

TOPIC

Allegations of Reprisal when Complainant is not the one making a Protected Communication.

TEXT OF THE DECISION

We reviewed the referenced Inspector General (IG) Report of Investigation (ROI) as approved by the Secretary of the Air Force Complaints Resolution Directorate (SAF/IGQ) addendum, dated 8 Mar 18. The case includes one allegation of reprisal against one Responsible Management Official (RMO). The Investigating Officer (IO) and SAF/IGQ concluded the allegation was **NOT SUBSTANTIATED.**

BACKGROUND

Complainant was assigned as the readiness flight commander and his wife was assigned as the squadron superintendent. In late fall 2014, a “walkabout” survey of the squadron by the wing Equal Opportunity office revealed a deep and widespread level of discontent with Complainant's wife. The Squadron Commander (Sq/CC) and RMO in this case, scheduled a follow-up organizational climate assessment, which also indicated Complainant's wife had created a hostile and toxic work environment. In January 2015, the Sq/CC fired Complainant's wife from her superintendent position. On 30 Jan 15, Complainant's wife contacted the IG and on 13 Mar 15, she submitted a completed AF Form 102, alleging reprisal.¹

In January 2015, the Sq/CC moved complainant from the readiness flight to the logistics flight after Complainant requested the move. On 24 Jun 15, Complainant nominated himself for Squadron Company Grade Officer of the quarter (CGOQ). He won the award for the Squadron. The Squadron First Sergeant ran the Squadron awards program; around 1 July 15, he forwarded Complainant's package to the Group Command, to compete at the Group level. Around 8 Jul 15, the Sq/CC learned for the first time that Complainant was the Squadron CGOQ nominee. The Sq/CC believed that Complainant should not have been her squadron's nominee for the quarter because he had struggled as he transitioned to leading the logistics flight, and she did not believe an award was “indicative of his performance over the quarter.”² The Sq/CC admitted being absent from the awards process, stating, “if I had done my job, I would not have allowed the package to be graded.” The Sq/CC directed the Squadron First Sergeant to pull Complainant's nomination package from the Squadron award competition. Though not yet publicly announced, the nominations had already been judged and Complainant had won CGOQ for the Squadron. The Sq/CC spoke with the Group Commander, who agreed she could pull Complainant's package from consideration.

On 16 Jul 15, a captain from the same squadron, not Complainant, was named the CGOQ for the Squadron. Multiple individuals in the Squadron, including the Squadron First Sergeant, told Complainant that he had won the CGOQ award for the Squadron, but that the Sq/CC had pulled

¹ Complainant's wife's reprisal allegations were not substantiated.

² Other witnesses interviewed during this investigation concurred with this view.

his award. Complainant's performance report for the period 16 Nov 14 – 15 Nov 15 lists his squadron CGOQ award, but not the group award. On 11 Feb 16, Complainant submitted an AF Form 102, alleging that the Sq/CC pulled his CGOQ award in reprisal for his wife's IG complaint³ after the Sq/CC fired her from the squadron superintendent position.

GUIDANCE

10 U.S.C. § 1034 prohibits retaliatory personnel actions against service members who make Protected Communications (PCs). "No person may take...an unfavorable personnel action...as a reprisal against a member of the armed forces for making or preparing or being perceived as making or preparing [a PC]." ⁴ The statute specifically defines who can receive PCs,⁵ mandates that IGs investigate allegations of personnel actions taken in reprisal,⁶ and provides a list of PCs that IGs "shall not exclude" from protection.⁷ This list does not include communications not made by the person alleging reprisal. The Military Whistleblower Protection Act does not contemplate protecting anyone other than the person blowing the whistle, with the exception of those who later testify, participate, or assist in investigations, proceedings, or actions brought under the statute.⁸ Department of Defense and Air Force Regulations reflect this framework and contain the same limitations.⁹ The protections prohibit retaliation against individuals who make PCs.

DISCUSSION

We concur the preponderance of the evidence supports the IO's findings that Complainant's allegations are not substantiated, but for the reasons noted in the SAF/IGQ addendum, not those in the ROI. The IO "attributed" Complainant's wife's PCs to Complainant, found the Sq/CC withheld a favorable personnel action, and that she had knowledge of Complainant's wife's PCs.¹⁰ However, the IO also found that her withdrawal of Complainant's award nomination was reasonable and not made in reprisal.¹¹ We agree with SAF/IGQ that because Complainant did not make a PC before the Sq/CC pulled his CGOQ award, his complaint cannot be substantiated for reprisal.

Complainant specifically alleged the Sq/CC reprised against him in July 2015 because his *wife* made a PC in February 2015. The investigation did not disclose, and Complainant does not allege, the Sq/CC reprised against him because *he* made a PC. Complainant's first documented PC in the

³ There is no record Complainant's wife contacted the IG on 20 Feb 15 as listed on the AF Form 102, but she did make protected communications during this general time period.

⁴ 10 USC §1034 (b)(1)

⁵ 10 USC § 1034 (b)(1)(B), broadened in AFI 90-301 under the authority of 10 USC §1034 (b)(1)(B)(vi)

⁶ 10 USC § 1034 (c)

⁷ 10 USC § 1034 (c)(3)

⁸ 10 USC § 1034 (b)(1)(c)

⁹ See DoDI 7050.06, para 3(a)-3(c) and AFI 90-301's definition of PCs

¹⁰ The evidence supports a finding that the Sq/CC knew Complainant's wife made, or prepared to make PCs complaining about issues other than the Sq/CC's actions. There is no evidence the Sq/CC knew Complainant's wife made PCs about her, including the 20 Feb 15 PC listed in complainant's AF Form 102.

¹¹ Although not necessary to SAF/IGQ's analysis, we note that the IO's findings that the Sq/CC pulled Complainant's CQOG award because of her lack of oversight and because his duty performance did not warrant it, not in reprisal for PCs, is supported by the preponderance of the evidence.

ROI was on 11 Feb 16, seven months after the Sq/CC pulled his award.¹² There is no evidence that complainant made, prepared to make, or was perceived as having made or prepared a PC prior to losing his CGOQ award.

Nor did the investigation disclose, and Complainant does not allege, that he encouraged, participated in, or assisted his wife in filing her own IG complaint, or that he was perceived as having done so. In fact, the investigation supports the opposite conclusion. The Sq/CC excluded discussion of Complainant's wife during her flight commander's hot wash of the climate assessment that led to her firing, threatening to punish rumor spreading. Although the Sq/CC would ask Complainant how his wife "was doing," Complainant asked her to not talk about his wife because he "did not feel comfortable sharing his personal life with her." The Sq/CC testified that she did not suspect Complainant of making a PC, that he maintained his composure during what was surely a personally difficult time in his life and marriage, and never displayed unhappiness at work. By all accounts Complainant remained distant from his wife's PCs and the personnel actions that drove her complaint.

The facts of this case do not support a conclusion that Complainant was reprimed against in violation of 10 USC § 1034. Both the Air Force and DoD tests for reprisal begin with the question of whether the member/complainant made a PC, because this is who the law protects—complainants who make PCs. Congress has determined the breadth, and limits, of reprisal protections. These protections are not unclear or absurd, and they do not extend to cases, such as this one, where the member alleging reprisal did not make a PC prior to the personnel action. Should Congress chose to extend whistleblower protections to friends, family, or co-workers of those who make PCs, they could certainly do so, but because they have not, complainant's allegations cannot be substantiated.

CONCLUSION

The framed allegation has been addressed and alleges a violation of law, regulation, or policy. The IO did not correctly apply the preponderance of the evidence standard in arriving at his findings, but the SAF/IGQ addendum corrects the investigation's deficiencies. The ROI, with its addendum, is supported by and consistent with the evidence. The investigation complied with all applicable legal and administrative requirements. We concur with SAF/IGQ's analysis that the allegation is **NOT SUBSTANTIATED** for reprisal.

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¹² According to the Sq/CC, shortly before his PCS in January 2016, complainant expressed dissatisfaction with how she handled the complaints against his wife. It's unclear whether those comments rose to the level of a PC, but they also occurred months after alleged reprisal action.