UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 8 2011

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CIVIL RIGHTS

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Certified Mail# 7004-1160-0002-3622-7991

In Reply Refer to:
EPA File No. 03r-09-R8

Gregory Merrill
President
National Older Workers Career Center
3811 North Fairfax Drive, Suite 900
Arlington, VA 22203-1757

Re: Dismissal of Administrative Complaint

Dear Mr. Merrill:

The purpose of this letter is to notify the National Older Workers Career Center (NOWCC) that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is dismissing the April 20, 2009, administrative complaint filed by [redacted] (Complainant). [redacted] filed an administrative complaint with OCR alleging a violation of Title VI of the Civil Rights Act of 1964, as amended (Title VI),[1] and EPA's nondiscrimination regulations implementing Title VI found at 40 C.F.R. Part 7; Section 504 of the Rehabilitation Act of 1973,[2] and Section 14 of the Federal Water Pollution Act Amendment, as amended, including the Environmental Financing Act of 1972.

Specifically, the complaint alleged that NOWCC discriminated against [redacted] on the basis of sex by issuing him a letter of warning, and on the basis of disability and retaliation by separating him from NOWCC's Senior Environmental Employee (SEE) Program. NOWCC is a recipient of EPA assistance and is therefore subject to EPA's regulations prohibiting discrimination.[3] Further, as an enrollee in NOWCC's SEE program, [redacted] was not an

[1] *See* 42 U.S.C. §§ 2000d *et seq.*

[2] *See* 29 U.S.C. § 701 *et seq.*

[3] *See* Section 14 of the Federal Water Pollution Act Amendment, as amended, including the Environmental Financing Act of 1972 (prohibiting sex discrimination); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (prohibiting disability discrimination); Title VI of the Civil Rights Act of 1964, as amended (Title VI), 42 U.S.C. §§ 2000d *et seq.*, and 40 C.F.R. Part 7.100 (prohibiting retaliation).

employee of EPA during the alleged discrimination act.[4] Finally, it is OCR's understanding that, as a SEE enrollee, [redacted] was also not an employee of NOWCC.[5]

OCR partially accepted the complaint for investigation by letter dated June 25, 2010.[6] [redacted] sex discrimination allegation was rejected for investigation because OCR did not have jurisdiction to investigate it. Then, in a telephone conversation with OCR on December 6, 2010, [redacted] withdrew his disability claim.[7] [redacted] retaliation allegation was investigated and OCR's findings are discussed in detail below. In summary, after careful consideration, OCR finds no violation of Title VI or EPA's nondiscrimination regulations implementing Title VI.

I. BACKGROUND

NOWCC is a 501 (c)(3) nonprofit organization based in Arlington, Virginia that "provides national leadership to expand employment and to help shape public and private policy and practice for America's fast-growing population of workers age 55 and over."[8] The organization "provides employment to over 700 older workers located at the Environmental Protection Agency, United States Department of Agriculture, and other government agencies."[9] NOWCC's stated mission is to "meet employers' needs for competent workers by providing access to individuals age 55 and over, and to enhance lifelong employment opportunities of experienced workers through training, job placement, education, research and advocacy."[10]

[redacted] was enrolled in the SEE program and assigned by NOWCC to the EPA's National Enforcement Investigation Center (NEIC) in Denver, Colorado. [redacted] served as a [redacted] from [redacted], until the time of his separation from the SEE program on [redacted][11]

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[4] *See Omeli v. Nat'l Council of Senior Citizens*, 12 Fed. Appx. 304, 2001 WL 700849 (6th Cir. 2001); *Daniels v. Browner*, 63 F.3d 906, 908 (9th Cir. 1995).

[5] *See Jaffer v. The National Caucus and Center on Black Aged, Inc., et. al*, 296 F. Supp. 2d 639, 644 (M.D.N.C. 2003) (noting that Congress did not intend for SEE enrollees to be considered employees of their sponsoring agencies).

[6] Letter from Karen Higginbotham (former Director), U.S. EPA, Office of Civil Rights to [redacted]. (June 25, 2010).

[7] Letter from Rafael DeLeon (Director) U.S. EPA, Office of Civil Rights to [redacted] (December 30, 2010) (memorializing December 6, 2010 telephone conversation with [redacted]).

[8] http://www.nowcc.org/about/.

[9] http://www.nowcc.org/about/.

[10] http://www.nowcc.org/about/.

[11] *See* [redacted] EEO Investigative Affidavit (April 26, 2010).

II. COMPLAINANT'S ALLEGATION

Complainant alleges that he was separated from the SEE program in retaliation for previously threatening to file a discrimination complaint against his EPA monitors on the bases of sex and disability because his EPA monitors were "female and of questionable mental abilities."[12] Complainant argues that he received a letter of warning from NOWCC that he did not deserve and that the letter was factually inaccurate.[13] Prior to this letter of warning, Complainant contends, his work had not been criticized. Within weeks of the warning letter and his threat to file a discrimination complaint against his EPA monitors, Complainant was separated from the SEE program. He believes the separation was retaliatory and not based on his work performance.[14]

III. POSITION STATEMENT FROM THE RECIPIENT

NOWCC's position is that it did not violate any of EPA's nondiscrimination regulations. NOWCC stated that Sheila Miner, the Director of NOWCC Western Field Operations, issued a letter of warning on April 8, 2009, to [redacted] due to his conduct on March 19, 2009, with a delivery truck driver and his allowing an unauthorized truck into a secure area. Gregory Merrill, NOWCC President, reviewed the letter of warning and agreed that [redacted] conduct on March 19, 2009 was inappropriate.[15] NOWCC stated that on April 9, 2009, [redacted] refused the letter of warning from Ms. Miner and continued to act in an unprofessional manner.[16]

On April 17, 2009, [redacted] met with EPA's NEIC Acting Director, Mr. Tom Norris, and, again acted in an unprofessional manner.[17] Immediately after the meeting, [redacted] was escorted from EPA premises by the Federal Protective Services. Mr. Norris requested that [redacted] not be allowed back at EPA NEIC's facility due to his "unstable demeanor."[18]

After this incident, Ms. Miner received approval from Mr. Merrill, to separate [redacted] from the SEE Program based on his "failure to abide by the conditions in the warning letter [he] received on April 9, 2009."[19] By this time, [redacted] had made NOWCC aware that he may

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[12] *Id.*

[13] *Id.*

[14] Letter from [redacted] to US EPA Office of Civil Rights. (April 23, 2008); *see also,* [redacted], EEO Investigative Affidavit (April 26, 2010).

[15] Gregory A. Merrill, President & Chief Executive Office, NOWCC, Witness Affidavit. (February 2, 2011).

[16] Sheila Miner, NOWCC, Director of NOWCC Western Field Operations, Witness Affidavit. (February 2, 2011).

[17] Tom Norris, NEIC Acting Director, Environmental Protection Agency, Witness Affidavit. (February 7, 2011).

[18] *Id.*

[19] Correspondence from Sheila Miner to [redacted]. (April 21, 2009).

file a discrimination complaint against Valerie James (Information Technology Branch Chief, EPA NEIC) and L. Susan Datson (Facility Development Specialist, EPA, NEIC). NOWCC's personnel maintain that they did not consider any allegations of discrimination that [redacted] made, or any contact he had with EPA civil rights officials in determining to issue [redacted] the letter of warning or separate him from the SEE Program. NOWCC's position is that these decisions were made because of [redacted] conduct on the job and with EPA personnel.[20]

IV. FINDINGS OF MATERIAL FACT

After reviewing the administrative record concerning the alleged retaliation, OCR established the following findings of material facts:

1. On [redacted], Complainant [redacted] was assigned by NOWCC to [redacted] to operate [redacted].[21]

2. On March 19, 2009, [redacted] was involved in an incident with a delivery truck driver.[22]

3. The delivery truck driver, Salvador Mendoza, attempted to make a delivery to Alluet Company and was directed to the loading dock where [redacted] was assigned. This was the incorrect dock, however, for the delivery.[23]

4. Upon arriving at the facility, Mr. Mendoza heard [redacted] say, "I know that doesn't go here but hopefully you speak good enough English so we can figure out where it goes."[24] Later, Ben Costales, NEIC, heard [redacted] say to Mr. Mendoza: "Speak English!"[25]

5. Mr. Mendoza wrote a letter to [redacted], [redacted] SEE Monitor at NEIC, describing what occurred with [redacted] at the loading dock.[26] Ben Costales also wrote an account of what occurred.[27]

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[20] Sheila Miner, Witness Affidavit. (February 2, 2011).

[21] [redacted], Complainant, Witness Statement. (April 26, 2010).

[22] *Id.*

[23] Letter from Salvador Mendoza to Sue Datson, Facility Development Specialist, NEIC, USEPA, (undated).

[24] *Id.*

[25] Ben Costales, Physical Science Technician, NEIC, USEPA, Witness Affidavit. (January 20, 2011).

[26] Letter from Salvador Mendoza to Sue Datson (undated).

[27] E-mail from Ben Costales to [redacted], Forensic Information Branch Chief, NEIC, USEPA (March 23, 2009).

6. On March 24, 2009, [redacted] wrote an email to Sheila Miner, Director, Western Field Office of NOWCC, and Bridget Farley, Recruiter, NOWCC, stating in its entirety: "I may have to file an EEO complaint against [redacted] and [redacted] because of assumptions they have made about a situation in the mail room."[28]

7. Later in the day on March 24, 2009, [redacted] met with Ms. Miner and Ms. Farley and he told them that he believed [redacted] and [redacted] were discriminating against him based on his sex.[29]

8. Ms. Miner summarized [redacted] concerns in an email to him the next day, writing, "You raised the issue of discrimination…because [redacted] and [redacted] spoke to you recently about what they felt was 'unprofessional' behavior on your part in dealing with a mis-directed delivery man…You stated that Sue and Valerie did not raise any directly-related work-performance issues with you….You felt that 'unprofessional' behavior did not qualify as a legitimate work-related issue." Ms. Miner then wrote that she would investigate the issue.[30]

9. On March 25, 2009, [redacted], NEIC, found out from Ms. Miner that [redacted] stated that Ms. [redacted] had discriminated against him.[31] [redacted] cannot recall exactly when she found out about [redacted] allegation of discrimination.[32]

10. On March 26, 2009, Ms. [redacted], Ms. Miner, and Ms. [redacted] met to discuss the issues that [redacted] had raised.[33]

11. On April 2, 2009, Ms. [redacted], Ms. Miner, and Ms [redacted] met with [redacted] to discuss the incident with the truck driver and [redacted] statements about discrimination. Ms. Miner explained to [redacted] that providing good customer service was part of his job. After talking to the relevant individuals, Ms. Miner concluded that there was no discrimination. At the end of the meeting, while [redacted] was still present, Ms. [redacted], Ms. Miner, and Ms. [redacted] decided jointly to issue [redacted] a letter of warning about his conduct toward Mr. Mendoza and for allowing Mr. Mendoza and his

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[28] E-mail from [redacted] to Sheila Miner and Bridget Farley, Recruiter, NOWCC (March 24, 2009).

[29] E-mail from Sheila Miner to [redacted] (March 25, 2009); Sheila Miner, Witness Affidavit (February 2, 2011).

[30] E-mail from Sheila Miner to [redacted], (March 25, 2009).

[31] [redacted], Witness Affidavit, (January 28, 2011).

[32] [redacted], Facility Development Specialist, NEIC, USEPA, Witness Affidavit, (January 24, 2011).

[33] [redacted], Witness Affidavit, (January 28, 2011).

truck to have access to the NEIC loading dock in violation of EPA's secure building requirements.[34]

12. On April 3, 2009, a security concern was reported after [redacted] had permitted an individual who said he had come to repair an NEIC compressor into the NEIC building without an escort, allowing him to wander around the building on his own.[35]

13. On April 7, 2009, MaryAnn Mattick, the Homeland Security Division office manager, reported that [redacted] called her and told her that a package of explosives had arrived. The package did not contain explosives, but ammunition for the Homeland Security Division. [redacted] accepted delivery of the package, even though he was not authorized to accept delivery of ammunition.[36]

14. On April 8, 2009, NOWCC issued a letter of warning to [redacted]. The letter explained that [redacted] unprofessional behavior toward the delivery truck driver was unacceptable. The letter also addressed concerns regarding building security at the loading dock area. [redacted] was told that providing good customer services was expected from him. Specifically, he was warned that if "there is another incident of unprofessional 'customer service' by you or another violation of allowing unwarranted entrance to the EPA docking area or building, be advised that further disciplinary action, up to and including your immediate separation from the SEE Program, could result."[37]

15. On April 10, 2009, [redacted] wrote an email to Tom Norris, NEIC Deputy Director, stating, "I am attempting to charge [redacted] and [redacted] with discrimination…The purviews are sex and handicap. The incident concerns a motor delivery to Aleut Maintenance."[38]

16. On April 13, 2009, Mr. Norris responded to [redacted] by writing: "[redacted] I am very sorry to hear this. Please know that we take allegations of discrimination extremely seriously and will look into the incident you have referenced. If you wish to file a complaint of discrimination, you should contact the EPA's Office of Civil Rights and ask whether you can file a complaint by contacting an EEO counselor. Either way, we will look into mediating the matter." Ms. Miner of NOWCC was copied on this email.[39]

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[34] Sheila Miner, Witness Affidavit, (February 2, 2011).

[35] [redacted], Witness Affidavit, (January 28, 2011).

[36] *Id.*

[37] Letter from Sheila Miner, NOWCC, to [redacted] (April 8, 2009).

[38] E-mail from [redacted] to Tom Norris, (April 10, 2009).

[39] E-mail from Tom Norris to [redacted], (April 13, 2009).

17. On April 16, 2009, [redacted] responded to Mr. Norris by writing, "I will file a formal EEO complaint if your investigation doesn't result soon in purging the warning from NOWCC."[40]

18. On April 17, 2009, Mr. Norris met with [redacted] to discuss the situation in person. When Mr. Norris mentioned the incident with the delivery truck driver, [redacted] became very agitated and yelled repeatedly, "This conversation is over."[41]

19. Mr. Norris left the meeting after five minutes. He felt that [redacted] posed a threat to other individuals in the office. He called Federal Protective Services and had [redacted] escorted out of the building.[42]

20. Mr. Norris testified that several employees on the next floor heard [redacted] shouting during the meeting.[43]

21. By the end of the meeting on April 17, 2009, Mr. Norris determined that he would not allow [redacted] to be assigned to NEIC.[44] Mr. Norris summarized his meeting with [redacted] in an e-mail to Ms. Miner of NOWCC.[45]

22. On April 17, 2009, Mr. Norris made it clear to Ms. Miner that he did not want [redacted] back at NEIC. Soon thereafter, Ms. Miner drafted the letter of separation, which was then approved by Mr. Merrill.[46]

23. In a letter dated April 20, 2009, [redacted] wrote to OCR, alleging sex and disability discrimination in violation of Title VI of the Civil Rights Act.[47] He also contacted Sandra Fusco, EEO Counselor, Region VIII, EPA, by email stating his allegations of discrimination.[48]

24. On April 21, 2009, Ms. Miner called [redacted] and told him that he was being separated from the SEE program.[49]

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[40] E-mail from [redacted] to Tom Norris, (April 16, 2009).

[41] Tom Norris, Witness Affidavit, (February 7, 2011).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] E-mail from Tom Norris to Sheila Miner, (April 17, 2009).

[46] Sheila Miner, Witness Affidavit, (February 2, 2011).

[47] Letter from [redacted] to US EPA Office of Civil Rights, (April 20, 2009).

[48] Sandra Fusco, EEO Counselor, Region VIII, USEPA Witness Affidavit, (January 19, 2011).

[49] Sheila Miner, Witness Affidavit, (February 2, 2011).

25. In a letter dated April 21, 2009, NOWCC separated [redacted] from the SEE program. He was provided two weeks pay in lieu of notice.[50]

26. According to Ms. Miner, the reasons for his separation included: [redacted] failure to abide by conditions in his warning letter by continuing to provide poor customer service; he was unprofessional when she tried to give him the warning letter; he lost his temper with Tom Norris on April 17, 2009; and Tom Norris made it clear that he did not want [redacted] back at NEIC.[51]

27. On April 21, 2009, after he spoke to Ms. Miner about being separated from the SEE Program, [redacted] emailed Sandra Fusco to add an allegation of retaliation against NOWCC related to his separation.[52]

28. On April 22, 2009, Ms. Fusco responded to [redacted] and told him that "contract employees, such as NOWCC employees, are not considered agency employees by nature of their contract, and therefore have no opportunity for redress through the federal EEO process."[53]

29. In a letter dated April 23, 2009, [redacted] wrote to OCR, adding his allegation of retaliation related to his separation.[54]

V. LEGAL FRAMEWORK FOR ANALYZING RETALIATION COMPLAINT

A. Regulatory Prohibition

EPA's anti-retaliation regulation at 40 C.F.R. § 7.100 provides:

> No applicant, recipient, nor other person shall intimidate, threaten, coerce, or discriminate against any individual or group, either:
>
> (a) For the purpose of interfering with any right or privilege guaranteed by the Acts [*e.g.*, Title VI] or this part [7], or

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[50] Letter from Sheila Miner to Michael Fratini, (April 21, 2009).

[51] Sheila Miner, Witness Affidavit, (February 2, 2011).

[52] E-mail from [redacted] Sandra Fusco, (April 21, 2009).

[53] E-mail from Sandra Fusco to [redacted], (April 22, 2009).

[54] Letter from [redacted] to US EPA Office of Civil Rights, (April 23,2009). (This letter is dated 2008, but OCR deems it a typographical error, as Complainant was not yet a SEE enrollee in April 2008).

(b) Because the individual has filed a complaint or has testified, assisted or participated in any way in an investigation, proceeding or hearing under this part, or has opposed any practice made unlawful by this regulation.

B. Intentional Discrimination Framework

The U.S. Supreme Court has held that retaliation is a form of intentional discrimination.[55] Therefore, the analytical framework developed in case law decisions involving intentional discrimination forms the Agency's analysis of a retaliation complaint.

Intentional discrimination may be based on direct or circumstantial evidence. Direct evidence of intentional discrimination is exceedingly rare. Therefore, most intentional-discrimination cases are based on circumstantial evidence. The intentional-discrimination analysis for a Part 7 complaint based on circumstantial evidence is drawn from *McDonnell Douglas v. Green,* 411 U.S. 792 (1973) (setting forth evidentiary burdens for proving disparate-treatment claim by circumstantial evidence), and other employment-discrimination case law.[56]

As applied in the context of an administrative retaliation complaint, *McDonnell Douglas* sets forth a three-part test for establishing a violation. First, there must be a *prima facie* claim of retaliation. Second, if a *prima facie* retaliation claim exists, the burden shifts to the alleged retaliator to articulate a legitimate, nonretaliatory reason (*i.e.,* justification) for its actions. Third, if the alleged retaliator meets its justification burden, the record must establish whether the articulated justification was a pretext for retaliation and whether a retaliatory motive was behind the adverse action.[57]

C. *Prima Facie* Retaliation Claim

Courts have established a three-part test for establishing a *prima facie* retaliation claim.[58]

1. Protected Activity

The first *prima facie* element is that a complainant or aggrieved person or group must have engaged in a "protected activity" under Title VI or Part 7. Filing an administrative complaint under Part 7 is specifically recognized as a protected activity under Part 7.[59] Courts

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[55] *See Jackson v. Birmingham Bd. of Educ.,* 125 S. Ct. 1497, 1504 (2005) (case involving Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX")). Courts analyze claims under Title IX identically to claims under Title VI. *N.C.A.A. v. Smith,* 119 S. Ct. 924, 928 n.3 (1999).

[56] *Baldwin v. Univ. of Texas,* 945 F. Supp. 1022, 1031 (S.D. Tex. 1996); *Brantley v. Indep. Sch. Dist. No. 625, St. Paul Pub. Sch.*, 936 F. Supp. 649, 658 n. 17 (D. Minn.1996).

[57] *Mayfield v. Hart County Sch. Dist.,* No. 3:04-CV-09 (CDL), 2006 WL 1652299, slip op. at *7 (M.D. Ga. June 9, 2006).

[58] *See Davis v. Halpern,* 768 F. Supp. 968, 985 (E.D.N.Y. 1991) (denying summary judgment because plaintiff established a *prima facie* case of Title VI retaliation); *Topol v. Univ. of Pennsylvania,* 160 F.R.D. 474, 475 (E.D. Pa. 1995) (listing *prima facie* elements of retaliation under Title IX).

[59] 40 C.F.R. § 7.100(b).

have also recognized protected activity when a plaintiff has "made a charge, testified, assisted, or participated in" a proceeding or investigation under a civil-rights statute.[60]

2. Adverse Action

The second *prima facie* element is that a recipient of, or applicant for Federal assistance, or some other person, must have taken an "adverse action" against the protected person or group. Specific adverse actions listed under Part 7 are "intimidat[ion]," "threat[s]," "coerc[ion]," and "discriminat[ion]."[61] Based on a plain-meaning analysis of these terms, an adverse action is an imposition of some form of actual, impending, or potential pecuniary or physical harm.[62]

Title VI and Title IX case law have identified several examples of adverse actions that comport with the plain meaning of the adverse actions listed under Part 7.[63] By contrast, bothersome but relatively minor behavior does not constitute adverse action.[64]

3. Causal Connection

The third *prima facie* element is that a "causal connection" must exist between the complainant's protected activity and the alleged retaliator's adverse action. This means that there must be evidence sufficient to infer that the protected activity was the "likely reason" for the adverse action.[65]

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[60] *See Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 62 (2006).

[61] 40 C.F.R § 7.100.

[62] *See Webster's New International Dictionary of the English Language* 439, 648, 1184, 2382 (3d ed. 1986) (definitions of "coerce," "discriminate," "intimidate," "threat," and "threaten"); *Black's Law Dictionary* 252, 827, 1489 (7th ed. 1999) (definitions of "coercion," "intimidate," and "threat").

[63] *See, e.g., Lowery v. Texas A&M Univ.*, 11 F. Supp. 2d 895, 913 (S.D. Tex. 1998) (university denied promotion to, demoted, and severely reprimanded plaintiff); *Topol*, 160 F.R.D. at 475 (university officials hindered plaintiff's efforts to pursue a sexual-harassment complaint); *Davis,* 768 F. Supp. at 985 (university denied plaintiff admission to its law school eight consecutive times); *Paisey v. Vitale,* 634 F. Supp. 741, 745 (S.D. Fla. 1986) (filing of a retaliatory lawsuit against plaintiff who engaged in protected activity), *aff'd on other grounds*, 807 F.2d 889 (11th Cir. 1986).

[64] *See, e.g., Lowery,* 11 F. Supp. 2d at 912 (allegations that "focus on personality conflicts and personal behavior, which are not the type of adverse actions protected by Title IX"); *Robinson v. City of Pittsburgh,* 120 F.3d 1286, 1301 (3d Cir. 1997) (employment-discrimination case involving alleged retaliatory "'unsubstantiated oral reprimands' and 'unnecessary derogatory comments'" that did "not rise to the level of the 'adverse employment action'"); *Moore v. Carlucci*, Nos. 83 C 6698, 85 C 10373, 1988 WL 17615, *10 (N.D. Ill. Feb. 23, 1988) (employment-discrimination case in which personality conflicts at work that made an employee's position more difficult were not sufficiently adverse).

[65] *See Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982) (employment-discrimination case).

There are two elements needed to establish a causal connection. First, the adverse action must have followed the protected activity. Second, the alleged retaliator must have known about the protected activity.[66] In other words, EPA must find that, but for the complainant engaging in a protected activity, the alleged retaliator would not have taken adverse action against the complainant.[67]

Generally, causation may be inferred by a close temporal proximity between the prior protected activity and the subsequent adverse action. If a case relies solely on temporal proximity to infer causation, recent cases suggest that a very close temporal proximity is needed.[68] As a general rule, the closer the temporal proximity is, the stronger the inference of causation.

D. Justification

If a *prima facie* claim exists, the alleged retaliator must articulate a legitimate, nonretaliatory reason for its actions. This is not a demanding burden to meet. The veracity of the stated justification is not tested at this stage. Justification is merely a burden of production, not persuasion.[69]

However, based on holdings from employment-discrimination case law, there are some circumstances in which an alleged retaliator's proffered reason for its action may be deemed insufficient. For example, if the articulated justification does not contradict the *prima facie* case, is too vague, is internally inconsistent, is facially not credible, or is blatantly pretextual, the alleged retaliator may not meet its justification burden.[70]

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[66] *See Gifford v. Atchison, Topeka, & Santa Fe Ry. Co.*, 685 F.2d 1149, 1155 (9th Cir. 1982) (employment-discrimination case); *Aguirre v. Chula Vista Sanitary Serv.*, 542 F.2d 779, 781 (9th Cir. 1976) (per curium)).

[67] *See Prince v. Cannon Mills Co.*, 607 F. Supp. 1146, 1155 (M.D.N.C. 1985) (employment-discrimination case noting that, to prevail on a claim of retaliatory disparate treatment, plaintiff must prove that, but for engaging in a protected activity, she would not have been discharged from her job).

[68] *See Nicastro v. N.Y.C. Dep't of Design & Constr.*, 125 Fed. Appx. 357, 2005 WL 590167, *1 (2d Cir. 2005) (employment-discrimination in which lapse of 10 months between protected activity and adverse action found insufficient to infer causation); *Shanklin v. Fitzgerald*, 397 F.3d 596, 604 (8th Cir. 2005) (employment-discrimination case holding causal inference "tends to evaporate" from "lengthy delay" of 10 months between protected activity and adverse action).

[69] *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981) (employment-discrimination case explaining that articulating justification is a burden of production); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993) (employment-discrimination case explaining, "[T]he determination that a defendant has met its burden of production (and has thus rebutted any legal presumption of intentional discrimination) can involve no credibility assessment. For the burden-of-production determination necessarily precedes the credibility-assessment stage.").

[70] *See* B. Lindemann & P. Grossman, *Employment Discrimination Law* 18 (3d ed., Vol. I 1996) (discussion of justification in analysis of employment-discrimination cases) (citations omitted).

E. Pretext

If the alleged retaliator satisfies its justification burden, the analysis then focuses on whether its articulated reason is "unworthy of credence."[71] A finding of a *prima facie* claim combined with a finding that the articulated justification was false "may permit" a fact finder to make a finding of unlawful retaliation.[72] Nevertheless, the traditional rule is that, in order to make an ultimate finding of retaliation, a fact finder still must be satisfied that retaliation for engaging in prior protected activity "actually motivated" the adverse action.[73]

F. Evidentiary Burden of Proof

The preponderance-of-the-evidence standard is the applicable burden of proof in this investigation.[74] In other words, to make a finding of unlawful retaliation, the Agency must be satisfied at every step of the analysis that the record demonstrates that it was more likely than not that retaliation motivated the alleged retaliator's adverse action against the complainant.

VI. ANALYSIS

A. *Prima facie* Case Analysis

1. Protected Activity

The first *prima facie* element is that a complainant or aggrieved person or group must have engaged in a "protected activity" under Title VI or Part 7. Here, on March 24, 2009, [redacted] first mentioned filing an EEO complaint against Valerie James and Sue Datson (both EPA employees) in an email to Sheila Miner and Bridget Farley (both NOWCC employees). He repeated his intention to file an EEO complaint against these EPA employees in emails to Tom Norris dated April 10, 2009, and April 16, 2009. On April 20, 2009, [redacted] filed a complaint with OCR alleging sex and disability discrimination.

[redacted] emails in March and April 2009 to NOWCC and EPA employees complaining about discrimination referred to "EEO" or Equal Employment Opportunity complaints against EPA employees, rather than complaints of discrimination in violation of Title VI against NOWCC (a recipient).

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[71] *See Burdine,* 450 U.S. at 256 (employment-discrimination case).

[72] *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2109 (2000) (employment-discrimination case based on age).

[73] *See Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610 (1993) (intentional-employment-discrimination case based on age).

[74] U.S. Dep't of Justice, *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes* at pg. 58 (1998) (citing Administrative Procedure Act, 5 U.S.C. § 556(d)).

EPA's regulations implementing Title VI prohibit retaliation "because the individual has filed a complaint or has testified, assisted or participated in any way in an investigation, proceeding or hearing under this part, or has opposed any practice made unlawful by this regulation."[75] Thus, [redacted] emails in March and April 2009, which concerned alleged "EEO" discrimination by EPA employees, do not constitute protected activity under Title VI or EPA's implementing regulations because these laws do not cover the conduct of Federal employees.

However, the evidence shows that [redacted] filed a complaint of discrimination in violation of Title VI with OCR on April 20, 2009. Because filing a complaint under Title VI is protected activity, the first element of the *prima facie* case is satisfied by virtue of [redacted] April 20, 2009, complaint with OCR.

2. Adverse Action

The second *prima facie* element is that a recipient of, or applicant for Federal assistance, or some other person, must have taken an "adverse action" against the protected person or group. Based on a plain-meaning analysis of these terms, an adverse action is an imposition of some form of actual, impending, or potential pecuniary or physical harm.[76] On April 8, 2009, NOWCC issued a letter of warning to Complainant. Then on April 21, 2009, NOWCC informed [redacted] that he was to be separated from the SEE program and a letter to him, separating him from the SEE Program. By separating Complainant from the SEE program, NOWCC imposed a pecuniary harm on him. The separation of Complainant from the SEE program constitutes an adverse action and the second element of the *prima facie* case has been established.

3. Causal Connection

The third *prima facie* element is that a "causal connection" must exist between the complainant's protected activity and the alleged retaliator's adverse action. This means that there must be evidence sufficient to infer that the protected activity was the "likely reason" for the adverse action.[77] There are two elements needed to establish a causal connection. First, the adverse action must have followed the protected activity. Second, the alleged retaliator must have known about the protected activity.[78] In other words, OCR must find that, but for the complainant engaging in a protected activity, the alleged retaliator would not have taken adverse action against the complainant.[79]

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[75] 40 C.F.R. §7.100(b) (emphasis added).

[76] *See Webster's New International Dictionary of the English Language* 439, 648, 1184, 2382 (3d ed. 1986) (definitions of "coerce," "discriminate," "intimidate," "threat," and "threaten"); *Black's Law Dictionary* 252, 827, 1489 (7th ed. 1999) (definitions of "coercion," "intimidate," and "threat").

[77] *See Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982) (employment-discrimination case).

[78] *See Gifford v. Atchison, Topeka, & Santa Fe Ry. Co.*, 685 F.2d 1149, 1155 (9th Cir. 1982) (employment-discrimination case); *Aguirre v. Chula Vista Sanitary Serv.*, 542 F.2d 779, 781 (9th Cir. 1976) (per curium)).

[79] *See Prince v. Cannon Mills Co.*, 607 F. Supp. 1146, 1155 (M.D.N.C. 1985) (employment-discrimination case noting that, to prevail on a claim of retaliatory disparate treatment, plaintiff must prove that, but for engaging in a

OCR established that [redacted] engaged in protected activity when he filed a Title VI administrative complaint on April 20, 2009. With respect to [redacted] allegation relating to the letter of warning, however, the record establishes that the letter of warning was issued on April 8, 2009, before he engaged in the protected activity, and, therefore, could not have been motivated by the protected activity. Thus, the adverse action did not follow the protected activity and there is no causal connection between the protected activity and the letter of warning.

With respect to [redacted] separation from the SEE program, the record establishes that the protected activity preceded the separation. [redacted] filed his administrative complaint with OCR on April 20, 2009, the day before Ms. Miner called him to tell him he was being separated from the SEE program. The record does not clearly establish whether NOWCC knew about the administrative complaint before Ms. Miner called [redacted] to advise him of his separation, but Ms. Miner and Mr. Merrill, President and CEO of NOWCC, both testified that they were unaware of any protected activity by [redacted] when they decided to separate him from the SEE program.[80]

Even assuming that NOWCC knew about the complaint when he was separated, the record establishes that the decision to separate him had already been made when he engaged in protected activity. On April 17, 2009, Mr. Norris met with [redacted] to discuss how Mr. Norris could help [redacted] "successfully perform his work responsibilities."[81] Instead, the meeting lasted just a few minutes because [redacted] became very agitated and Mr. Norris "became concerned that [redacted] posed a threat to the safety of the other individuals at NEIC because of his highly unstable demeanor during the conversation."[82] By the end of the meeting, Mr. Norris had determined that he would not allow [redacted] to continue working at NEIC.[83] Mr. Norris then contacted Ms. Miner to tell her he did not want [redacted] working at NEIC.[84] Ms. Miner began the process of separating [redacted] from the SEE program, culminating in her April 21, 2009, phone call to [redacted] telling him he would be separated from the SEE program and the April 21, 2009, letter of separation.[85] Thus, while the protected activity preceded [redacted] notice of his separation by one day, the circumstances and timing cast serious doubt on [redacted] assertion that his administrative discrimination complaint motivated his separation.

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protected activity, she would not have been discharged from her job).

[80] Sheila Miner, Witness Affidavit, (February 2, 2011); Gregory A. Merrill, Witness Affidavit (February 2,2011).

[81] Tom Norris, Witness Affidavit, (February 7, 2011).

[82] *Id.*

[83] *Id.*

[84] Sheila Miner, Witness Affidavit, (February 2, 2011).

[85] *Id.*

Accordingly, OCR finds no causal connection between his protected activity and the letter of warning or separation and thus, no *prima facie* case of retaliation. However, even assuming that a *prima facie* case of retaliation was established, OCR analyzed NOWCC's justification and whether there was any evidence of pretext.

B. Justification

The record reveals that NOWCC had a number of legitimate issues with Complainant's job performance, which led to his letter of warning and ultimate separation from the SEE program. As discussed above, Complainant had a major incident with a delivery truck driver, improperly allowing the driver into a secure area and then speaking to the driver in a disrespectful and unprofessional manner. Complainant had other issues with improperly allowing individuals into secure areas and accepting packages that he was unauthorized to accept. NOWCC first disciplined Complainant for these actions and then, when he continued to act unprofessionally, separated him from the SEE program. NOWCC justifications – poor work performance and unprofessionalism – are legitimate, nonretaliatory reasons for its actions.

C. Pretext

As noted above, if the evidence shows that the alleged retaliator had a legitimate, nonretaliatory justification for its actions, the analysis then focuses on whether its articulated reason is "unworthy of credence." Here, the record shows no evidence of pretext. To the contrary, the record's evidence – through documents and testimony of parties unaffiliated with NOWCC – corroborates NOWCC's assertions of Complainant's unprofessional manner on more than one occasion and that he did not follow all safety protocols for the secure building. Specifically, the record contains a letter from Mr. Mendoza to Ms. Datson detailing and corroborating the incident at the loading dock.[86] The record also contains testimony from Ben Costales corroborating the incident at the loading dock, which lead to [redacted] letter of warning.[87] In addition, the record contains an e-mail from MaryAnn Mattick to Sue Datson explaining that [redacted] signed for ammunition when he was unauthorized to do so and that he incorrectly identified a package as having explosives in it.[88] Thus, the record corroborates NOWCC's legitimate, non-discriminatory explanation for [redacted] separation from the SEE program and fails to establish that NOWCC's actions were a pretext for unlawful discrimination.

VII. CONCLUSION

Based upon the evidence gathered and reviewed, EPA has determined that there was no violation of Title VI or EPA's regulations implementing Title VI. The record does not establish that Mr. Fratini's letter of warning or separation from the SEE program were done in retaliation

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[86] Letter from Salvador Mendoza to Sue Datson (undated).

[87] Ben Costales, Witness Affidavit. (January 20, 2011).

[88] E-mail from MaryAnn Mattick to Sue Datson, April 7, 2009.

for his administrative discrimination complaint.

If you have any questions, please contact Helena Wooden-Aguilar, Assistant Director of the OCR External Compliance and Complaints Program, by telephone at (202) 564-0792, via e-mail at wooden-aguilar.helena@epa.gov or via mail at U.S. EPA, Office of Civil Rights, Washington, D.C., 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

Sincerely,

Rafael DeLeon

Rafael DeLeon
Director

cc: [redacted]
Certified Mail# 7004-1160-0002-3622-7984
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