THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
PATRICIA JOHNSON, Employee	
v.	OEA Matter No.: 1601-0009-20
D.C. DEPARTMENT OF PUBLIC WORKS, Agency	Date of Issuance: March 25, 2021

OPINION AND ORDER ON
MOTION FOR INTERLOCUTORY APPEAL

Patricia Johnson ("Employee") worked as a Parking Enforcement Officer with the Department of Public Works ("Agency"). On October 22, 2019, Agency issued Employee a Final Decision on Proposed Removal. Employee was terminated based on charges of Conduct Prejudicial to the District Government; Misrepresentation; Knowingly and Willingly Making an Incorrect Entry on an Official Record; Reporting False or Misleading Material Information; and Conduct Prejudicial to the District Government. The effective date of her termination was October 25, 2019.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 19, 2019. She denied violating any Agency's rules and claimed that Agency failed to

meet its burden of proof in establishing the charges levied against her.[1] In response, Agency contended that Employee's arguments were unfounded, without merit, and discipline in this case was both warranted and appropriate. Therefore, it requested that OEA sustain the termination action.[2]

An OEA Administrative Judge ("AJ") was assigned to this matter in July of 2020. On October 29, 2020, the AJ held a prehearing conference to assess the parties' arguments. He then issued a post-conference order which originally scheduled an evidentiary hearing for February 16th and 17th of 2021. The order also set forth a briefing schedule to afford the parties an opportunity to address OEA's jurisdiction because Agency objected to the Office's ability to determine whether Employee's removal was in retaliation for filing a sexual harassment complaint.[3]

After reviewing the submissions, the AJ issued an Order on Jurisdiction Regarding Retaliation on January 22, 2020. In his order, the AJ held that OEA may consider evidence of Employee's claim that her termination was a pretext manufactured by Agency. He explained that this Office lacked original jurisdiction over complaints of unlawful discrimination because those claims are generally reserved for the D.C. Office of Human Rights ("OHR"). However, the AJ reasoned that in *Raphael v. Okyiri,*[4] the D.C. Court of Appeals concluded that OEA retained the jurisdictional authority to address an employee's retaliation claim as a cognizable defense in an adverse action that was not a Reduction-in-Force ("RIF").[5] Additionally, he disagreed with Agency's reliance on the holdings in *El-Amin v. Dist. Of Columbia Dep't of Pub. Works*[6] and

[1] *Petition for Appeal* (November 19, 2019).
[2] *Agency Answer to Petition for Appeal* (December 20, 2019).
[3] *Post-Conference Order* (October 19, 2020).
[4] 740 A.2d 935 (1999).
[5] *Order on Jurisdiction Regarding Retaliation* (January 22, 2020).
[6] 730 A.2d 164 (D.C. 1999).

Office of the Dist. of Columbia Controller v. Frost[7] to support its position that OEA could not address Employee's retaliation claims. The AJ provided that in both instances, the OEA rules relied upon by the agencies were no longer in effect at the time the current Order on Jurisdiction Regarding Retaliation was issued. As such, he determined that Employee's claims of retaliation constituted a cognizable defense to Agency's termination action. Consequently, the AJ held that OEA retained the jurisdictional authority to address Employee's argument.[8]

On January 28, 2021, Agency filed a Motion for Certification of Interlocutory Appeal to the OEA Board and Request for Stay of Proceedings. It reiterated is previous contention that OEA was not the proper venue to adjudicate Employee's claims of unlawful discrimination and retaliation because the appropriate venue for addressing these arguments was OHR. Agency acknowledged that the OEA regulations that were utilized at the time that *El-Amin* was decided were no longer in effect at the time of Employee's appeal. However, its rational was that *El-Amin* was nonetheless instructive because the D.C. Court of Appeals confirmed, after reviewing the language of the District of Columbia Human Rights Act ("DCHRA"), that the term "unlawful discrimination" includes retaliation claims. Additionally, Agency stated that the AJ failed to give the holding in *El-Amin* the appropriate weight in rendering his decision. Thus, Agency maintained that the AJ erred in concluding that OEA retained jurisdiction to adjudicate Employee's claims of retaliation because his decision unlawfully expanded this Office's jurisdiction. As a result, it requested that the AJ's Order on Jurisdiction be reversed and that all

[7] 638 A.2d 657 (D.C. 1994).
[8] *Order on Jurisdiction Regarding Retaliation* at 2.

pending deadlines be stayed.[9] On January 29, 2021, the AJ issued an Order Granting Agency's Motion for Certification of Interlocutory Appeal to the OEA Board.[10]

Discussion

Under OEA Rule 616.1, 59 DCR 2129 (March 16, 2012), an interlocutory appeal is defined as an appeal to the Board of a ruling made by an Administrative Judge during the course of a proceeding. The rule further provides that the Administrative Judge may permit this particular appeal if he or she determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate consideration. In his January 29, 2021 Order Granting Agency's Motion for Certification of Interlocutory Appeal with the OEA Board, the AJ determined that it was proper to certify this matter to the Board for the purpose of determining whether this Office may consider evidence of Employee's pretextual and retaliation claims, and whether the AJ's conclusion regarding jurisdiction was erroneous and contrary to District law.

This Office's jurisdiction is conferred upon it by law and was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 ("CMPA"), D.C. Code §1-601-01, et seq. (2001). It was amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which took effect on October 21, 1998. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions. According to 6-B, Section 604.17 of the DCMR, this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

> (a) A performance rating resulting in removal;
> (b) An adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more; or
> (c) A reduction-in-force; or
> (d) A placement on enforced leave for ten (10) days or more.

[9] *Motion for Certification of Interlocutory Appeal with the OEA Board* (January 28, 2021). Employee did not file a response to Agency's motion.
[10] *Order Granting Agency's Motion for Certification of Interlocutory Appeal* (January 29, 2021).

Moreover, OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), states that "[t]he employee shall have the burden of proof as to issues of jurisdiction...." Under this rule, the burden of proof is by a preponderance of the evidence which is defined as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." This Office has no authority to review issues beyond its jurisdictional authority.[11] Additionally, issues regarding jurisdiction may be raised at any time during the course of the proceeding.[12] Therefore, the onus is upon Employee to establish whether OEA may consider her arguments related to jurisdiction.

Section 2-1411.11 of the DCHRA applies to employers, employment agencies, and labor organizations. As it relates to prohibited practices, the section provides the following in pertinent part:

> It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, political affiliation, status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking, or credit information of any individual

Employee concedes that OEA does not have primary jurisdiction over complaints of unlawful discrimination, as specified by the DCHRA. She also acknowledges that this Office lacks the jurisdictional purview to adjudicate appeals that are properly before OHR.[13] Employee's primary

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[11] *Banks v. District of Columbia Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992).
[12] *Brown v. District of Columbia Public Schools*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (January 22, 1993); and *Maradi v. District of Columbia Gen. Hosp*., OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995).
[13] Section 2-1411.03 of the DCHRA states that one of the functions of the OHR is to "[r]eceive, review, and investigate complaints of unlawful discrimination in employment, housing, public accommodations, or educational institutions." *See also El-Amin v. District of Columbia Dep't of Pub. Works*, 730 A.2d 164 (1991).

argument regarding jurisdiction is that OEA may consider evidence that Agency's termination action was motivated by retaliatory animus. In other words, Employee seeks to admit evidence to prove that her termination was pretextual in nature because she complained of being sexually harassed at work.

In her Response to Agency's Brief on Jurisdiction, Employee stated that she was sexually harassed by her supervisor, Alex Weaver ("Weaver"), two or three months before the precipitating events giving rise to her removal. According to Employee, Weaver made repeated and inappropriate comments about her appearance. Employee explains that she complained to Weaver's immediate supervisor, Dwayne Means ("Means"), and Preston Moore ("Moore"), who was Means' supervisor. She maintains that Agency ignored her request to be removed from Weaver's supervision and that Agency took no remedial action in response to her complaints of harassment. While Employee does not seek for OEA to adjudicate her substantive claim of sexual harassment *per se*, she does wish to provide evidence to underscore that Agency's decision to terminate her was a rush to judgment based on improper motives.

The AJ's Order on Jurisdiction Regarding Retaliation relied heavily on the D.C. Court of Appeal's holding in *Raphael v. Okyiri*, 740 A.2d 935 (1999), to support his finding that OEA may consider the issue of pretext in employment personnel matters. In *Okyiri*, the employee was terminated from her position after being charged with insubordination and inexcusable neglect of duty. On appeal before OEA, the employee argued, amongst other claims, that her dismissal was carried out in a vengeful and punitive manner. The OEA AJ concluded that her termination for the neglect of duty and insubordination charges constituted a pretext manufactured by the agency in order to support its managers' decision to remove an employee they felt to be an obstructionist. As it related to the charge of neglect of duty, the Court of Appeals in *Okyiri* was challenged with

OEA's finding that this charge was, in fact, a pretext manufactured by the agency. Because the Court could not make a ruling based on the record, the matter was remanded to OEA to determine whether the employee's argument of pretextual termination could be considered a cognizable defense in light of the legal principles it set forth its opinion.[14]

Agency disagrees with the AJ's determination that *Okyiri* should serve as controlling case law in this matter. It objects to the AJ's conclusion that the holdings in *El-Amin* and *Frost* are largely inapplicable here because the former matters were dismissed on jurisdictional grounds based on regulations that were no longer in effect at the time Employee allegedly committed the underlying conduct forming the basis of this appeal. We agree with the AJ's reasoning as to why each case is distinguishable from the instant matter. Most notably, *El-Amin* can be differentiated because the employee in that case argued that his separation from service under a RIF was merely a pretext to retaliate against him for engaging in whistleblowing activities. The Court of Appeals in *Anjuwan v. D.C. Department of Public Works*, 5 729 A.2d 883 (D.C. 1998), held that OEA lacks authority to determine whether a RIF was bona fide. Its rational was that OEA does not have the authority to second guess an agency's decisions about which positions should be abolished in conducting a RIF. The *Anjuwan* Court further explained that as long as a RIF is justified by a shortage of funds at the agency level, the agency has discretion to implement the RIF. Here, Employee's termination was not the result of a RIF; therefore, relying on *El-Amin* as instructive case law would be illogical under these circumstances.

In *Frost*, the Court deferred to OEA's holding that the Public Employee Relations Board ("PERB"), not OEA, was the appropriate forum for the employee to raise his retaliation defense. Like *El-Amin*, the statutes and regulations relied upon by the Court in *Frost* are also no longer in

[14] *Okyiri* at 951.

effect. Thus, it was also reasonable for the AJ to conclude that it was improper to rely on *Frost* in reaching his decision.

Additionally, Agency submits that the AJ failed to afford the proper deference to the holding in *Karen Falls v. Dist. of Columbia Dep't of Gen. Servs.*, OEA Matter No. 1601-0044-12, *Opinion and Order on Motion for Interlocutory Appeal* (Oct. 29, 2013), wherein the employee alleged that the agency terminated her in retaliation for complaints of sexual harassment and racial discrimination. Relying on *El-Amin*, the agency in *Falls* argued that District law reserves claims of discrimination to OHR and that OEA lacks jurisdiction over appeals where discrimination or retaliation appear to be the motives behind an adverse action.[15] The acting OEA Board agreed and determined that the agency was correct in its position that exclusive discrimination claims are reserved for OHR.

In his Order on Jurisdiction, the AJ was satisfied that the holding in *Okyiri* permitted OEA to consider an employee's pretextual argument as a cognizable defense in an adverse action proceeding, save for RIFs.[16] However, the OEA Board's holding in *Falls* can by no means supersede the D.C. Court of Appeals' holding in *Okyiri*, as the later constitutes a binding decision, and the former does not, because an administrative body's holdings cannot supplant that of a higher court.

It should also be noted that this Office has previously considered ancillary evidence of an employee's claim of retaliation or pretext, in conjunction with appeals over which OEA retains original jurisdiction. In *Bussey v. D.C. Office of Admin. Hearings*, OEA Matter No. 1601-0043-16 (February 1, 2017), the AJ considered evidence of the employee's claim that the charges levied against her were the result of retaliation after she filed complaints with OHR alleging the

[15] *Falls* at 3.
[16] *See Anjuan* at 883.

violation of her rights under the Family and Medical Leave Act ("FMLA"). Likewise, in *Garner-Berry v. Dep't of Pub. Works,* OEA Matter No. 1601-0083-14, *Opinion and Order on Petition for Review* (July 11, 2017), the OEA Board acknowledged that the AJ properly permitted the employee to submit evidence of retaliation, as it related to her fifteen-day suspension. In each of the aforementioned cases, OEA held that the employee failed to establish sufficient proof that the agency's adverse action was a pretext or a result of retaliation. Notwithstanding, the employees in these matters were permitted to introduce evidence of retaliation in conjunction with their other arguments to buttress their positions.

Accordingly, based on the holding in *Okiyri* and OEA's case law, this Board finds that the AJ's conclusion regarding jurisdiction is supported by the record. The arguments forming the basis of Employee's appeal include, but are not limited to, her claim of a pretextual termination. She also denies Agency's contention that she violated any rule, law, or regulation that would warrant termination. Employee also opines that Agency failed to meet its burden of proof in establishing the six charges against her.[17] As previously stated, Employee does not wish to introduce evidence to prove that the underlying conduct, allegedly committed by another Agency employee, constituted *per se* sexual harassment within the context of the DCHRA. Rather, she solely requests to provide evidence to underscore that Agency's decision to terminate her was based on improper motives.

This Board acknowledges that OEA does not retain original jurisdiction over complaints of sexual harassment. However, Employee's original arguments contained in her Petition for Appeal *are* issues over which this Office may exercise jurisdiction (emphasis added). To bifurcate or parse the issue of pretext would only serve to subvert the timely resolution of this appeal. The arguments regarding retaliation are closely related to Employee's substantive

[17] *Petition for Appeal* at 2.

arguments. Employee's proffer of a cognizable defense does not divest this Office of jurisdiction to consider evidence that Agency's termination action may have been motivated by retaliation. Therefore, we find that the holding in *Okyiri*, and the interest of justice, necessitates the AJ's ability to determine whether there was a connection between employee's claims and Agency's adverse action. Consequently, Agency's interlocutory appeal must be denied.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Motion for Certification of Interlocutory Appeal is **DENIED**.

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Clarence Labor, Jr., Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.