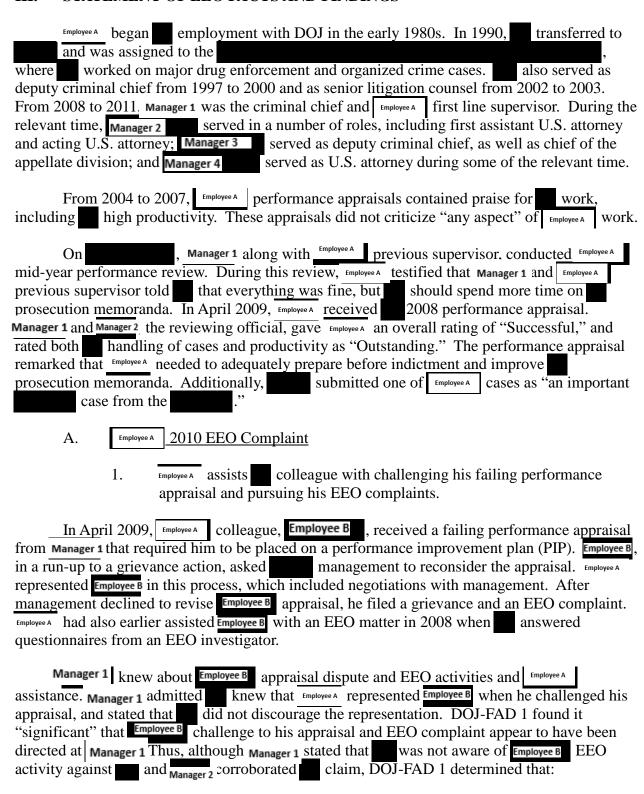
I. INTRODUCTION
This U.S. Office of Special Counsel (OSC) report stems from a case referral from the Equal Employment Opportunity Commission (EEOC). EEOC found that the U.S. Department of Justice (DOJ), retaliated against under Equal Employment Opportunity (EEO) procedures. EEOC asked OSC to determine whether disciplinary action is warranted against DOJ employees. After reviewing EEOC's evidentiary record, OSC requests that DOJ take disciplinary action against official Manager 1 for violating 5 U.S.C. § 2302(b)(9), which prohibits retaliation for engaging in protected activities. OSC also requests that management officials receive OSC-provided training on prohibited personnel practices and merit system principles.
II. PROCEDURAL BACKGROUND
On 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 a formal (DOJ-FAD 1). DOJ-FAD 1 found that DOJ retaliated against Employee A when management referred twice to DOJ's Office of Professional Responsibility (OPR) and subjected 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 complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from, among other things, a lengthy critical performance memorandum attached to complaint stemmed from a lengthy critical performance memorandum attached to complaint stemmed from a lengthy critical performance m
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 , DOJ provided EEOC with a letter indicating that it was declining to impose discipline against Manager 1 because had "already been returned to a non-supervisory line 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 officials should be disciplined. ³
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 or compensatory damages and or compensatory damages] in attorney's fees for 2010 EEO Complaint. For 2011 EEO Complaint, [Employee A or ceeived an award of or compensatory damages, in medical expenses, restored annual and sick leave, as well as the expungement of all copies of the critical performance memorandum.

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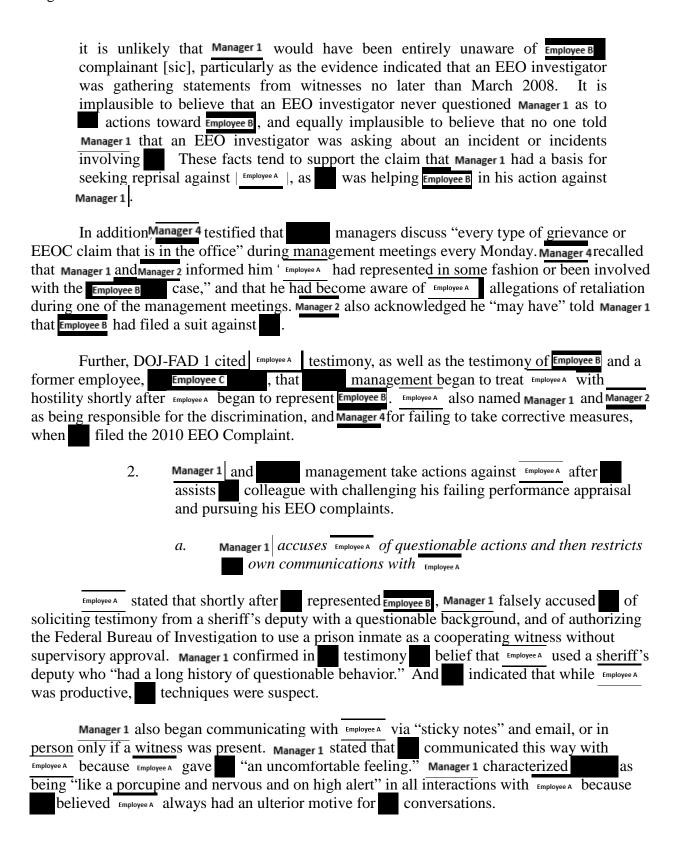
III. STATEMENT OF EEO FACTS AND FINDINGS⁴

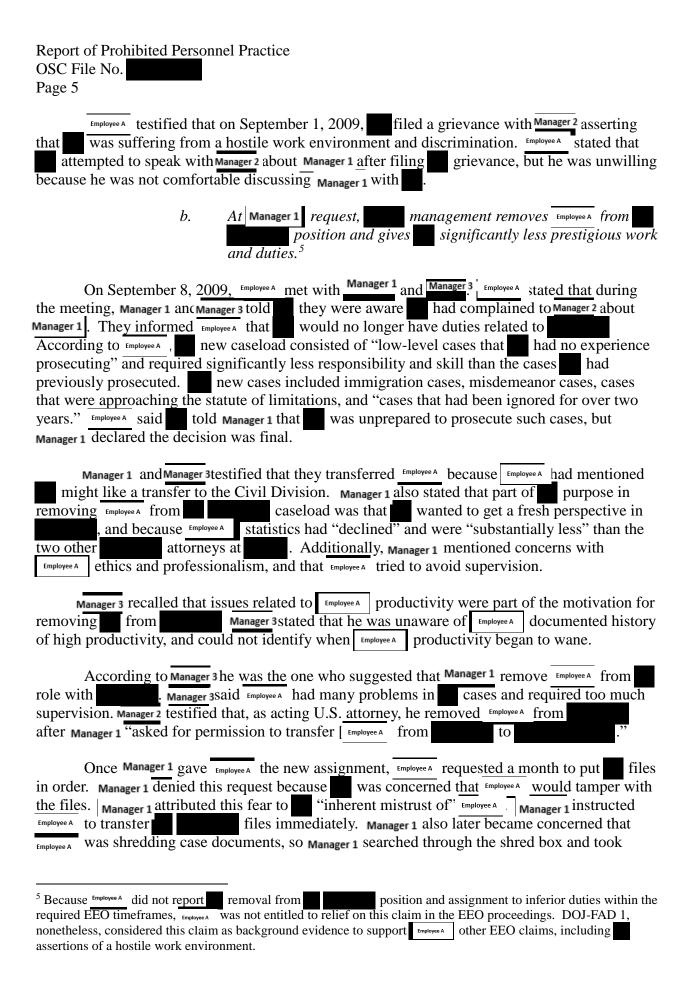


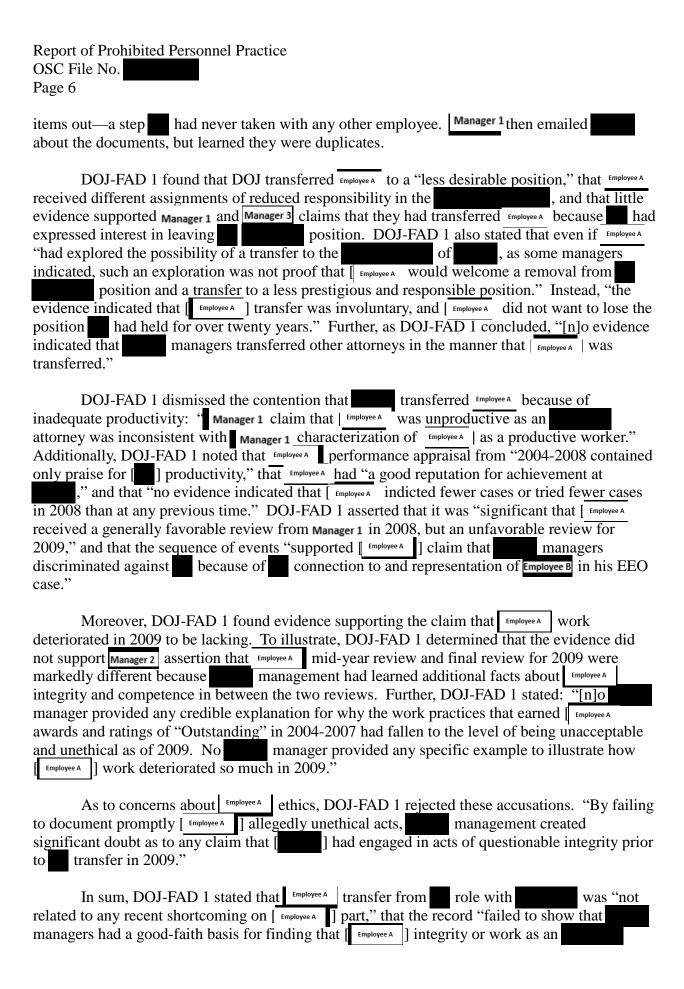
⁴ The findings referenced here include testimony from the agency EEO cases, DOJ-FAD 1, and EEOC's decision.

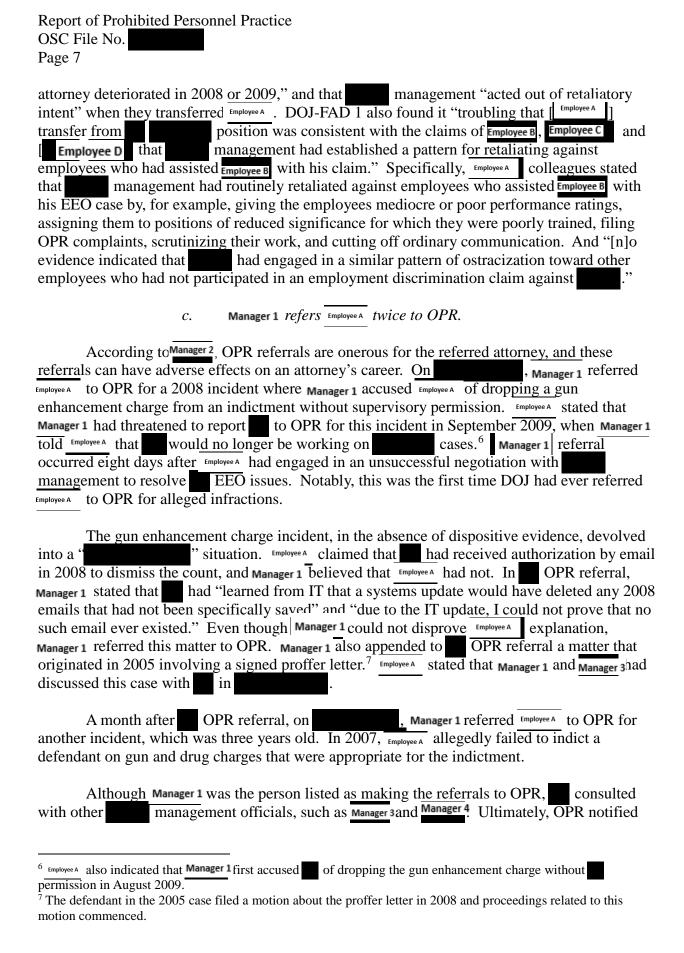
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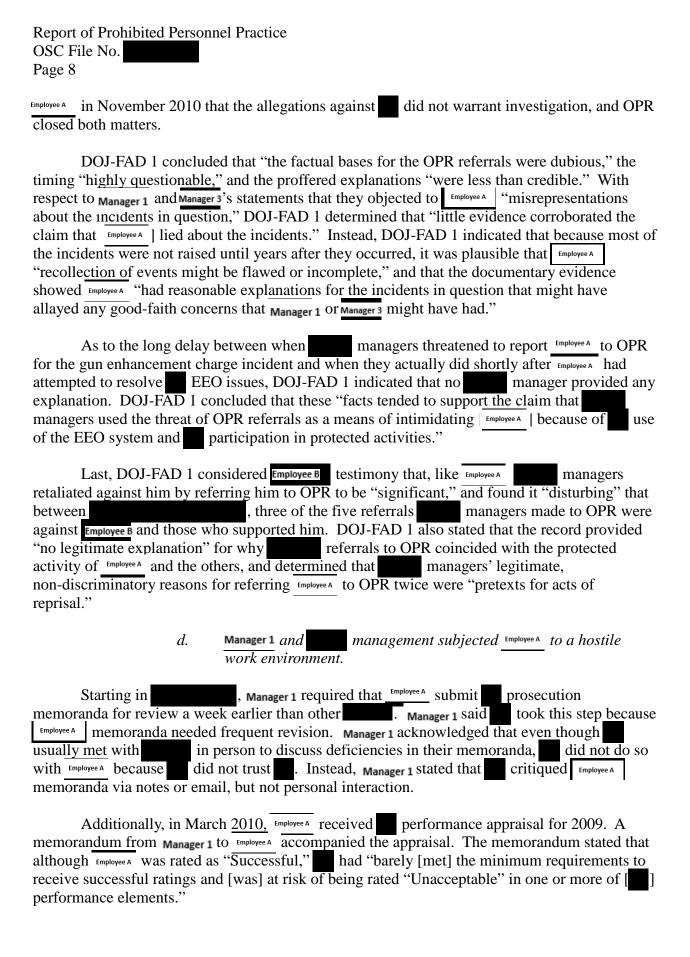
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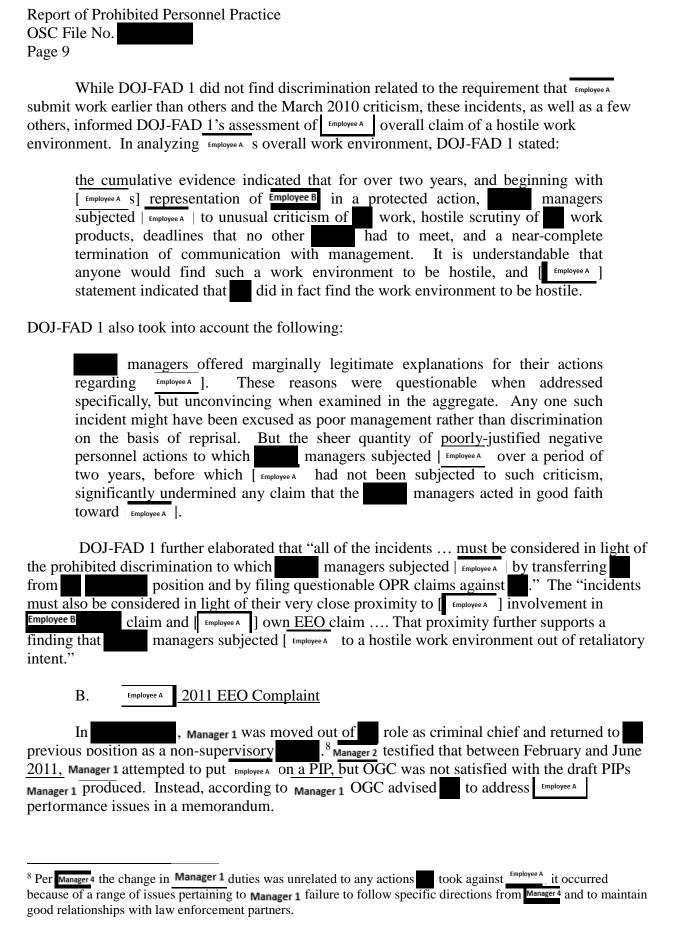


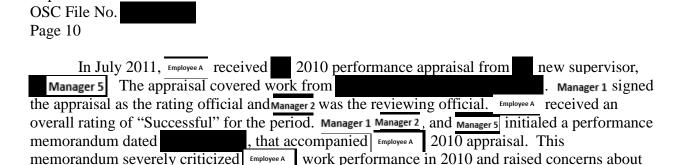












EEOC concluded that Manager 1 was "the primary force behind the issuance" of the "highly critical" performance memorandum. Although management maintained that the memorandum was not intended to be part of personal animosity and mistrust" had developed between Manager 1 and Employee A Besides Employee 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] EEO activity."

As managers wrote appraisal. Managers gave 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

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handling of six separate cases.

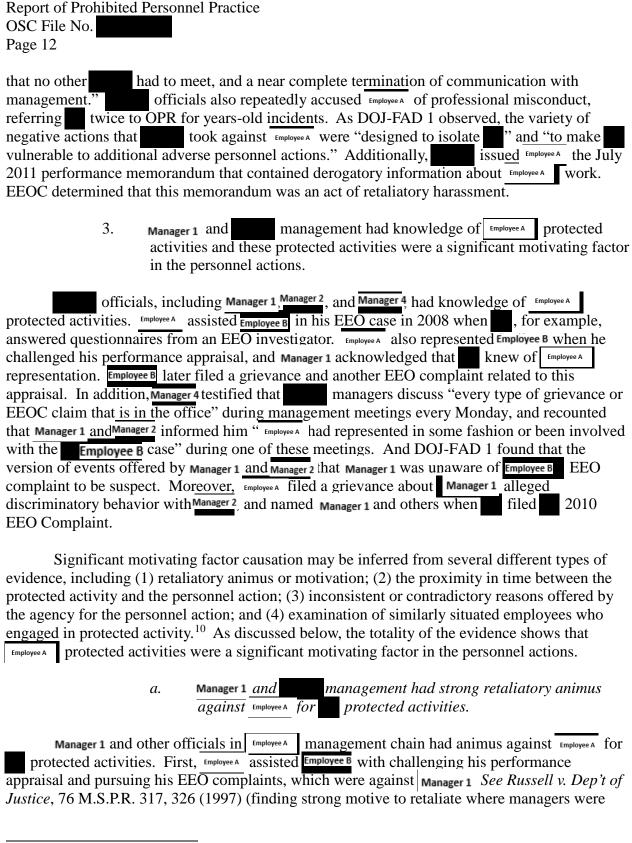
Section 2302(b)(9) of title 5 of the U.S. Code prohibits retaliation against federal employees for engaging in protected activity, e.g., the exercise of any appeal, complaint, or grievance right, or testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint, or grievance right. 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).

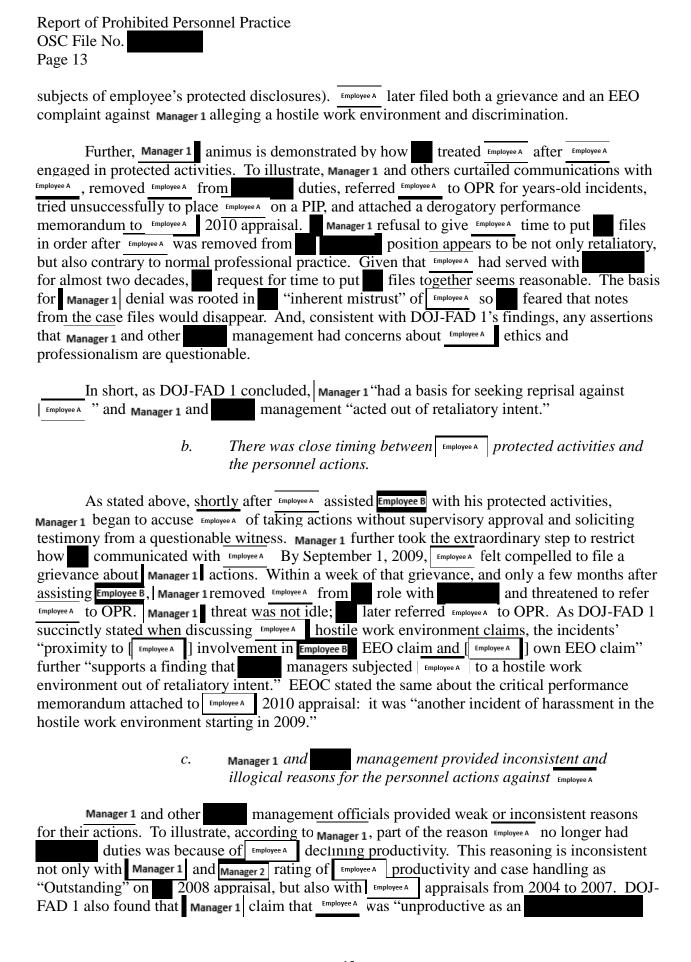
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<i>Frazier</i> , 1 M.S.P.R. 163, 190-92 (1979) (retaliation against employee who exercises EEO rights violates section 2302(b)(9)). To establish the causal connection required for disciplinary action, OSC must demonstrate that the protected activity 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. <i>Id.</i>
A. DOJ violated section 2302(b)(9) when Manager 1 and management significantly changed engaged in protected activities. management duties, responsibilities, and working conditions because engaged in protected activities.
OSC can show a prima facie case of retaliation by Manager 1 and management against for engaging in activities protected under section 2302(b)(9). OSC can further demonstrate that protected activities were a significant motivating factor in the retaliatory personnel actions suffered as a result.
1. Employee A engaged in protected activities.
engaged in activities protected under section 2302(b)(9) when (1) provided information to an EEO investigator in 2008 for Employee B EEO complaint; (2) represented 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 management took personnel actions against Employee A
management officials took personnel actions against Employee A. Specifically, they significantly changed duties, responsibilities, or working conditions by (1) removing from after serving there for close to two decades; and (2) creating a hostile work environment for 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, career before protected activities focused on major drug enforcement and organized crime cases with experience and success litigating these types of cases had resulted in consistently favorable performance appraisals. But on September 8, 2009, management officials removed from and assigned to a "less desirable" and less prestigious and responsible position.

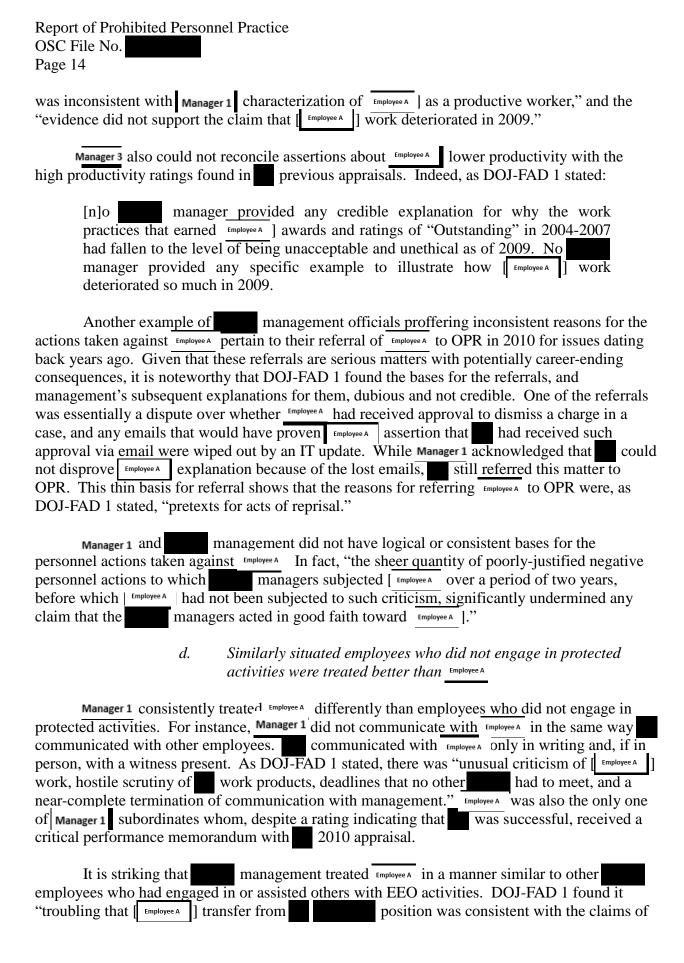
Dep't of the Army, 122 M.S.P.R. 612, 627 (2015) (finding that the creation of a hostile work environment is a personnel action). The incidents that constituted a hostile work environment include "unusual criticism of [Employee A] work, hostile scrutiny of work products, deadlines

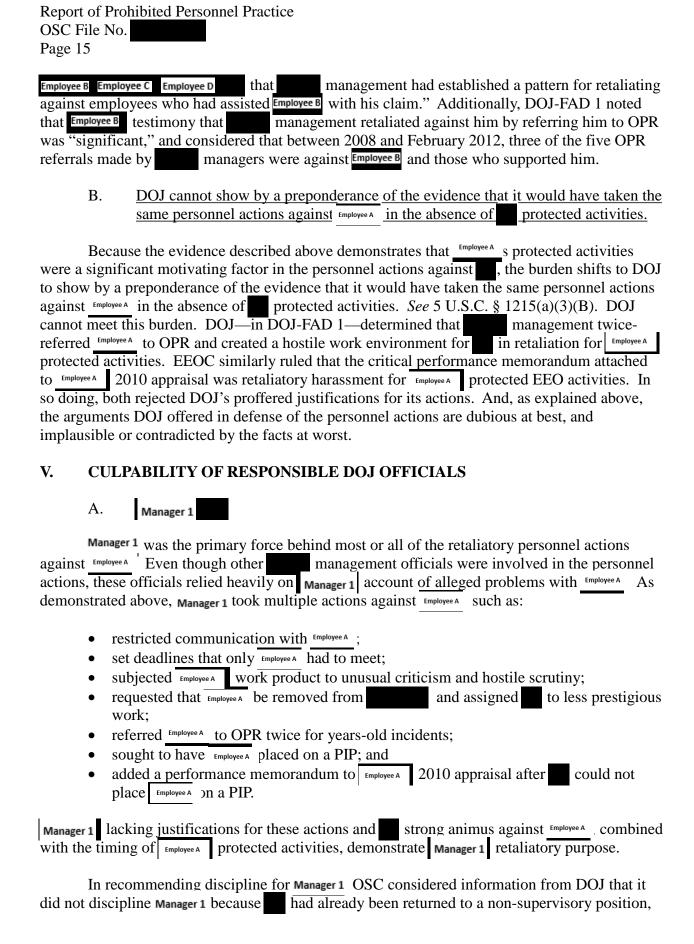
management officials also created a hostile work environment. See Savage v.

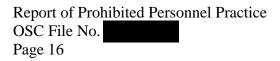


¹⁰ This list of factors is similar to those articulated in case law applying the "significant factor" standard under civil service laws and the "motivating factor" standard under the Uniformed Services Employment and Reemployment Rights Act. See, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 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).









and because had consulted closely with OGC in composing the performance memorandum that was attached to 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 Thus, Manager 1 has not been held accountable for 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 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 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 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 management officials retaliated against 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.

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appropriate disciplinary action against Manager 1	as well as other officials responsible for

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