



Memorandum

Subject: Request for Supplemental Information in <u>A. Ashley Tabbador v. EOIR</u> Agency Number EOI-2013-0081	Date: FEB 24 2014
To: Jason Osborne Assistant Director, EEO Staff Executive Office for United States Attorneys	From: Robert K. Abraham <i>RKA</i> Supervisory Attorney Complaint Adjudication Office

This office received the Report of Investigation in the above-referenced case on November 5, 2013. The ROI makes clear that the processing of this complaint is being handled by your office due to potential conflicts of interest issues for EOIR. We have reviewed the record and have determined that we cannot issue a decision without first obtaining additional information. Please provide this office with the information listed below within thirty (30) days of the date of this memorandum. If you have any questions, please contact David Berry at (202) 353-0030.

Complainant Ashley Tabbador, a Los Angeles Immigration Judge with the Executive Office of Immigration Review, filed a complaint of employment discrimination based on race (Asian), national origin (Iranian-American) and religion (Muslim). Complainant alleged that she was discriminated against when EOIR ordered her to recuse herself from all cases involving Iranian respondents because of her prominent involvement in outside activities on behalf of the Iranian-American community.

Assuming complainant establishes a *prima facie* case of discrimination, EOIR is required to articulate a legitimate, non-discriminatory reason for the recusal determination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The explanation provided must be legally sufficient to rebut the inference raised by the *prima facie* case. Id. at 255. Management's

explanation must "frame the factual issue with sufficient clarity so that [the complainant] will have a full and fair opportunity to demonstrate pretext." Id. at 255-56. The failure to provide a legitimate, non-discriminatory reason for the alleged adverse employment action may result in a failure to rebut the complainant's *prima facie* case and could lead to an adverse inference being drawn and a finding of discrimination. See Obas v. Dept. of Justice, EEOC No. 0120083050 (October 28, 2010).

In this case, Jeffrey Rosenblum, Chief Counsel of EOIR's Employee/Labor Relations Unit during the relevant period, said he made the recusal determination because complainant had "held herself out to be very active in the Iranian-American community" and "might have an appearance problem in relation to hearing cases involving individuals from Iran" (Ex. 8, p. 3). In addition, in an August 28, 2012, e-mail to complainant, Rosenblum stated that, "OGC has formally recommended that other IJs disqualify themselves from a particular class of matters in similar circumstances" (Ex. 2, p. 15).

Rosenblum said he consulted with attorney Marlene Wahowiak in making his recusal recommendation. Rosenblum said that Wahowiak researched complainant on Google and, based on what she found, "agreed that [complainant's'] activities could cause a reasonable person to question her impartiality in cases involving individuals from Iran" (Ex. 8, p. 4). In her affidavit, Wahowiak stated that she searched the internet using complainant's name along with the word "Iran," and came up with 970 entries (Ex. 11, p. 3). Wahowiak said she had concerns about complainant "appearing before groups at events which seemed to advocate a particular position" (*ibid.*). However, when asked what recommendations she made based on the information she obtained from her internet search, Wahowiak stated, "I have been advised by Agency counsel, and I concur, that any advice or recommendations I made are privileged" (*id.* at 4).

In order for this office to make a reasoned decision in this complaint, we are requesting that EOIR provide supplemental statements from both Jeffrey Rosenblum and Marlene Wahowiak and any additional documentation that supports their statements described above. Rosenblum's statement should address specific examples of complainant's "high profile activities" that triggered his concerns regarding her impartiality in cases involving Iranian respondents. In a November 5, 2013 letter to Mark Gross, agency counsel stated that complainant's invitation to attend the White House Roundtable with Iranian-American community leaders in June 2012 "is merely one example of the high-profile nature of her activities on behalf of

the Iranian community." Rosenblum's supplemental statement should provide other examples of such high profile activity that raised concerns. In addition, Rosenblum and EOIR management should provide specific information (e-mails, written memoranda, etc.) supporting his August 28, 2012 statement that OGC recommended that other IJs disqualify themselves from particular classes of cases in circumstances similar to the facts in this matter. Evidence of such recommendations should predate August 28, 2012, the date Rosenblum told complainant that such recommendations had been made.

Marlene Wahowiak's supplemental statement should address the results of the internet search she conducted regarding complainant in late June/early July 2012 and should also provide a summary of any advice or recommendations she made to Rosenblum or other EOIR management officials based on those results. Wahowiak's statement should provide a more detailed explanation of her statement regarding complainant "appearing before groups at events which seemed to advocate a particular position."

cc: A Ashley Tabaddor
Ali M.M. Mbjdehi
Jill A. Weissman