**U.S. Department of Justice**

Complaint Adjudication Office

Agency Complaint No. EOI-2012-00081
DJ Number 187-10-21

*950 Pennsylvania Ave, NW*
*Patrick Henry Building, Room A4810*
*Washington, DC 20530*

MAY 14 2014

Ms. Ashley Tabbador
1415 Camden Avenue, Apt. 208
Los Angeles, CA 90025

Dear Ms. Tabbador:

This is in reference to your complaint of discrimination that you filed against the Executive Office for Immigration Review. Under federal equal employment opportunity regulations, the Department of Justice renders the final decision on your complaint. Enclosed is the final Department of Justice decision which concludes that you were not subjected to discrimination based on your national origin, race or religion.

## Rights of Appeal

First, you have the right to appeal any part of this decision to the Equal Employment Opportunity Commission. You may do so by filing your appeal within 30 days of the date you receive this decision. If you are represented by an attorney of record, the 30-day appeal period shall begin to run the day your attorney receives this decision. The appeal must be in writing. The Commission prefers that you use EEOC Form 573, Notice of Appeal/Petition, a copy of which is attached, to appeal this decision. The notice of appeal should be sent to the Director, Office of Federal Operations, EEOC, Post Office Box 77960, Washington, D.C. 20013, by mail, personal delivery, or facsimile. You must also send a copy of your notice of appeal to JuanCarlos Hunt, EEO Officer, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 1904, Falls Church, VA 22041. You must state the date and method by which you sent the copy of your notice to the agency's EEO Director either on, or attached to, the notice of appeal you mail to the EEOC.

Second, you have the right to file a civil action in the appropriate United States District Court within 90 days of the date you receive this decision. In filing your federal complaint, you should name Attorney General Eric Holder as the defendant. Even if you appeal this decision to the EEOC, you

still have the right to go to federal court. You may file a civil action in the United States District Court within 90 days of the day you receive the Commission's final decision on your appeal, or after 180 days from the date you filed your appeal with the Commission, if the Commission has not made a final decision by that time.

If you cannot afford to file a civil action, you can ask the court to allow you to file the action at no cost to you. The court may also provide you with an attorney if you cannot afford to hire one to represent you in your civil action. Questions concerning when and how to file a waiver of costs should be directed to your attorney or the District Court clerk.

Sincerely,

Mark L. Gross
Complaint Adjudication Officer

cc: JuanCarlos Hunt
Richard Toscano
Ali M.M. Mojdehi
Jill Weissman

The U.S. Equal Employment Opportunity Commission

# NOTICE OF APPEAL/PETITION
# TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OFFICE OF FEDERAL OPERATIONS
P.O. Box 77960
Washington, DC 20013

**Complainant Information:** (Please Print or Type)

| | |
|---|---|
| Complainant's name (Last, First, M.I.): | |
| Home/mailing address: | |
| City, State, ZIP Code: | |
| Daytime Telephone # (with area code): | |
| E-mail address (if any): | |

**Attorney/ Representative Information (if any):**

| | |
|---|---|
| Attorney name: | |
| Non-Attorney Representative name: | |
| Address: | |
| City, State, ZIP Code: | |
| Telephone number (if applicable): | |
| E-mail address (if any): | |

**General Information:**

| | |
|---|---|
| Name of the agency being charged with discrimination: | |
| Identify the Agency's complaint number: | |
| Location of the duty station or local facility in which the complaint arose: | |
| Has a final action been taken by the agency, an Arbitrator, FLRA, or MSPB on this complaint? | _____Yes; Date Received _____(Remember to attach a copy)<br>_____No<br>_____This appeal alleges a breach of settlement agreement |
| Has a complaint been filed on this same matter with the EEOC, another agency, or through any other administrative or collective | _____No<br>_____Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate) |

**U.S. Department of Justice**

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*950 Pennsylvania Ave, NW*
*Patrick Henry Building, Room A4810*
*Washington, DC 20530*

MAY 14 2014

DEPARTMENT OF JUSTICE FINAL DECISION

in the matter of

A. Ashley Tabbador v. Executive Office for Immigration Review

On or about November 29, 2012, complainant A. Ashley Tabbador filed an employment discrimination complaint against the Executive Office for Immigration Review (EOIR) pursuant to Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16, and 29 C.F.R. §§1614.101(a)&(b). Complainant claimed that she was subjected to discrimination based on her national origin (Iranian), race (Asian) and religion (Muslim) when EOIR management officials ordered her to recuse herself from all cases in the Los Angeles Immigration Court (LAIC) involving Iranian nationals (Ex. 4). Complainant also claimed that, after she engaged in protected EEO activity by protesting the recusal order, EOIR management officials retaliated against her by holding her to a more restrictive standard with regard to her participation in outside speaking engagements (Ex. 5, p. 4).

Because the complaint arose out of the Office of General Counsel at EOIR, that office was recused from representing the agency and the Executive Office for United States Attorneys agreed to represent EOIR in this matter (Ex. 26, p. 1). Due to additional conflicts with the EOIR EEO Office, the matter was assigned to the United States Marshals Service for investigation. After an EEO investigation was conducted, complainant received a copy of the Report of Investigation and was informed of her right to elect either a hearing before an EEOC Administrative Judge or a final written decision from the Department of Justice. Complainant requested a Final Agency Decision and, on September 9, 2013, the Complaint Adjudication Office received the case file for issuance of a final Department of Justice decision. The CAO requested supplemental information on February 24, 2014.

## Facts

Complainant has been an Immigration Judge (IJ) in the LAIC since 2005. Her first-level supervisor is Assistant Chief Immigration Judge Thomas Fong (Asian, Chinese/Polynesian). Throughout her tenure as an IJ, complainant has been involved in outside volunteer and professional activities, including pro bono, academic, bar association and community activities (Ex. 1, p. 3). Complainant stated that, because she participated in these activities in her personal capacity, she was not required to seek approval to engage in these activities on her own time. However, she said she regularly sought approval from ACIJ Fong and EOIR's ethics attorneys before participating in outside activities (ibid.). Complainant said that EOIR routinely granted her requests to participate in such outside activities in her personal capacity, including invitations to speak or participate in events organized by Iranian-American and Muslim groups (ibid.).

### I. Discrimination claim based on EOIR's July 2012 recusal order

#### A. Background

In June 2012, complainant was invited to attend a "Roundtable with Iranian-American Community Leaders" at the White House that was to feature a discussion of federal initiatives relevant to the Iranian community (Ex. 2, p. 22). Complainant asked ACIJ Fong for one day of leave to attend the White House roundtable in her personal capacity (id. at 21). In her e-mail to Fong, complainant stated, "As you know, I am very active in the Iranian-American community, and based on that I have been asked to meet with the White House per the invitation below" (ibid.). Fong granted complainant approval to attend the White House event in her personal capacity.

In a July 5, 2012, e-mail, Jeff Rosenblum, who was the Chief Counsel of EOIR's Employee/Labor Relations Unit (ELU) in the Office of General Counsel (OGC) at the time,[1] informed complainant that she was approved to participate in the roundtable in her personal capacity and that she had to ensure that "neither your position nor your official title is associated with this activity" (id. at 19). Rosenblum also told complainant that she could not "opine on immigration-related

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1 The record indicates that EOIR's ethics opinions were issued by Rosenblum and his ELU staff.

issues during this activity." After explaining the general restrictions regarding outside activities, Rosenblum stated the following (id. at 20):

> Finally, your request to participate in this roundtable has raised a separate ethics concern. Based on your representation that you are very active in the Iranian-American community, as well as your participation in this event, we recommend that you disqualify yourself from any matter involving individuals from Iran that comes before you in your capacity as an Immigration Judge. Pursuant to 5 C.F.R. §2635.502(a), an employee should not participate in a matter in which "circumstances would cause a reasonable person with knowledge of the relevant facts to question [her] impartiality in the matter."

On August 20, 2012, complainant sought clarification from Rosenblum regarding his recommendation that she recuse herself from all cases involving Iranian nationals, informing him that the "'recommendation' deeply concerns me" (id. at 16). In her e-mail, complainant asked Rosenblum if his recommendation was based on the fact that she was Iranian-American. Complainant told Rosenblum that her activities were not limited to the Iranian-American community and that every one of her outside activities had been vetted through the ACIJ and the ethics process (ibid.). Thus, she said "the level or the nature of my activities in these communities should not be a surprise to anyone at EOIR ethics office" (id. at 17).

Rosenblum responded to complainant on August 28, 2012, stating that (id. at 14):

> You are a prominent advocate for the Iranian-American community, and your activities are well-documented in the public domain, including but not limited to the internet. You engage in advocacy at such a high level that you were invited by the White House Office of Public Engagement to speak on behalf of the Iranian-American community, and your speeches, presentations, and advocacy are widely available. Based on this involvement, it remains the opinion of the [OGC] that under the standards set forth in Section 502, you should disqualify yourself from matters involving respondents from Iran.

Rosenblum told complainant that such appearance problems are evaluated on a case-by-case basis and added that "OGC has formally recommended that other IJs disqualify themselves from a particular class of matters in similar circumstances" (id. at 15). Rosenblum further stated that the fact that complainant's previous outside activities had been vetted through the ACIJ/ethics process did not lessen the appearance problem in this instance (ibid.) He said that if complainant's other activities would have caused "large-scale recusals," they would not have received ethics approval. Rosenblum added that Fong had assured OGC that cases affected by the recusal recommendation would represent only a small fraction of cases heard in the LAIC and that it would not be difficult to reassign such cases (ibid.). He said Fong had assured him that any cases complainant recused herself from would be replaced by other cases so there would be no reduction in her overall caseload. Rosenblum finished by stating, "[p]lease note that in no way is OGC suggesting that you have an actual bias" (ibid.).

Complainant asked Rosenblum if his recommendation was the official opinion of OGC or if there were others involved in making the determination that complainant should recuse herself from cases involving Iranian nationals (id. at 13). On September 7, 2012, Rosenblum stated that this was the official opinion of the OGC and the opinion was not reviewable by any other entity (ibid.). He informed complainant that he had also consulted DOJ's Ethics Office (DEO) and the DEO had confirmed OGC's opinion.

On September 10, 2012, complainant e-mailed ACIJ Fong stating that, while she disagreed with OGC's conclusion, she was prepared to follow the "order" and needed instructions on how to proceed (id. at 12). She told Fong that she had seven pending cases involving Iranian nationals at different stages of the process. Fong responded that "this is OGC's conclusion" and that he would sit down with complainant to figure out how to handle the cases (ibid.). Fong informed complainant on October 11, 2012, that "[y]ou are directed by me to [recuse yourself from all Iranian national cases] as the OGC has stated that is what they require" (Ex. 9.1, p. 14).

B. Complainant's allegations

Complainant stated that, while Rosenblum told her that OGC had recommended that other IJs disqualify themselves from a

particular class of matters in similar circumstances, he failed to identify those other matters or whether in those instances OGC required an IJ to recuse herself from hearing cases from an entire class of respondents without any actual finding of an appearance of impartiality (Ex. 7, p. 6). Complainant said that, based on instructions from ACIJ Fong, she issued recusal orders in all cases on her docket that involved Iranian nationals (ibid.). On September 10, 2012, complainant told Fong that, based on a review of her docket, she had seven pending cases that involved Iranian nationals as respondents (Ex. 2, p. 12). She emphasized that the recusal order has a continuing effect because she is subject to an open-ended standing order that she not be assigned any cases involving Iranian nationals (id. at 7).

Complainant said the only reason OGC issued the recusal recommendation was because of her association with the Iranian-American community (id. at 8). She said she believes her Muslim religion was a motivating factor for the recusal determination because of the substantial overlap between Iranian nationality and the Muslim religion (id. at 14). She said she was aware of other IJs who were active in ethnic, religious and community activities, but she was unaware of any of those IJs being subject to a blanket recusal order (id. at 8). Complainant said she questions whether, for example, an African-American judge who is active in the African-American community would be prohibited from hearing all cases involving respondents from Africa (id. at 11). She also said that, based on OGC's recusal determination, a Jewish IJ active in an organization such as the Anti-Defamation League would be required to recuse himself from all cases involving "people of Jewish ethnicity or religion" (ibid.). She said OGC's decision was not in accord with agency guidance that contemplates IJ recusal decisions being made on a case-by-case basis (ibid.).

Complainant said that, in making its recusal decision, the OGC mistakenly relied on 5 C.F.R. §2635.502(a), the section of the federal ethics regulations governing "Impartiality in Performing Official Duties." This provision states:

> Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with

> knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

Complainant said that the recusal recommendation and standing order that she not be assigned cases involving Iranian nationals has affected her employment because she is being held to different recusal and disqualification standards than other IJs (ibid.). She said the order prevents her from fully exercising her authority as an IJ and from using her "independent judgment to objectively determine whether to recuse myself from cases as required by applicable authority" (ibid.). She added that the recusal order "has raised a suggestion of wrongful conduct on my part without any basis, resulting in reputational harm, and has otherwise imposed an undeserved stigma on my legitimate and proper outside activities, which nonetheless have always been undertaken with appropriate EOIR approval" (ibid.). Complainant said that in her EOIR career, she has "never been subject to any discipline in my capacity as an Immigration Judge and my employment record with the EOIR supports my positive performance in my current position" (id. at 9).

C. Management's response

1. Jeff Rosenblum said that in July 2012, the ELU was responsible for providing ethics advice to EOIR employees (Ex. 8, p. 3). Rosenblum said that ACIJ Fong forwarded complainant's June 2012 request to attend the White House roundtable meeting and recommended that Rosenblum deny the request (ibid.). Rosenblum said he had several conversations with the Office of the Chief Immigration Judge (OCIJ), as well as complainant, about the issue. He said that he was concerned that complainant would be representing an organization at the White House event and that her appearance might violate 18 U.S.C. §205 which prohibits federal employees from representing third parties before the federal government (ibid.). Rosenblum said that because complainant wanted to attend the event, he tried to ensure she could do so without violating any ethics rules. He said he approved her attendance once she confirmed that she would be attending solely in her personal capacity (ibid.).

Rosenblum said that, because complainant had held herself out to be "'very active in the Iranian-American community,' to

such extent that she received an invitation from the White House to attend this event," he believed she might have an appearance of impartiality issue as it related to hearing cases involving Iranian nationals (ibid.). He said his concern was that, based on complainant's high-profile activities, a reasonable person with knowledge of the relevant facts could question her impartiality in such cases (id. at 4). Rosenblum said he consulted with others in the office, including Associate General Counsel Marlene Wahowiak who had significant experience in the ethics field. He said Wahowiak researched complainant on the internet and agreed that her activities could cause an appearance of impartiality (ibid.). Rosenblum stated that the fact that complainant requested to speak before the White House at the roundtable "was the most significant factor we considered" (Rosenblum's March 20, 2014 response to CAO Request for Supplemental Information).[2] He provided other examples of complainant's "high profile activities," including complainant's requests to speak: 1) at an Iranian-American women's trade fair in March 2012; 2) at the Iranian-American Women's Leadership Conference in October 2011; 3) at the Coalition of Iranian Entrepreneurs in September 2010; and 4) during a teleconference entitled "The Last Minstrel Show? The War on Terrorism, Mass Media and the Middle Eastern Question" in November 2009 (id. at Attachment 1).

Rosenblum added that his ethics determination regarding complainant was not an order, but rather a recommendation based on the ethics rules and the particular facts at issue (Ex. 8, p. 4). He said he did not have the authority to mandate that complainant recuse herself from cases (ibid.). Rosenblum said the recommendation that complainant recuse herself from cases involving Iranian nationals was based solely on her activities and had nothing to do with her national origin, race or religion (id. at 7). He said he would have made the same recommendation if complainant had been involved in high profile activities on behalf of another country (ibid.). He also said he would have recommended that complainant recuse herself from matters involving Iranian nationals regardless of her own country of origin because the concern regarding an appearance of impartiality arose from her activities, not from her country of origin (ibid.).

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2 While complainant was invited to the White House roundtable meeting, there is no indication that she was invited to speak at the meeting.

With regard to his August 28, 2012 statement that OGC had formally recommended that other IJs disqualify themselves from a particular class of matters "in similar circumstances," Rosenblum said OGC has formally recommended that IJs disqualify themselves from a class of cases based on OGC's analysis that the IJs' outside activities would cause a reasonable person with knowledge of the relevant facts to question the IJs' impartiality (Rosenblum's March 20, 2014 response to CAO Request for Supplemental Information). Rosenblum said he was specifically referring to two situations in which OGC formally recommended that IJs disqualify themselves from a particular category of cases based on the fact that those IJs had married individuals who were not legal U.S. citizens (ibid.). Rosenblum said these other matters were similar legally because OGC recommended recusal based on its analysis and interpretation of 5 C.F.R. §2635.502(a), the same ethics regulation it cited in its recommendation that complainant recuse herself from cases involving Iranian nationals (ibid.).

Rosenblum further explained that multiple individuals, including attorneys in DOJ's Ethics Office, were consulted before the ethics opinion was issued in this matter and that EOIR's intent was to issue the proper interpretation of the ethics regulations, not to discriminate against complainant. He added that, had DEO disagreed with EOIR's interpretation of 5 C.F.R. §2635.502(a), EOIR would not have recommended recusal (ibid.).

2. ACIJ Thomas Fong said he was not aware of other IJs being recused from matters as a result of an OGC ethics opinion (Ex. 9, p. 4). Fong said he has had IJs come to him regarding recusal matters and that, in most cases, the IJs made the final recusal decisions themselves (id. at 14). Fong said he believed that Rosenblum's ethics opinion required complainant to recuse herself from cases involving Iranian nationals (id. at 13).

3. Marlene Wahowiak said that, while serving as the Ethics Duty Attorney in the OGC, she had some concerns about complainant appearing before groups at events that seemed to advocate a particular position (Ex. 11, p. 3). Wahowiak said she conducted an internet search using complainant's name and the word "Iran" after discussing her concerns with Rosenblum in August 2012 and came up with 970 search hits (ibid.). Wahowiak said that complainant's faculty profile for the UCLA School of Law listed her as a "leader" in the Iranian-American community (Wahowiak's March 18, 2014 response to CAO's Request for

Supplemental Information). In an August 22, 2012 e-mail she sent to ELU attorney Rena Scheinkman (who was responsible for handling ethics matters at the time), Wahowiak summarized the results of her internet search regarding complainant and recommended that Scheinkman respond to complainant as follows:

> It is clear that you have a prominent role in the Iranian-American community at large. As an advocate/activist for a group which may have a direct interest in a matter before the immigration court, the issue of an appearance of impartiality arises. An appearance of impartiality does not in any way suggest that you have an actual bias. Rather, given that the agency has resources to reassign cases to others without creating an undue burden, it is the opinion of the Ethics Office that out of an abundance of caution this process be followed. Since this is only a recommendation, the final decision on whether you should be recused from cases ultimately rests with ACIJ Fong.

As examples of complainant's high profile activities, Wahowiak cited complainant's participation on a panel at the 2010 Public Affairs Alliance of Iranian Americans (ibid.). A magazine article summarizing the panel said that complainant and another Iranian immigration judge discussed the importance of Iranians getting involved in the politics of this country. According to the article, complainant "mentioned that they are creating change from within the system" (ibid.). Wahowiak cited other articles that identified complainant as an "active member of the Iranian-American community."

4. JuanCarlos Hunt, EOIR's Director of EEO and Diversity Programs, said he served as the Deputy Designated Agency Ethics Official during the relevant period (Ex. 14, p. 3).3 Hunt said that, if the matter had been brought to his attention, he would not have recommended that complainant recuse herself from cases involving Iranian nationals based on the ethics regulations cited by Rosenblum (ibid.). Hunt said the decision was akin to saying that a Hispanic IJ could not hear any cases involving Hispanic respondents if the IJ was active in

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3 There is some dispute in the record as to whether Hunt was actually the DDAEO at the time. Rosenblum said that Hunt left the position of Acting General Counsel to become EOIR's EEO Director in June 2012 (Rosenblum's April 11, 2013 supplemental affidavit, p. 1). Rosenblum said that the DEO confirmed in March 2013 that Hunt was no longer considered the DDAEO once he vacated the Acting GC position.

the Hispanic community (id. at 4). Hunt said that Rosenblum's recusal order was "discriminatory" because the facts did not support such an order pursuant to the relevant ethics regulations (id. at 8).

II. Reprisal claims

A. Complainant's allegations

Complainant alleged that, after she protested the discriminatory recusal order in August 2012, EOIR management officials retaliated against her by restricting her participation in outside speaking engagements. Complainant cited three specific instances of reprisal. First, she said that, on August 27, 2012, she requested to speak at the Iranian-American Women's Leadership Conference. She said that ACIJ Fong and OGC ethics attorneys denied her the ability to use her official title and a disclaimer at the event (Ex. 1, p. 9). OGC attorney Charles Smith approved complainant to speak solely in her personal capacity without use of her official title (Ex. 2, p. 31). Complainant said she spoke at the same conference the previous year, on the same subject ("From Law School to the Bench - How to Create Your Own Path to Becoming a Judge"), and was allowed to use her title and a disclaimer (id. at 44). On September 10, 2012, Smith told complainant that he had confirmed that ACIJ Fong approved her to speak in her limited personal capacity (id. at 34). Smith told complainant that, even though she had been approved to speak in her personal capacity with her title and a disclaimer in 2011, all speaking requests are considered on a case-by-case basis (ibid.).

Complainant claimed that she was subjected to further reprisal on November 28, 2012, when she asked Fong if she could speak on a panel of motivational speakers at the 5th Annual International Business Women Trade Show in March 2013. Complainant said she was asked to discuss her personal and professional background and to offer advice on career choices and opportunities for young people (Ex. 7, p. 7). She said Fong had approved her request to speak at the same show in March 2012 and had allowed her to use her official title with disclaimer. She said Fong approved her request to speak at the 2013 show, but OGC informed her that she could speak only in her personal capacity and could not use her title and a disclaimer (ibid.; December 7, 2012 e-mail from Nina Elliot). Complainant said OGC's decision prevented her from participating as a speaker at the event (Ex. 7, p. 7).

Complainant also said that she received the same restriction from OGC and ACIJ Fong when she requested to speak at a diversity day at a local K-12 school (id. at 8; January 2, 2013 e-mail from Matthew Bradley). She said she was supposed to speak on a panel regarding the changing role of women. She said she had received approval to speak on the same topic with other organizations in the past with the use of her title and a disclaimer (Ex. 7, p. 7). Complainant said she was not aware of such restrictions being imposed on other IJs with respect to their involvement in outside activities (id. at 15).

B. Management's response

1. Jeff Rosenblum said that when the ethics function came under his supervision in February 2012, he trained his attorney staff on the ethics rules regarding outside speaking engagements (Ex. 8, p. 7). Rosenblum said that employees can be approved to speak at events in an official capacity or in their personal capacity in events that do not relate to their official work. He added that IJs have a special third status that allows them to speak in a personal capacity "with title and disclaimer" (ibid.). Rosenblum said this status allows IJs to speak personally about an issue related to their work without EOIR having to approve them speaking in an "official" capacity. Rosenblum said that the final determination is made by the OCIJ (ibid.). In a July 25, 2012 e-mail in response to an IJ question about outside speaking engagements and the difference between "official" v. "personal," Rosenblum stated (Ex. 8.1, p. 34):

> Therefore, most IJs are approved to speak at such events in their personal capacity. If the subject matter relates to an IJ's responsibilities, though, provided that the ACIJ approves, the IJ can use his official title, provided that he also uses the appropriate disclaimer.

Rosenblum said that one of his attorneys in the ELR, Charles Smith, pointed out to him that IJs were being approved to speak "personally with title and disclaimer," even though the subject matter of their presentations did not relate to any official responsibilities (Ex. 8, p. 8). Rosenblum said they agreed this was not appropriate and that IJs should not be able to use their official titles when speaking purely about a matter unrelated to their duties. Rosenblum added that, on April 12, 2012, well before the events that led to this complaint, Smith approved complainant's request to speak at the Spring Conference

of the Pacific Counsel on International Policy (ibid.). He said that in Smith's e-mail to complainant, Smith noted that ACIJ Fong had approved the request for complainant to speak only in her personal capacity without using her title (Ex. 8.1, p. 36). Thus, Rosenblum emphasized that complainant was told she could not use her official title in relation to a purely personal speaking event almost three months before the recusal determination in this matter (Ex. 8, p. 8).

2. Thomas Fong said that complainant has requested many more personal speaking engagements than any other IJ he supervises and he did not recall ever disapproving one (Ex. 9, p. 5). He said he did not recall how many times she had requested to use her official title (ibid.).

3. Charles Smith said that he administered a speaking request for complainant in August 2012 after ACIJ Fong had limited her speaking capacity to "personal" without the use of title and disclaimer (Ex. 10, p. 4). Smith said that in October 2012, he administered a speaking request for complainant to speak at a UCLA immigration law class after Fong had approved the request for complainant to speak in her personal capacity, with the use of title and disclaimer (ibid.; Ex. 10.1, p. 8). Smith said he also administered complainant's request to speak at an Iranian-American Bar Association gala at which she was receiving an award in February 2013 (Ex. 10.1, p. 11). Smith noted in his e-mail to complainant that Fong had approved complainant's attendance at the event in her personal capacity with the use of her title and the appropriate disclaimer (ibid.).

## Analysis

Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16, and 29 C.F.R. §1614.101(a), prohibit discrimination on the bases of national origin, race and religion. In addition, 29 C.F.R. §1614.101(b) prohibits federal employers from retaliating against employees who have engaged in protected EEO activity. In order to find intentional discrimination or reprisal, the preponderance of the evidence in the record must show that management's stated non-discriminatory reason(s) for its actions are not credible, and that management was more likely motivated by complainant's protected traits or her prior EEO activity. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515-517 (1993); McCoy v. WGN Broadcasting, 957 F.2d 368, 371 (7th Cir. 1992). A thorough and objective review of

the record fails to demonstrate that complainant was subjected to discrimination or reprisal.

I. The record fails to establish that complainant was discriminated against based on national origin, race or religion.

To prevail in a disparate treatment discrimination claim, complainant must satisfy the three-part evidentiary scheme first set out by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must first establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. To ultimately prevail, complainant must prove, by a preponderance of the evidence, that the agency's explanation is pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000).

Even assuming without finding that the record establishes a prima facie case of discrimination in this matter, EOIR management officials articulated legitimate, nondiscriminatory reasons for their decision that complainant should recuse herself from all cases before the LAIC involving Iranian nationals. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-256 (1981). OGC attorney Jeff Rosenblum explained that he relied on the relevant ethics rules and made his recommendation based on the fact that complainant was very active in the Iranian-American community and that her activities raised an appearance of impartiality (Ex. 8, p. 3). Rosenblum said that complainant's invitation from the White House to attend the Iranian-American roundtable event in July 2012 "was the most significant factor we considered" in making the recusal recommendation" (Rosenblum's March 20, 2014 response to CAO Request for Supplemental Information). ACIJ Thomas Fong, complainant's direct supervisor and the management official who was the ultimate decision-maker with regard to complainant's recusal from cases involving Iranian respondents, said he believed that Rosenblum's recommendation required complainant to recuse herself from such cases (Ex. 9, p. 13).

Because EOIR management officials provided non-discriminatory reasons for their determination that complainant should recuse herself from all cases involving Iranian nationals, for complainant to prevail on her claim the record

must demonstrate that those stated reasons were a pretext for discrimination based on national origin, race or religion. See Rose-Maston v. NME Hospitals, Inc., 133 F.3d 1104, 1108 (8th Cir. 1998). To discredit EOIR's legitimate, non-discriminatory reasons, the record "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [EOIR's] proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence." Fuentes v. Perskie, 32 F.3d 759, 765 (3rd Cir. 1994).

In an effort to establish that management's proffered reasons were a pretext for discrimination, complainant makes two primary arguments. Her first argument is that OGC's ethics attorneys mistakenly relied on 5 C.F.R. §2635.502(a) in making their recusal determination and that their reliance on that section of the ethics regulations was pretextual (Ex. 1, p. 6). Complainant claims that OGC attorneys improperly interpreted the section broadly to provide for recusal any time a "reasonable person with knowledge of the relevant facts" would question an employee's impartiality. Complainant points out that 5 C.F.R. §2635.502(a) specifically and narrowly allows for recusal:

> Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter (emphasis supplied).

Complainant contends that EOIR did not claim that its recommendation that complainant recuse herself from all cases involving Iranian nationals was based on her having either a "financial interest in a particular matter involving specific parties" or a "covered relationship" with any person who is either a party or representative of a party in a particular matter. Complainant states that 5 C.F.R. §2635.502(a) "requires case-specific recusal determinations based on certain specific relationships between an employee and a party involved and only then, if such particular relationship raises an appearance of impropriety" (November 26, 2013 letter to Mark Gross, p. 3). Complainant argues that EOIR instead issued an open-ended recusal order requiring complainant to recuse herself from any case involving individuals from Iran "without any problematic

link to [complainant's] relationship to any such individual." Thus, complainant argues that 5 C.F.R. §2635.502(a) was not applicable to her situation and EOIR's reliance on it was a pretext for discrimination.

A thorough review of the record, including the applicable ethics regulations, establishes that while 5 C.F.R. §2635.502(a) is worded rather narrowly, EOIR's more expansive interpretation of the regulation does not, without additional evidence, establish that the officials responsible for the recusal determination were motivated by discriminatory animus. In determining whether pretext exists, the issue is not whether EOIR management officials or OGC attorneys made the correct decision with regard to the recusal determination, but whether they honestly believed in the reasons offered for the decision. See Michael v. Caterpillar Financial Services Corp., 496 F.3d 584, 598 (6th Cir. 2007). An employer has an honest belief in its rationale when it "reasonably relied on the particularized facts that were before it at the time the decision was made." Majewski v. Automatic Data Processing, Inc., 274 F.3d 1106, 1117 (6th Cir. 2001). The preponderance of the evidence in this record demonstrates that EOIR officials involved in the recusal determination honestly believed that complainant's outside activities on behalf of the Iranian-American community would cause a reasonable person with knowledge of the relevant facts to question her impartiality in matters involving Iranian nationals. Thus, even if the OGC attorneys responsible for the ethics opinion and the subsequent recusal determination were mistaken in concluding that the provision applied to complainant's situation, this does not automatically establish that EOIR's proffered reasons for the recusal determination were a pretext for discrimination. The objective of the provision, to avoid situations that would cause a reasonable person to question the impartiality of an IJ, applies to complainant's circumstances and there is nothing so unusual or unreasonable about OGC's conclusions to suggest discriminatory animus.

Supporting this conclusion is evidence in the record showing that OGC attorneys made a recommendation that an IJ recuse herself from a class of cases based on a similar interpretation of 5 C.F.R. §2635.502(a) in at least one other matter (Rosenblum's April 11, 2013 supplemental affidavit, Attachment 5). In November 2012, an Armenian IJ was extended an invitation to attend a private roundtable meeting of Armenian organizations with the United States Ambassador to Armenia. On November 29, 2012, Rosenblum issued an ethics opinion letter to the IJ, granting approval for the IJ to attend the meeting in

her personal capacity. In the letter, Rosenblum recommended that the IJ "disqualify yourself from any matter involving individuals from Armenia that comes before you in your capacity as an Immigration Judge." As he did in making the recusal determination in complainant's case, Rosenblum cited 5 C.F.R. §2635.502(a) and stated that "an employee should not participate in a matter in which 'circumstances would cause a reasonable person with knowledge of the relevant facts to question [her] impartiality in the matter'" (ibid.). The DEO ultimately decided that the IJ could not attend the meeting with the ambassador (id., Attachment 6). While it is recognized that this opinion letter post-dates complainant's protests regarding her recusal order and her October 2012 contact with an EEO Counselor, the opinion letter provides some evidence that OGC consistently interpreted 5 C.F.R. §2635.502(a) in a broad manner.

Moreover, on July 11, 2011, nearly a year before the recusal recommendation in complainant's case, the OGC issued an ethics opinion regarding an IJ who had recently married a Peruvian national who had overstayed his visa and was not a legal U.S. resident (Rosenblum's March 20, 2014 supplemental statement, Attachment 2). The OGC found that the IJ had not violated ethics laws or regulations, but Ethics Officer Brigette Frantz added in the letter "we are still concerned about the appearance of a loss of impartiality and the appearance of impropriety" (ibid.). Frantz recommended that the IJ be recused from certain categories of cases during the pendency of her spouse's immigration case to minimize the appearance of impropriety and loss of impartiality in the matter. In discussing the application of 5 C.F.R. §2635.502(a), Frantz stated, "[t]he regulation further provides that an employee who is concerned that circumstances other than those specifically described in the regulations would raise a question regarding his impartiality should also consider whether a reasonable person with knowledge of the relevant facts would question his impartiality" (ibid.). Again, while the recusal recommendation in that case was limited to the pendency of the spouse's immigration matter, Frantz's opinion provides further evidence that in circumstances not exactly as specified in 5 C.F.R. §2635.502(a), OGC attorneys nevertheless applied the section, rationalizing that the circumstances fit within the overall goal of needing to appear impartial. It was this expansive interpretation of 5 C.F.R. §2635.502(a) that led to the recusal determination in complainant's case and there is no evidence that any EOIR official involved in the determination harbored discriminatory animus.

Complainant also argues that EOIR's determination that she was involved in "high profile activities" in the Iranian-American community that would lead a reasonable person to question her impartiality was a pretext for discrimination based on national origin, race or religion. Complainant argues that EOIR failed to explain why the White House roundtable event in June 2012 would provide a basis for anyone to question her impartiality, and also failed to provide evidence of any other such "high profile activities." Rosenblum explained that, because complainant had held herself out to be very active in the Iranian-American community to the extent that she received an invitation from the White House to attend the July 2012 roundtable event, he believed she might have an issue regarding an appearance of impartiality in cases involving Iranian respondents (Ex. 8, p. 3). Rosenblum said the invitation to the White House roundtable with Iranian-American community leaders was the "most significant factor we considered." Marlene Wahowiak said her August 2012 internet search uncovered a number of articles or interviews in which complainant was referred to as an "active member of the Iranian-American community" and that complainant's UCLA School of Law faculty profile referred to her as a "leader" in that community (Wahowiak's March 18, 2014 supplemental statement). Significantly, in her e-mail to ACIJ Fong requesting permission to attend the White House event, complainant stated that she was invited to the White House based on the fact that she was "very active in the Iranian-American community" (Ex. 2, p. 21).

It certainly appears that the June 2012 invitation to the White House roundtable for Iranian-American community leaders was the impetus for EOIR's questioning whether complainant's activities on behalf of the Iranian-American community might raise an appearance of impartiality. As both Rosenblum and Wahowiak noted, it was not a burden for EOIR to reassign complainant's cases involving Iranian nationals because those cases only involved a small fraction of her overall caseload. Complainant told Fong she only had seven such cases on her docket at the time. Moreover, Rosenblum explained that the fact that complainant had always had her outside activities vetted through the ethics process, and that management had never raised any concerns before, did not change the fact that her active participation in the Iranian-American community - as evidenced by her high profile invitation from the White House - caused appearance concerns.

Importantly, the fact that complainant had been permitted to participate in such outside activities on the behalf of the

Iranian-American community during her more than seven year career as an IJ before EOIR raised any concerns regarding a possible appearance of impartiality tends to support management officials' claim that their determination in this case was not based on discriminatory concerns. In fact, EOIR's approval of complainant's attendance at the White House roundtable in June 2012 would certainly appear to dispel any notion that management officials harbored discriminatory animus towards her based on complainant's Iranian national origin. One would think that if such animus existed, the OCIJ would have simply denied her request. Rosenblum also pointed out that if complainant's participation in previous outside activities would have necessitated large-scale recusals, her activities would not have received ethics approval (Ex. 8.1, p. 1). Even if EOIR officials were overly cautious in recommending recusal based on complainant's activities, there is no evidence that either the OGC attorneys involved in the recommendation, or ACIJ Fong who was complainant's direct supervisor and the official ultimately responsible for the recusal order, were motivated by discriminatory animus.

Complainant further contends that a finding of national origin discrimination is warranted in this matter because EOIR admitted that its recusal order was solely motivated by complainant's association with the Iranian-American community (November 26, 2013 letter to Mark Gross, p. 4). However, as stated above, while EOIR management officials were certainly concerned with complainant's outside activities related to the Iranian-American community, the decision to recommend recusal was based not on those activities themselves, but on the OGC's opinion that complainant's involvement in those activities raised an appearance of impartiality under their interpretation of 5 C.F.R. §2635.502(a). Thus, as Rosenblum stated, OGC's advice would have been the same if complainant had been of a different national origin but still actively involved in the Iranian-American community. Again, even if OGC reached the wrong conclusion in this matter - and it is important to note that Rosenblum's conclusion regarding recusal was fully supported by the DEO - the record establishes that EOIR honestly believed that complainant's activities created an appearance of impartiality and that her recusal from cases involving Iranian-American nationals was warranted. Moreover, it should be noted that EOIR's EEO Director JuanCarlos Hunt's opinion that OGC's recusal determination was "discriminatory" and that he would not have approved the decision had he been asked for his opinion is not dispositive in this matter. Hunt's disagreement with both OGC's and DEO's interpretation of the applicable ethics

regulation does not establish that OGC's interpretation and the subsequent recusal determination was discriminatory.

In a further attempt to establish that EOIR management officials' proffered reasons were a pretext for discrimination, complainant raises the question of whether either an African-American IJ involved in the African-American community, or a Mexican IJ involved in the Mexican-American community, would have been similarly prohibited from hearing cases involving respondents from Africa or Mexico. Complainant stated that at the time of the recusal order "[n]o similar action had been taken against any other Immigration Judge to the best of her knowledge" (id. at 5). However, complainant provided no evidence of IJs who were similarly prominent in their respective communities and who were treated differently. Nor is there evidence that a similar issue had ever arisen in the LAIC. Without such evidence, complainant's speculative argument that she was treated disparately from IJs of other nationalities is insufficient to overcome management's proffered reasons for issuing such a recusal order in this case. The record demonstrates that EOIR officials consistently interpreted 5 C.F.R. §2635.502(a) in a broad manner and that they honestly believed complainant's outside activities warranted her recusal from the small fraction of cases in the LAIC involving Iranian respondents.

While complainant also stated that she believed she was discriminated against based on her Muslim religion, the record contains no evidence that EOIR management officials considered complainant's religion in making their recommendation for recusal. The recusal order only affected complainant's cases involving Iranian respondents. It did not affect her cases that may have involved Muslims from other countries.

II. The record fails to establish that complainant was subjected to reprisal.

Complainant claims that after she protested OGC's recusal recommendation in August 2012, EOIR retaliated against her by restricting her participation in outside activities. She said that, on three occasions after she protested Rosenblum's recusal recommendation on August 20, 2012, EOIR denied her the ability to speak at outside conferences in her personal capacity with the use of her title and a disclaimer (Ex. 7, p. 7). Complainant alleged that, prior to protesting the recusal recommendation, she had been allowed to use her title and a

disclaimer while speaking at the same events and/or on the same topics.

Even assuming for purposes of discussion that complainant's claim establishes a prima facie case of reprisal, EOIR ethics officials articulated legitimate, non-retaliatory reasons for their decisions regarding complainant's outside speaking engagements. Jeff Rosenblum said that, sometime after he took over the OGC's ethics responsibilities in February 2012, he and ELR attorney Charles Smith discussed the fact that IJs were receiving approval to speak in their personal capacity "with title and disclaimer" even though the subject matter of their presentations did not relate to the IJs' official duties (Ex. 8, p. 8). Rosenblum said that they agreed that IJs should not be permitted to use their official titles when speaking about a matter unrelated to their duties, but added that the ultimate decision is made by the requesting IJ's supervisor.

The record fails to demonstrate that EOIR ethics officials' proffered reasons for their approval decisions with regard to the three speaking engagements complainant referenced were a pretext for reprisal. While complainant claims that she was not allowed to use her official title during these speaking engagements because she protested the recusal order and raised the possibility of discrimination in August 2012, a review of the record establishes that EOIR's decisions with regard to the use of her official title were consistent with Rosenblum's explanation and with decisions made prior to her EEO activity.

Regardless of whether complainant was permitted to use her official title during similar speaking engagements in 2011, Rosenblum explained that he and Smith determined in 2012 that IJs should not be permitted to use their official titles when they were speaking on matters unrelated to their official duties. Significantly, in April 2012, nearly four months before complainant engaged in any EEO activity, she requested to moderate a panel at a meeting of the Pacific Counsel on International Policy on the topic of "Democracy, Corruption and Law Across Borders" (Ex. 10.1, p. 2). This topic was unrelated to complainant's official duties as an IJ. Charles Smith, the same OGC ethics attorney who authored the ethics opinion for two of the speaking engagements complainant cited in her retaliation claim, granted complainant approval to appear, but only in her personal capacity without use of her official title (ibid.). Smith noted that ACIJ Fong had also approved complainant's appearance in her personal capacity without use of her official title. The fact that complainant was not permitted to use her

official title at a speaking engagement on a topic unrelated to her official duties prior to her EEO activity certainly weakens her claim that EOIR's decisions regarding the three speaking engagements after August 2012 that form the basis of her reprisal claim were motivated by retaliatory animus.

Moreover, management's decision regarding complainant's appearance at the White House roundtable event in June 2012, which was also made prior to any EEO activity on complainant's part, provides further support for a finding that such decisions were based on the discussion topic and the nature of the event. As is the case with the speaking engagements at issue in the reprisal claim, Rosenblum granted complainant approval to participate in the White House event in her personal capacity without use of her official title. Thus, evidence in the record demonstrates that EOIR officials made similar determinations regarding complainant's speaking engagements prior to her involvement in any EEO activity.

A review of the speaking engagements in question demonstrates that it was the topics of the discussions, not complainant's EEO activity, that were the determining factors in whether complainant was permitted to use her official title with a disclaimer, or whether she had to appear solely in her personal capacity without use of her title. This is consistent with Rosenblum's explanation that the ethics office began to handle these matters differently in 2012. The topic for the Iranian-American Women's Leadership Conference in September 2012 was "From Law School to the Bench - How to Create Your Own Path to Becoming a Judge" (Ex. 1, p. 9). With regard to the International Business Women Trade Show in March 2013, complainant was asked to serve on a panel of motivational speakers to offer advice on career choices and opportunities for young women (Ex. 7, p. 7; December 7, 2012 e-mail from EOIR attorney Nina Elliot). Finally, complainant was asked to join a panel discussion at the Brentwood School in February 2013 to discuss "The Changing Role of Women" (Ex. 7, p. 8; January 2, 2013 e-mail from EOIR attorney Matthew Bradley). There is no indication that any of these speaking engagements involved a discussion related to complainant's official duties as an IJ. Thus, OGC's decisions to permit her to appear only in her personal capacity without use of her title was consistent with Rosenblum's statement regarding the discussion he had with Charles Smith.

Management's proffered position for its decisions regarding complainant's use of her title during speaking engagements is

further bolstered by the fact that complainant was allowed to participate in speaking engagements using her official title after August 2012 where the topic was related to her official duties. Specifically, in October 2012, complainant requested permission to serve as a guest speaker at a UCLA Immigration Law class to discuss a day in the life of an IJ (Ex. 10.1, p. 8). Charles Smith approved her request to speak in her personal capacity with the use of her title and a disclaimer. Moreover, in February 2013, Smith and ACIJ Fong approved complainant's request to accept an award and give a short speech at an Iranian-American Bar Association gala (id. at 13). Again, complainant was approved to appear in her personal capacity with the use of her title and a disclaimer. A review of the totality of these matters indicates that EOIR officials based their decisions on the nature of the event and the topic of discussion, not on the fact that complainant had engaged in EEO activity. Thus, complainant's claim that she was subjected to reprisal after she protested her recusal order in August 2012 fails.

## Decision

Based on the foregoing reasons, the preponderance of the evidence in the record fails to establish that complainant was discriminated against based on national origin, race or religion when she was ordered to recuse herself from cases involving Iranian nationals in August 2012. The record also fails to establish that complainant was subjected to reprisal after she protested the recusal order. Relief is denied.

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