U.S. Department
of Transportation
Federal Aviation Administration

Western-Pacific Region
Office of Civil Rights

777 S. Aviation Blvd., Suite 150
El Segundo, CA 90245

April 11, 2019

Jessica Rogers
Assistant City Attorney
City of Rapid City
300 Sixth St.
Rapid City, SD 57701-2724

Re: Complainant v. Rapid City Regional Airport
DOT #: 2018-0292

Dear Ms. Rogers:

This letter is in response to complaint DOT# 2018-0292, against the City of Rapid City, the airport sponsor for Rapid City Regional Airport (RAP). The Federal Aviation Administration (FAA) opened an investigation for this complaint on July 24, 2018, and received the City's written response on August 27, 2018. The FAA has completed its investigation.

Complainant alleges that the City retaliated against her for filing an earlier civil rights complaint alleging discrimination on the basis of sex in violation of the Airport and Airway Improvement Act of 1982 (49 U.S.C. § 47123). That complaint was filed with FAA on January 30, 2018, and investigated as complaint DOT# 2018-0107.

The complainant's specific allegations under complaint DOT# 2018-0292 are as follows:

1. On March 21, 2018, the City withdrew a settlement offer, made before the January 30, 2018 complaint, for damages and corrective actions related to a separate fuel farm incident.
2. The City initially denied the complainant's request to be included in the May 8, 2018 Airport Board meeting agenda, and thereafter failed to make related documents available to the public and interfered with complainant's presentation to the Board through repeated interruptions and disparaging comments.
3. The City removed members from the Board that appeared supportive of the complainant's positions.

In addition, in the course of our investigation for complaint DOT# 2018-0292, we became aware of a disagreement between Complainant and the City concerning a request for government documents, related to allegation #3, above. The allegations related to the disagreement raise serious issues that may require a separate complaint investigation.

FAA Jurisdiction for Complaint Investigation

The FAA Airport Nondiscrimination Compliance Program is responsible for investigating complaints that allege discrimination by recipients of Federal assistance on the basis of race, color, national origin, sex, creed, or age, as well as related acts of retaliation, in violation of Federal law.

At the time of the alleged retaliation, the City was a recipient of Federal financial assistance from FAA. FAA awarded $805,000 in FAA Airport Improvement Program (AIP) grants to the City for RAP in Fiscal Year 2018. AIP recipients commit that they will ensure against discrimination as a grant program condition. The City continues to be subject to 49 U.S.C. § 47123 and FAA jurisdiction based on its commitments and as a condition of receiving Federal assistance.

At several points in its August 27, 2018 response, the City indicates that allegations are not related to any discrete Federally-funded activities[1]. The implication is that Federal nondiscrimination requirements would not apply absent direct Federal funding for the activity. Before addressing the substance of the allegations, it is therefore necessary to clarify that receipt of Federal funds for RAP obligates the City to comply with nondiscrimination requirements in all airport actions. This is a fundamental requirement of Federal recipients, addressed among other instances, in AIP Grant Assurances 30, which states, "if the sponsor has received a grant (or other federal assistance) for any of the sponsor's programs or activities, these requirements extend to all of the sponsor's programs or activities[2]." The Civil Rights Restoration Act of 1987 (P.L. 100-259, 102 Stat. 28), as clarified by the requirements in Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendment Act of 1972, and the Age Discrimination Act of 1975, extends compliance requirements to all portions of the recipient's program or facility, including those portions that do not receive Federal funding directly.

Requirements for Preventing Retaliation

Anti-discrimination statutes contain an implied cause of action for retaliation based on the general prohibition against intentional discrimination. *See, e.g., Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 173 (2005) ("Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action"); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (a prohibition on racial discrimination includes an implicit prohibition on retaliation against those who oppose the discrimination); *Gomez-Perez v. Potter*, 553 U.S. 474, 479 (2008) (Age Discrimination in Employment Act prohibitions for age discrimination implicitly cover claims of retaliation for filing an age discrimination complaint). In *Jackson*, the Court also noted that the

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[1] See page 3, concerning allegation 1: "[Complainants] have not been denied access to any federally funded program or service." See page 4, concerning allegation 2: "[Complainants] were in no way harmed or denied a federally funded service by the delay in making their request publicly available."

[2] See https://www.faa.gov/airports/aip/grant_assurances/ and Airport Improvement Program (AIP) Grant Assurances, 79 Fed. Reg. 18755 (April 3, 2014).

statute itself supplies sufficient notice to a recipient that it cannot retaliate against those who complain of discrimination, requiring no separate regulation. *Jackson*, 544 U.S. at 183.

In order to make a preliminary showing of retaliation, the complainant must present evidence that (1) she engaged in protected activity of which the City was aware; (2) the City took a significantly adverse action against her; and (3) that a causal connection exists between her protected activity and the City's adverse action. *See Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003); *Emeldi v. Univ. of Oregon*, 673 F.3d 1218, 1223 (9th Cir. 2012); *Palmer v. Penfield Cent. Sch. Dist.*, 918 F. Supp. 2d 192, 199 (W.D.N.Y. 2013); *Kimmel v. Gallaudet Univ.*, 639 F. Supp. 2d 34, 43; *Hickey v. Myers*, 852 F. Supp. 2d 257, 268 (N.D.N.Y. 2012); *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71, 84 (D.D.C. 2003).

Filing the complaint that was investigated as DOT# 2018-0107 qualifies as a protected activity of which the City was aware.

Prohibited adverse actions are those that would deter a reasonable person from bringing or supporting a charge of discrimination. *See, e.g., Jackson*, 544 U.S. at 179 (giving coach negative evaluations and firing him are adverse actions); *Burlington*, 548 U.S. at 68, 70 (reassigning employee to a less desirable job and suspending her for 37 days without pay are adverse actions); *Palmer*, 918 F. Supp. 2d at 199 (denial of tenure is an adverse action). However, the actions must be more than trivial harms, minor annoyances, or petty slights. *Burlington*, 548 U.S. at 68; *Morales v. N.Y. Dep't of Labor*, 865 F. Supp. 2d 220, 256 (N.D.N.Y. 2012) (plaintiff alleged only "petty slights"), *aff'd*, 530 Fed. App'x 13 (2d Cir. 2013).

Causal connection between the complaint and adverse action can be shown by direct or circumstantial evidence, particularly timing. *See, e.g., Loudermilk v. Best Pallet Co.*, 636 F.3d 312, 315 (7th Cir. 2011) ("an adverse action [that] comes so close on the heels of a protected act that an inference of causation is sensible"); *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997) ("the timing of the alleged retaliatory action must be 'unusually suggestive' of retaliatory motive before a causal link will be inferred."); *Palmer v. Penfield Cent. Sch. Dist.*, 918 F. Supp. 2d 192, 199 (W.D.N.Y. 2012) (allegation that denial of tenure "swiftly followed" complaint about discrimination supported claim of retaliation).

As a sub-set of intentional discrimination claims, there are affirmative defenses for retaliation allegations. Once the *prima facie* case of retaliation is made, the recipient can show a substantial legitimate nondiscriminatory reason in defense of the practice. That reason must then be evaluated to ensure it is not merely pretext for a discriminatory motive. *See Georgia State Conference v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Analysis of Complainant's Retaliation Allegations

Complainant alleges that the Airport Director, Mr. Dame, and the City Attorney, Mr. Landeen, were the principal actors engaged in retaliation. Specific allegations are addressed individually, below.

Notably, the original underlying allegation of discrimination, which led to the retaliatory conduct, does not need to be proven in order to make a retaliation claim. Consequently, our office's finding that the City was in compliance through our investigation of DOT# 2018-0107 does not preclude a finding of retaliation for the present complaint.

Though requested in the course of our investigation, the City was unable to provide any documentation of policies or trainings concerning retaliation.

First Retaliation Allegation

The City proposed a settlement agreement related to an earlier fuel farm incident on January 9, 2018. According to the City's response, Mr. Landeen became aware of complaint DOT# 2018-0107 with our office on or about February 20, 2018. Complainant made a counter-offer for the fuel farm settlement agreement on March 2, 2018[3]. Mr. Landeen explicitly rescinded the January 9, 2018 settlement offer on March 21, 2018[4]. The City also refused to resume settlement negotiations until after the conclusion of our office's investigation

In its August 27, 2018 response, the City contends that it initially took reasonable measures to keep the fuel farm settlement issue and related discussions separate from the DOT# 2018-0107 matter, in the hope that negotiations for the fuel farm issue, which had been ongoing for nearly 2 years, could continue as before. After receipt of the notification for DOT# 2018-0107, the parties met on February 23, 2018 – the City was represented by Airport Board members, Bill Eldridge and Shawn Gab. According to the City, it was Complainant's March 2, 2018 counter-offer, not receipt of the complaint notification, that caused the City to suspend negotiations.

The City contends that upon receipt of the counter-offer, they became concerned that the DOT# 2018-0107 investigation would substantially impact their negotiating position. They believed that Complainant filed complaint DOT# 2018-0107 with the intent of altering the parties' negotiating positions, as evidenced by Complainant's negotiation tactics, which included several conditions in the counter-proposal directly related to complaint DOT# 2018-0107 and a related demand for admission of wrongdoing. The City's response to our investigation indicated that they were willing to restart negotiations once the investigation for DOT# 2018-0107 was concluded and that they

[3] The Complainant's counter-offer differed from the City's offer in proposing that the City finance additional airport improvements and issue an apology. It also removed requirements to enter into mediation.

[4] The City's offer was implicitly rejected by Complainant upon issuance of Complainant's counter-offer.

never foreclosed the possibility of considering future settlement proposals, even while the investigation was pending.

Complainant's allegations point to evidence supporting a *prima facie* showing of retaliation. The City's offer was rescinded and negotiations discontinued in sufficiently close temporal proximity – about 1 month – after the City became aware of complaint DOT# 2018-0107. The close proximity provides circumstantial evidence of causation. Further, discontinuation of settlement discussions, which might have yielded significant benefits to the complainant, would likely deter a reasonable person from taking a protected action.

However, the City provided a legitimate nondiscriminatory reason for its decision to discontinue settlement negotiations. It was foreseeable that the parties' bargaining positions could be affected by the outcome of our decision related to DOT# 2018-0107. Complainant's March 2, 2018 counter-offer attempted to link the two issues[5]. Consequently, there was a risk that the City might concede more through negotiating an early resolution of the fuel farm issue than if they postponed it. Although it would have also been reasonable to accept the risk, there is no reason to believe that the City's explanation was mere pretext for a retaliatory motive. Consequently, we are unable to conclude that the City's actions related to the settlement offer were taken in retaliation for Complainant filing complaint DOT# 2018-0107 with our office.

Second Retaliation Allegation

Complainant alleges that she had to submit multiple emails to be placed on the May 8, 2018 Airport Board meeting agenda. After being placed on the agenda, Complainant alleges that Mr. Dame removed Complainant's submitted materials. Consequently, the public and the Board members did not have Complainant's information at the meeting. In addition, at the Board meeting, Complainant alleges that she was interrupted multiple times by Mr. Landeen. She believed that Mr. Landeen's intention was to embarrass her.

The City concedes that there are no clear policies or procedures for how a tenant can get on an Airport Board meeting agenda. However, in their email discussions related to the request, Mr. Dame promptly indicated that for any requested Board action, a summary letter or memorandum was required. The City also indicated that staff prepares a memorandum for any Board action related to an agenda item. On Friday, May 4, 2018, Complainant submitted a short request to discuss the fuel farm issue at the Tuesday, May 8th Board meeting[6]. Mr. Dame responded on Sunday, May 6th, indicating that a summary was required. Complainant responded that same day, and provided further clarification on Monday, May 7th, that included a proposal to repair a gate, in addition to some ancillary items. The Board memorandum was completed on May 7th, and along with the other materials and information provided by Complainant, was made available to Board

[5] The linkage may have been unavoidable since our office's DOT# 2018-0107 complaint notification letter included several references to lease terms for the same facilities at issue in the negotiations.

[6] See May 4, 2018 email from Don Rydstrom to Dame Patrick stating only "We are of the opinion that what we have to say will require Board action which can't be done in the Public Comment category."

members and the public at the meeting the next day. According to the City's response, Complainant's materials and the memorandum were not timely posted with other meeting information on the Board's website, because the memorandum was not complete in the time for the posting.

Ultimately, the Board met and took up the issue proposed by the complainant. The Board adopted a motion to move forward with several logical steps prior to taking a specific action related to the repair. They included verifying the findings from a related audit and the related legal obligations. Based on our review of a 15-minute recording of the proceedings, the discussion was not particularly contentious, and it appeared that all participants were able to make lengthy presentations without interruption. At one point, a participant, identified as Mr. Landeen in the City's response, made a brief remark about the timing of Complainant's request, within a larger point about needing more information about the need for the requested action. In response, Complainant indicated taking offense at any insinuation that the proposed action was related to either her complaint with our office, contract negotiations, or pending legal action. It is not clear that Mr. Landeen was referencing DOT# 2018-0107, and Complainant's remarks point to other possible meanings as well. Nobody responded to Complainant's point of taking offense, made over a 15-second portion of her 4-minute presentation, and the discussion returned to the substance of the proposal and how to address it, for the duration of the recorded conversation.

The discussion of timing in the recording was a momentary aside, in which two viewpoints were expressed – though only Complainant spoke at any significant length on the topic – and no speaker was cut short. Neither the exchange nor the circumstances under which the Board was provided supporting documents had an apparent effect on the action taken by the Board, which, based on other discussion in the recording, was taken out of a concern that the issues be fully understood and efficiently addressed.

Complainant's allegations point to some evidence of causation, supporting a *prima facie* showing of retaliation. As with the first allegation, the timing of the events related to the Board meeting provides circumstantial evidence of causation. Further, a possible allusion to the complaint was made during the Board meeting itself, in Mr. Landeen's comment. Similarly, blocking access to the Board, a negative response from the Board, and publicly humiliating conduct could each qualify as adverse conduct that would deter a reasonable person from taking a protected action.

However, Complainant has the burden of showing an adverse action to support a *prima facie* case of retaliation. The City's response includes persuasive evidence contradicting Complainant's allegations of adverse actions. The Board ultimately received all required materials, in spite of some minor inconveniences that seem typical for a late addition to the agenda for a public board meeting. There is no evidence that Complainant was impeded from getting onto the Board agenda – rather, RAP administration appeared to accommodate Complainant's late request despite the inconvenience. Based on our review of the recording, it does not appear that Complainant was interrupted, and there were no clearly disparaging comments. Taken in the most favorable light to support

Complainant's allegation, Mr. Landeen's comments still do not rise above petty slights. Consequently, we are unable to conclude that the City's actions were sufficiently adverse or were in retaliation for Complainant filing complaint DOT# 2018-0107 with our office.

Third Retaliation Allegation

According to the City's response, the Airport Board is comprised of five members, all appointed by the City Mayor, with confirmation from the City Common Council. The Mayor has authority to remove any member at any time.

Complainant alleges that two Board members who wanted to resolve disagreements with Complainant were removed and replaced with other Board members in May 2018. Based on the City's response, the two referenced Board members were apparently William Aldridge and Ronald Johnson. Based on our review of related correspondence, Mr. Aldridge resigned at the Mayor's request, based on a poor relationship with Mr. Dame, and Mr. Johnson resigned because he had not yet been reappointed at the conclusion of his standard term. It is unclear why he was not reappointed. The City's response emphasized that Board members can be removed at any time and that Complainant has no legal "entitlement" to favorable Board members.

The Board members who were removed have not alleged they were improperly removed from the Board in any complaint or other evidence that our office is are aware of.

By email on August 9, 2018, Complainant made a related request to the City for the resignation letters from the two Board members. By letter dated August 24, 2018 and addressed to Complainant, Mr. Landeen denied the request, saying that he would have normally honored it, but that "based on your past actions and difficulty we have experienced in dealing with you, I have decided to not set a precedent that may lead you to believe you are entitled to request other records and correspondence that you are not legally entitled to." As noted above, our office will address this issue in more detail, separately.

Complainant may have been adversely affected by the removal of Board members. Complainant was benefitted by having supportive Board members, as the Board would make decisions on airport matters in which Complainant had a substantial interest. Unfavorable decisions by the Board could significantly affect Complainant's business.

The City contends that removal of Board members is not an adverse action because only the Mayor appoints Board members and Complainant is not "entitled" to do so. Complainant's lack of authority over undesirable Board membership changes is not a viable affirmative defense to a retaliation claim, particularly where the purpose of the removal of a Board member is to retaliate against a complainant. Adverse retaliatory actions are prohibited, even where the matters, such as City decisions for Board membership, are outside of a complainant's control. *See, e.g., Jackson*, 544 U.S. at 179 (negative performance evaluation); *Burlington*, 548 U.S. at 68, 70 (reassignment and

suspension); *Palmer*, 918 F. Supp. 2d at 199 (tenure decision). The City's response fundamentally misunderstands the scope of protections against retaliation.

However, Complainant has not shown causation, as required to establish a *prima facie* case of retaliation. Complainant has not established that there were no other valid, legitimate reasons for the Board membership decisions. As with the first two allegations, the timing of the Board changes, while the investigation for complaint DOT# 2018-0107 was pending, provides some circumstantial evidence of causation. However, other evidence suggests that the City's intent was not likely to punish Complainant, but to ensure a more cooperative Board for the Mayor's agenda, generally. During the relevant time period, one Board member voluntarily resigned, one was a reappointed and is still a member of the Board, and only the third was asked to resign. And with respect to the third member, the provided correspondence between the Board members and the Mayor, as well as other evidence in the record, points to a contentious relationship between various members of the airport administration, Board, and stakeholders. Given the scope of airport business, absent contrary evidence, it is more likely that the Board membership was changed to ensure smoother functioning of the airport administration, generally, than to specifically target Complainant for punishment.

Furthermore, while Complainant alleges that the two Board members were removed, it has not alleged, nor established, that the newly appointed Board members have taken retaliatory adverse action against Complainant. There is no evidence that new members had knowledge of the complaint or took any adverse action due to its filing. Complainant has not met her burden of providing evidence of causation to support a *prima facie* case of retaliation.

Nevertheless, the absence of safeguards to ensure against retaliation for protected conduct is concerning. The City's response to our investigation minimizes the seriousness of potentially retaliatory conduct. Taken together with the City's confrontational response to Complainant's request for related documents that by Mr. Landeen's own admission would have been freely given under other circumstances, it appears that there are no protections in City policies or procedures against retaliation. Consequently, although we find insufficient evidence of retaliation in this instance, we urge the City to adopt policies and procedures to ensure against it.

Conclusion

Based on the information provided by the City and Complainant, the FAA has determined that the City is in compliance with prohibitions against retaliation, under 49 U.S.C. § 47123, with regard to the issues raised in this complaint, but at significant risk of non-compliance in the future.

Within 30 days of the date of this letter, we request that the City identify specific corrective actions that it will take for developing policies and procedures that will ensure against retaliatory conduct. We request that the City propose timelines for developing and implementing anti-retaliation policies and for verifying that RAP and Airport Board

staff, as well as staff and officials in the City administration that directly participate in decisions related to RAP or the Board, have been trained in anti-retaliation requirements.

This is an informal preliminary determination, and not a final agency action or an order subject to judicial review within the meaning of 49 U.S.C. § 46110. You may request reconsideration of this informal preliminary determination in writing (or submitted initially in an alternate format, which FAA must ultimately put into writing) within 30 days of receipt of this letter with the Assistant Administrator for Civil Rights, Office of Civil Rights, Federal Aviation Administration, 800 Independence Avenue, SW, Orville Wright Bldg. (FOB 10A), Washington, DC 20591.

Please be advised that no one may intimidate, threaten, coerce, or engage in other discriminatory conduct against anyone because he or she has either taken action or participated in an action to secure rights protected by the civil rights laws that we enforce. Any individual alleging such harassment or intimidation may file a complaint with the FAA. We would investigate such a complaint if the situation warrants.

We would also like to inform you that under the Freedom of Information Act (5 U.S.C. § 552) and the Privacy Act (5 U.S.C. § 55(a)), it may be necessary to release this information, related correspondence, and records upon request. In the event that we receive such a request, we will seek to protect to the extent provided by law, personal information, which if released, could constitute an unwarranted invasion of privacy.

If you have any questions, please contact Jonathan Klein of my staff by phone at (424) 405-7202 or by email at Jonathan.Klein@FAA.gov. Please reference the DOT tracking number cited above in all future correspondence or contact with this office.

Sincerely,

Michael Freilich
Director, National External Operations Program
Office of Civil Rights