IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD HORNSBY, Plaintiff, v. MELVIN L. WATT, Director, Federal Housing Finance Agency, Defendant.	)	Civil No. 1:16-cv-00517 (GK)

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Melvin L. Watt, in his official capacity as Director, Federal Housing Finance Agency ("Defendant"), by and through undersigned counsel, respectfully moves this Court to dismiss Plaintiff's Complaint. The reasons for this Motion are set forth in the accompanying Memorandum in Support of Defendant's Motion to Dismiss.

DATED: June 23, 2016

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD HORNSBY,	)	
	)	
Plaintiff,	)	
v.	)	Civil No. 1:16-cv-00517 (GK)
	)	
MELVIN L. WATT, Director,	)	
Federal Housing Finance Agency,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Richard Hornsby ("Plaintiff") brings this action against Melvin L. Watt, in his official capacity as Director, Federal Housing Finance Agency ("Defendant"), alleging retaliation pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 *et seq.* ("Title VII"). Plaintiff's claims must be dismissed, however, for failure to state a claim upon which relief can be granted.

Plaintiff alleges that Mr. Watt retaliated against him when Mr. Watt failed to reinstate Plaintiff from paid administrative leave after Mr. Watt was found not guilty on criminal charges on November 20, 2015. Plaintiff also alleges that Mr. Watt retaliated against Plaintiff when Mr. Watt proposed removal of Plaintiff from federal service on December 19, 2015. Because neither of these actions constitute an adverse employment action, Plaintiff has failed to state a claim for retaliation.

Even if Mr. Watt's failure to reinstate Plaintiff and proposed removal of Plaintiff were adverse employment actions, Plaintiff has failed to allege any causal connection between these actions and protected activity. Plaintiff alleges that he engaged in protected activity when he served as the agency's settlement officer for an EEO complaint mediation and agreed to settle that complaint. However, Plaintiff fails to allege how his involvement in this EEO mediation would cause Mr. Watt to retaliate against him.

Instead, Plaintiff claims that one of Plaintiff's subordinates, Mr. Jeffrey Risinger, had a motive to retaliate against Plaintiff for settling the EEO complaint, which had alleged that Mr. Risinger had engaged in discriminatory conduct in violation of Title VII. However, Plaintiff has failed to include any facts in his Complaint to show that Mr. Risinger influenced Mr. Watt's determination under a "cat's-paw" theory. Plaintiff has thus failed to state a claim for retaliation,

as there is no alleged causal connection between the putative protected activity and any adverse employment action.

Defendant's motion to dismiss Plaintiff's Complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim should therefore be granted.

BACKGROUND

I. Statement of Facts[1]

The Federal Housing Finance Agency ("FHFA") is an independent federal agency authorized by the Housing and Economic Recovery Act of 2008 ("HERA"), which amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992. *See* Pub. L. No. 110-289, 122 Stat. 2654 (2008) (codified at 12 U.S.C. §§ 4501 *et seq*.). FHFA supervises and regulates the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Bank System, and may place these regulated entities into conservatorship or receivership under certain circumstances. 12 U.S.C. §§ 4511(b)), 4617(a). Mr. Melvin Watt was confirmed by the Senate in late December 2013 as Director of the FHFA and took office on January 6, 2014. Compl. ¶ 12.

Plaintiff Richard Hornsby was hired as Chief Operating Officer ("COO") of the FHFA on December 5, 2011. Compl. ¶ 8. Among his duties, Mr. Hornsby supervised human resources operations and served as FHFA's settlement officer for EEO and other personnel claims. Compl. ¶¶ 14–15. On April 25, 2014, in his capacity as FHFA's settlement officer, Mr. Hornsby attended the mediation of an EEO retaliation claim against his subordinate, Mr. Jeffrey Risinger—the head of FHFA's human resources unit—by Ms. Marie Harte—a deputy in

[1] The Statement of Facts is based on the factual allegations in Plaintiff's Complaint and those incorporated by reference. For the purposes of this Motion, Defendant assumes, as it must, the truth of the well-pled factual allegations in Plaintiff's Complaint.

FHFA's human resources department. Compl. ¶¶ 14–15. During the course of the mediation, Mr. Hornsby learned for the first time of Mr. Risinger's resistance to a reorganization of the human resources unit, which would have increased the EEO Complainant's responsibilities. Compl. ¶ 15. Mr. Hornsby agreed to settle that EEO claim on behalf of the FHFA. *Id*. Mr. Risinger resigned his position at FHFA at the end of April 2014. Compl. ¶ 22.

On April 28, 2014, Mr. Risinger reported to FHFA's lawyers and to the agency's Office of Inspector General ("OIG") that Mr. Hornsby had threatened to do bodily harm to Mr. Edward DeMarco, Mr. Hornsby's former supervisor who retired from the FHFA in April 2014 and who had served as Deputy Director and former Acting Director of the FHFA. Compl. ¶¶ 8, 12, 16. On April 28, 2014, Mr. Hornsby was placed on "excused absence status" and was escorted from FHFA's offices. Compl. ¶ 17.

On April 30, 2014, based on Mr. Risinger's allegations to FHFA's OIG and the OIG's subsequent investigation, Mr. Hornsby was arrested and charged with three felonies for attempting to kidnap, murder, and do bodily harm to Mr. DeMarco. Comp. ¶¶ 17–18. These felony charges were ultimately reduced to two misdemeanor charges. Compl. ¶ 20. After a two-day bench trial, on November 20, 2014, the court determined that the government had not proven beyond a reasonable doubt that Plaintiff had attempted to threaten to do bodily harm to Mr. DeMarco. Compl. ¶ 21; *see also District of Columbia v. Hornsby*, No. 2014-CF2-007582 (D.C. Super. Ct. filed Apr. 30, 2014).

After the conclusion of the criminal trial, Mr. Hornsby "expected to be returned to duty in his COO position at the FHFA." Compl. ¶ 22. Mr. Watt did not return Mr. Hornsby to duty, and Mr. Hornsby remained on paid administrative leave. *See id*. On December 19, 2014, Mr. Watt issued a proposal to terminate Mr. Hornsby from federal service for conduct unbecoming a

federal manager. Compl. ¶ 23. The notice of proposed removal included allegations of misconduct beyond the threats against Mr. DeMarco as reported by Mr. Risinger. *Id*.

On March 19, 2015, Mr. Watt removed Mr. Hornsby from federal service, effective March 21, 2015. Compl. ¶ 24. Mr. Hornsby appealed this removal action to the Merit Systems Protection Board ("MSPB"), where it is still pending. *Id*. Plaintiff concedes that he has not exhausted his administrative remedies on the removal action, and it is therefore "not an allegation in this [C]omplaint." *Id*.

II. Administrative EEO Complaint

On March 19, 2015, Plaintiff filed a formal administrative EEO complaint alleging that he was retaliated against when Mr. Watt kept Plaintiff in a paid administrative leave status after being exonerated of criminal charges and when Mr. Watt proposed Plaintiff's removal from federal service. Compl. ¶¶ 1, 4. The initial contact between Plaintiff and an EEO counselor that preceded the filing of the EEO complaint took place on December 15, 2014. *Id*.[2] On December 22, 2015, the FHFA issued a Final Agency Decision on Plaintiff's EEO complaint. Compl. ¶ 4.

III. Plaintiff's Claims

On March 18, 2016, Plaintiff filed the instant action pursuant to Title VII of the Civil Rights Act of 1964. Plaintiff alleges that Mr. Watt, Director of the FHFA, retaliated against him for settling an EEO claim involving allegations that Mr. Risinger retaliated against an employee in the human resources office. Specifically, Plaintiff claimed that Mr. Watt retaliated against him by (i) failing to return him to duty status from paid administrative leave after the conclusion of his criminal trial, and (ii) proposing to remove him from federal employment for conduct unbecoming a federal manager. Compl. ¶¶ 1, 19, 22–23.

[2] Plaintiff alleges the informal complaint was initiated on December 15, 2015, but this appears to be a typographical error. Compl. ¶ 4.

STANDARD OF REVIEW

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal upon the "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Motions to dismiss under Rule 12(b)(6) "test[] the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235 (D.C. Cir. 2002). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, acceptable as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). However, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). In addition, a court need not accept factual inferences drawn by a plaintiff if those inferences are not supported by facts alleged in the complaint, nor must a court accept a plaintiff's legal conclusions. *See Kramer v. United States*, 460 F. Supp. 2d 108, 109 (D.C. Cir. 2006).

When assessing a motion to dismiss under Rule 12(b)(6), a court must construe the complaint in the light most favorable to the plaintiff, assuming the truth of all well-pleaded allegations. *See id*. Detailed allegations are not required, but "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

In deciding a Rule 12(b)(6) motion, a court may consider the facts alleged in the complaint, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Maggio v. Wisconsin Ave. Psychiatric Ctr.*, 795 F.3d 57, 62

(D.C. Cir. 2015) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). The Court may thus consider "any documents either attached to or incorporated in the complaint . . . without converting the motion to dismiss into one for summary judgment." *Baker v. Henderson*, 150 F. Supp. 2d 13, 15 (D.D.C. 2001) (citations omitted). This includes documents that are "referred to in the complaint and [ ] central to the plaintiff's claim."[3] *Solomon v. Off. of the Architect of the Capitol*, 539 F. Supp. 2d 347, 349–50 (D.D.C. 2008) (citing *Vanover v. Hantman*, 77 F.Supp.2d 91, 98 (D.D.C. 1999), *aff'd*, 38 Fed. Appx. 4 (D.C. Cir. 2002)) (internal citations omitted).

ARGUMENT

Title VII provides that "[a]ll personnel actions" affecting employees of federal agencies "shall be made free of discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Discrimination for the purpose of Title VII may include retaliation for an employee's assertion of his or her rights under Title VII. *Forman v. Small*, 271 F.3d 285, 297 (D.C. Cir. 2001); *Moore v. Ashcroft*, 401 F. Supp. 2d 1, 23 (D.D.C. 2005).

Claims of discrimination or retaliation under Title VII are analyzed under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Ware v. Howard University, Inc.*, 816 F. Supp. 737, 749–750 (D.D.C. 1993). "Under this framework, the

[3] If this Court determines that the Notice of Administrative Leave and Notice of Proposed Removal cannot be considered without converting this Motion to a Motion for Summary Judgment, the Court should convert this motion and grant summary judgment for Defendant. Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment "is appropriate where either the evidence is insufficient to establish a *prima facie* case, . . . or, assuming a *prima facie* case, there is no genuine issue of material fact that the defendant's articulated non-discriminatory reason for the challenged decision is pretextual." *Paul v. Federal Nat'l Mortgage Ass'n*, 697 F. Supp. 547, 553 (D.D.C. 1988); *see also Simmons v. Cox*, 495 F. Supp. 2d 57, 66 (D.D.C. 2007). Given the facts set forth in the Complaint and in the Notice of Administrative Leave and Notice of Proposed Removal, Plaintiff cannot establish a *prima facie* case and Defendant is entitled to judgment as a matter of law for the reasons set forth herein.

plaintiff must first establish, by a preponderance of the evidence, a *prima facie* case of retaliation." *Meadows v. Mukasey*, 555 F. Supp. 2d 205, 210 (D.D.C. 2008). "To establish a *prima facie* case of retaliation, a claimant must show that (1) she engaged in a statutorily protected activity; (2) she suffered a materially adverse action by her employer; and (3) a causal connection existed between the two." *Wiley v. Glassman*, 511 F.3d 151, 155 (D.C. Cir. 2007), *cert. denied*, 555 U.S. 826 (2008).

Plaintiff has failed to allege in his Complaint that he suffered what courts have construed to be a materially adverse personnel action. Indeed, Plaintiff challenges herein, *inter alia,* his proposed removal but not his actual removal from his position at FHFA. Compl. ¶¶ 28–29. Plaintiff also has not alleged any facts that plausibly demonstrate a causal connection between his engagement in a statutorily protected activity and any purported adverse personnel action. Defendant's motion to dismiss should therefore be granted.

I. Plaintiff Has Failed to State a Claim for Retaliation Because Plaintiff Has Failed to Allege a Materially Adverse Personnel Action

Where, as here, acts of alleged discrimination or retaliation related to the employment of a plaintiff are at issue, the establishment of a *prima facie* case requires the plaintiff to show that he or she has been the subject of an adverse personnel action. *Taylor v. Small*, 350 F.3d 1286, 1292 (D.C. Cir. 2003); *Brown v. Brody*, 199 F.3d 446, 452–53 (D.C. Cir. 1999). To do so "in the absence of diminution of pay or benefits, [the] plaintiff must show an action with 'materially adverse consequences affecting the terms, conditions, or privileges of employment.'" *Stewart v. Evans*, 275 F.3d 1126, 1134 (D.C. Cir. 2002) (quoting *Brody*, 199 F.3d at 457). Anything other than "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant

change in benefits" is nonactionable. *Stewart*, 275 F.3d at 1134–35 (quoting *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998)); *accord Taylor*, 350 F.3d at 1293.

Indeed,

> "[p]urely subjective injuries," such as dissatisfaction with a reassignment, public humiliation, or loss of reputation, are not adverse actions. To the contrary, conduct becomes actionable only when an employee "experiences materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm."

Vines v. Gates, 577 F. Supp. 2d 242, 257 (D.D.C. 2008) (quoting *Holcomb v. Powell*, 433 F.3d 889, 902 (D.C. Cir. 2006)).

In this case, Plaintiff alleges two discrete acts violate Title VII.[4] As is shown below, neither of those acts constituted an adverse personnel action. Defendant's motion to dismiss should therefore be granted.

A. Mr. Watt's refusal to reinstate Plaintiff from paid administrative leave to full duty was not an adverse employment action.

Plaintiff was placed on paid administrative leave effective April 28, 2014, "[i]n light of allegations that [he] recently made inappropriate threatening comments . . . as a thorough investigation of th[o]se allegations [wa]s undertaken." Notice of Administrative Leave, attached hereto as Ex. A.[5] While on administrative leave, Plaintiff continued to receive pay and benefits as usual. *Id*.

[4] Plaintiff requests, *inter alia*, that this Court "order [D]efendant to provide [P]laintiff with outstanding performance ratings for 2014, 2015, and every period thereafter, with bonus and pay increases earned thereby to be paid with interest." Compl. at 14. However, Plaintiff has failed to allege that sub-outstanding performance ratings were an adverse personnel action in this case, and as such, this requested remedy would be inappropriate.

[5] This notice is a document incorporated in the Complaint, *see* Compl. ¶¶ 17, 19, 26, which may be considered under a Rule 12(b)(6) motion. *See Baker*, 150 F. Supp. 2d at 15.

Placing a plaintiff under investigation or placing him on paid administrative leave while an investigation is ongoing does not, alone, constitute adverse actions under Title VII. *Jones v. Castro*, No. 15-310, 2016 WL 777917, at *7 (D.D.C. Feb. 29, 2016) (citing *King v. Holder*, 77 F. Supp. 3d 146, 151 (D.D.C. 2015); *Bland v. Johnson*, 66 F. Supp. 3d 69, 73 (D.D.C.2014); *Brown v. Georgetown Univ. Hosp. Medstar Health*, 828 F. Supp. 2d 1, 9 (D.D.C. 2011); *Dickerson v. SecTek, Inc.*, 238 F. Supp. 2d 66, 79 (D.D.C. 2002)); *see also Henry v. Dep't of the Navy*, 902 F.2d 949, 953–54 (Fed. Cir. 1990) (paid administrative leave during notice of a proposed removal does not constitute constructive suspension, and is therefore not an adverse personnel action for MSPB jurisdictional purposes). It follows that continuing to keep an employee on paid administrative leave does not, alone, constitute an adverse action.

Plaintiff's Complaint does not allege that his paid administrative leave was prolonged as retaliation for a protected activity. Plaintiff simply asserts that he "expected to be returned to duty" after the criminal trial judge determined that the government had failed to prove beyond a reasonable doubt that Plaintiff was guilty of attempting to threaten to do bodily harm to Mr. DeMarco. Compl. ¶¶ 21–22. Nor does Plaintiff's Complaint identify any specific tangible harm that resulted from Mr. Watt's failure to reinstate him. "'Purely subjective injuries,' such as dissatisfaction with a reassignment, public humiliation, or loss of reputation, are not adverse actions." *Vines*, 577 F. Supp. 2d at 257. Any alleged harm that Plaintiff may have suffered as a result of Mr. Watt's determination to remove Plaintiff from federal service is not yet ripe for adjudication, as Plaintiff concedes. *See* Compl. ¶ 24. Plaintiff has failed to allege that he suffered a materially adverse personnel action when Mr. Watt failed to reinstate him from paid administrative leave, so Plaintiff's first retaliation claim should be dismissed for failure to state a claim.

B. Mr. Watt's proposed removal of Plaintiff from federal employment was not an adverse employment action.

On December 19, 2014, Mr. Watt issued a proposal to terminate Mr. Hornsby from federal service for conduct unbecoming a federal manager. Compl. ¶ 23. This notice included allegations of misconduct beyond the threats against Mr. DeMarco as reported by Mr. Risinger, including eighteen of Plaintiff's statements and actions that Mr. Watt believed constituted conduct unbecoming a federal manager. Notice of Proposal to Remove, attached hereto as Ex. B.[6]

"A long line of cases from this Circuit and others have held that threats, revoked disciplinary plans, and other such ultimately unconsummated actions are not materially adverse for purposes of retaliation claims." *McNair v. District of Columbia*, 903 F. Supp. 2d 71, 75–76 (D.D.C. 2012) (citing cases); *see also Baloch v. Kempthorne*, 550 F.3d at 1199 (D.C. Cir. 2008) (proposed suspension not material adverse action); *Castro*, 2016 WL 777917, at *9 (failure to dismiss a notice of proposed removal at a particular time is not adverse employment action). Proposed actions are only considered materially adverse employment actions to the extent they are finalized. *Zelaya v. UNICCO Serv. Co.*, 733 F. Supp. 2d 121, 130 (D.D.C. 2010) (threatening plaintiff's employment is not materially adverse because "[t]his Circuit . . . '[has] been unwilling to find adverse actions where the [threatened action] is not actually served'") (quoting *Baloch*, 550 F.3d at 1199); *Milburn v. West*, 854 F. Supp. 1, 14 (D.D.C. 1994) (written request for disciplinary action was not an "adverse action" for the purposes of Title VII, because the request was denied). A notice of proposed removal is "essentially a precursor" to a final decision to remove. *Boykin v. England*, No. 02-950, 2003 WL 21788953, at *5 (D.D.C. July 16,

[6] This notice is a document incorporated in the Complaint, *see* Compl. ¶¶ 23, 25, 26, which may be considered under a Rule 12(b)(6) motion. *See Baker*, 150 F. Supp. 2d at 15.

2003). Such notice is "merely an interlocutory or mediate decision," and because no materially adverse consequences follow directly from this notice, it not separately actionable. *Id*. (quoting *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981), and *Brody*, 199 F.3d at 457).

Here, Plaintiff does not allege that his paid administrative status or any other pay or benefits changed between the date of the notice of proposed removal and Mr. Watt's March 19, 2015, removal of Plaintiff from federal service. As noted above, any materially adverse impact Plaintiff suffered began only when his proposed removal from federal service was finalized, which employment action Plaintiff concedes is not a basis for his Complaint. *See* Compl. ¶ 24. Because Plaintiff has failed to allege that he suffered a materially adverse personnel action due to Mr. Watt's determination to propose to remove him from federal service, Plaintiff's second retaliation claim should be dismissed for failure to state a claim.

II. Even if Plaintiff Had Alleged an Adverse Personnel Action, Plaintiff Has Failed to State a Claim for Retaliation Because Plaintiff Has Failed to Allege a Causal Connection between Protected Activity and an Adverse Personnel Action

Even if Plaintiff's Complaint could plausibly be construed to allege an adverse personnel action, he has failed to state a claim upon which relief can be granted because he has not alleged a causal connection between statutorily protected activity and an adverse personnel action. *See Wiley*, 511 F.3d at 155. "'[T]here can be no retaliatory intent unless there is knowledge.'" *Downey v. Isaac*, 622 F. Supp. 1125, 1132 (D.D.C. 1985). Accordingly, a plaintiff cannot establish a *prima facie* case of retaliation without showing that the individual who committed the act of alleged retaliation had knowledge of the protected activity and was motivated by such knowledge. *See id*.

A. Plaintiff has failed to allege that the decisionmaker was aware of the protected activity.

Plaintiff's Complaint does not allege that the decisionmaker here—Mr. Watt—was aware of the alleged protected activity in which Plaintiff engaged. *See Downey*, 622 F. Supp. at 1132. Plaintiff's claims focus on Mr. Risinger, who was not involved in either the proposed or actual removal of Plaintiff and, indeed, had not been employed at the agency during the seven months before Mr. Watt determined not to reinstate Plaintiff and to propose his removal. *See* Compl. ¶¶ 22–23. The Complaint, however, does not set forth any facts to demonstrate that Mr. Watt was aware that Ms. Harte had filed an EEO claim involving allegations of unlawful retaliation by Mr. Risinger or that Plaintiff had agreed to settle that claim. Compl. ¶¶ 15–16. Evidence that one official within an organization received notice of a protected activity, without more, does not lead to a "reasonable inference" that other officials also had notice of the protected activity. *Hazward v. Runyon*, 14 F. Supp. 2d 120, 124 & n.9 (D.D.C. 1998). Because Plaintiff has not alleged facts to demonstrate that Mr. Watt had any knowledge of Plaintiff's involvement in settling the EEO claim, Plaintiff has not set forth any basis to make a plausible showing that a causal connection existed between statutorily protected activity and the adverse personnel action.

B. Plaintiff has failed to allege a "cat's-paw" theory of retaliation.

Under a "cat's-paw" theory of discrimination, a formal decisionmaker may be an unwitting conduit of another supervisor's discriminatory motives. *See Walker v. Johnson*, 798 F.3d 1085, 1095 (D.C. Cir. 2015) (citing *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1311–12 (D.C. Cir. 1998); *Hampton v. Vilsack*, 685 F.3d 1096, 1101–02 (D.C. Cir. 2012)); *see also Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011) ("[A] supervisor's biased report may remain a causal factor if the [ultimate decision maker's] independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation,

entirely justified."). The Supreme Court in *Staub* held that a plaintiff could prevail on such a theory "if [i] a supervisor performs an act motivated by [discriminatory] animus, [ii] that is intended by the supervisor to cause an adverse employment action, and . . . [iii] that act is a proximate cause of the ultimate employment action." *Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290, 297 (D.C. Cir. 2015) (citing *Staub*, 562 U.S. at 422). This theory does not support a finding of retaliation, however, if the impartial decisionmaker makes an independent determination that adverse action is warranted for reasons "unrelated to the [non-decision maker's] original biased action." *Staub*, 562 U.S. at 421.

Plaintiff's Complaint cannot be plausibly construed to make out a "cat's-paw" theory of retaliation. Plaintiff has failed to allege that Mr. Risinger, the actor with purportedly retaliatory motives, was his supervisor (indeed, Mr. Risinger was Plaintiff's subordinate). *See* Compl. ¶ 14. Plaintiff's Complaint simply claims that Mr. Risinger had a motive to retaliate against Plaintiff. Compl. ¶¶ 15–16. As such, Plaintiff has failed to state a "cat's-paw" theory of retaliation in this case because he has not alleged that a supervisor performed an act motivated by retaliatory animus. *See Staub*, 562 U.S. at 422. Plaintiff has also not alleged that Mr. Risinger intended to cause an adverse employment action against Plaintiff. *Id.*

Further, even if Plaintiff had set forth facts to show that Mr. Risinger had been in a position to influence Mr. Watt's employment decisions regarding Plaintiff, Plaintiff has failed to allege in his Complaint that Mr. Watt did not make an independent determination that Plaintiff should not be reinstated from paid administrative leave and that proposed removal of Plaintiff from federal service was appropriate. Indeed, Plaintiff concedes that Mr. Risinger—the only person whom he has alleged harbored a retaliatory intent toward him—was no longer at FHFA at the time of the purported adverse employment actions. Compl. ¶ 22. Mr. Risinger separated

from the agency at the end of April 2014, and the purported adverse actions occurred in November and December 2014. Compl. ¶¶ 22–23.

Plaintiff also notes in his Complaint that Mr. Watt's notice of proposed removal was due to multiple examples of Plaintiff's conduct unbecoming a federal manager. Compl.¶ 23. In fact, the notice included eight allegations of misconduct witnessed by FHFA employees other than Mr. Risinger. *See* Ex. B at 3–5. These examples "as a whole demonstrate[d] a pattern and practice of conduct, comments, and actions that reflect[ed] a tendency to make grossly inappropriate statements, a willingness to ignore or impede federally-protected employee rights, and a failure to correct [his] actions despite clear knowledge that [his] conduct was wrong and possibly illegal." *Id*. at 5–6.

In addition, Mr. Watt did not rely solely on Mr. Risinger's reports of Plaintiff's threats to harm Mr. DeMarco, but also on Plaintiff's failure to deny making the threats during his criminal trial as evidence in support of the notice of proposed removal. Ex. B at 5. Mr. Watt concluded that "the evidence presented at Mr. Hornsby's trial demonstrate[d] that [he] did not deny" threatening to shoot or otherwise physically injure Mr. DeMarco, and "in other instances Mr. Hornsby ha[d] indicated that the[se remarks] were taken out of context." *Id*. at 5. Mr. Watt determined that "regardless of whether [Mr. Hornsby] intended these remarks as threats or not and regardless of whether they were taken out of context as [Mr. Hornsby] ha[d] indicated, they [we]re extreme and violent in nature, ha[d] no place being uttered in any context in the federal workplace, and ha[d] the capacity to create great fear, insecurity, and angst among the employees of the Agency, both at the time they were made and in the future." *Id*. Mr. Watt also noted that "not long before [Mr. Hornsby's] comments about Mr. DeMarco, there was a fatal shooting at the Navy Yard not far from [FHFA's] office at Constitution Center." *Id*. at 6.

These factors show that Mr. Watt was "independent of and insulated from [Mr. Risinger's] influence." *See Walker*, 798 F.3d at 1095. Title VII's prohibition against retaliation "was not intended to immunize insubordinate, disruptive, or nonproductive behavior at work." *Rattigan v. Holder*, 604 F. Supp. 2d 33, 49 (2009) (quoting *Armstrong v. Index Journal Co*., 647 F.2d 441, 448 (4th Cir. 1981)). Plaintiff has failed to allege a "cat's-paw" theory of retaliation, and as such has failed to allege a causal connection between statutorily protected activity and any adverse personnel action.[7]

CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted.

[7] Plaintiff alleges that he brings this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 *et seq.*, and the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Compl. ¶ 1. To the extent Plaintiff is trying to bring a claim under the Civil Rights Act of 1991, as opposed to a claim under the Civil Rights Act of 1964 as amended by the compensatory damages provision in 42 U.S.C. § 1981a, *see* Compl. ¶ 2, this Court should dismiss such a claim as preempted by Title VII. In *Brown v. Gen. Servs. Admin.*, 425 U.S. 820 (1976), the Supreme Court held that § 717 of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000e-16, "provides the exclusive judicial remedy for claims of discrimination in federal employment." *Id.* at 835. The D.C. Circuit has specifically held that *Brown v. GSA* precludes federal employees from bringing employment discrimination claims under 42 U.S.C. § 1981. *Torre v. Barry*, 661 F.2d 1371, 1374 (D.C. Cir. 1981); *see also Prince v. Rice*, 453 F. Supp. 2d 14, 25 (D.D.C. 2006). Moreover, "[t]he absence of any language in § 1981 indicating that the statute authorizes suits against the federal government or its employees also demonstrates that the United States has not waived its sovereign immunity with respect to that statute." *Prince*, 453 F. Supp. 2d at 26 (further noting that "defendant is an instrumentality of the federal government and is therefore immune from suit absent an unequivocal waiver of sovereign immunity" and that "[a]nother judge on this court has concluded, and every court of appeals to address the question agrees, that § 1981 contains no such 'unequivocal' waiver of the United States' sovereign immunity") (citations omitted). Therefore, Plaintiff cannot bring his claims of retaliation under § 1981.

DATED: June 23, 2016

Respectfully submitted,

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Telephone: (202) 616-8491
Facsimile: (202) 616-8470
E-mail: Elizabeth.L.Kade@usdoj.gov

Counsel for Defendant

EXHIBIT A

Federal Housing Finance Agency
Constitution Center
400 7th Street, S.W.
Washington, D.C. 20024
Telephone: (202) 649-3800
Facsimile: (202) 649-1071
www.fhfa.gov

April 29, 2014

VIA ELECTRONIC MAIL

Richard Hornsby
[redacted]

Rick:

In light of allegations that you recently made inappropriate threatening comments, I am placing you on paid administrative leave effective April 28, 2014 and until further notice. I believe this action is in the best interest of both you and FHFA as a thorough investigation of these allegations is undertaken.

Sincerely,

Melvin L. Watt

cc: Alfred M. Pollard

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April 30, 2014

VIA ELECTRONIC MAIL

Richard Hornsby
[redacted]

Dear Rick:

Director Watt has made me aware that he has placed you on administrative leave until further notice. This letter is to explain the specific parameters of that leave.

While you are on administrative leave, you should not undertake any of your official duties or take any actions regarding or on behalf of FHFA. You should not communicate with any regulated entity employee or representative.

FHFA will represent to the staff that you are on leave until further notice. FHFA recommends that you answer any inquiries from outside parties for more information by stating only that you are on leave.

During administrative leave you:

1. Should not return to the office until you receive written notice to do so;

2. May be required to return any FHFA equipment or documents as requested;

3. Will receive pay and benefits as usual;

4. Are still subject to all rules of ethics and behavior for federal employees and FHFA employees;

5. Should not incur any expenses on your government issued credit card, calling card or in any other manner; and,

6. Should not access the FHFA computer network or any other FHFA system including, but not limited to, PRISM, GovTrip, and WebTA.

Please note that FHFA may alter your leave status in the future, but would provide you written notice in that event.

If you have any questions you may contact me or Janice Kullman at 202-649-3077.

Sincerely,

Alfred M. Pollard
General Counsel

EXHIBIT B

FEDERAL HOUSING FINANCE AGENCY
Office of the Director

December 19, 2014

Via Email and Certified First-Class U.S. Mail

Mr. Richard Hornsby
[redacted]

Re: Notice of Proposal to Remove

Dear Mr. Hornsby:

This is a notice of proposal to remove you from your position of Chief Operating Officer (COO), LL-1, Federal Housing Finance Agency (FHFA or Agency) and from federal service at FHFA, no sooner than 30 calendar days from the date you receive this Memorandum. By this memorandum, I am also rescinding the proposed indefinite suspension dated October 6, 2014. I am sending this letter by electronic mail and certified, first-class U.S. Mail. I am also providing a copy to your representative David Shapiro by hand delivery. If sustained, your removal will be effective no sooner than 30 days from when you receive this proposal by electronic mail. I propose this removal for Conduct Unbecoming a Federal Manager, pursuant to Title 5, United States Code, Chapter 75, Section 7501 *et seq.*, and implementing regulations at 5 CFR Part 752, in order to promote the efficiency of the service.[1]

On April 28, 2014, you were escorted out of FHFA's offices and placed on administrative leave because of statements you allegedly made regarding Ed DeMarco, former Acting Director of FHFA. On April 30, 2014, you were arrested and charged with a felony of making a threat to injure a person, which was subsequently reduced to two misdemeanor counts of attempted threats to do bodily harm.

On July 23, 2014, I received memoranda from the FHFA Acting Inspector General detailing complaints the Office of Inspector General (OIG) had received and was investigating, regarding allegations that you had made threatening statements against then Acting Director Edward DeMarco and that you had interfered with FHFA's Equal Employment Opportunity (EEO) process. I have also become aware of a number of other acts, comments and actions specified

[1] FHFA does not have Senior Executive Service (SES) employees. See 5 U.S.C. §3132 (a)(1)(D). Your appointment is to the Competitive Service, and therefore, the efficiency of the service standard applies to you. This document uses the term "executive" throughout to indicate the highest level employee at FHFA, not an employee in the SES covered by 5 U.S.C. § 3131.

400 7th Street, S.W., Washington, D.C. 20024 • 202-649-3801 • 202-649-1071 (fax)

below which together indicate a pattern of behavior that constitutes Conduct Unbecoming a Federal Manager.

On November 18, 19, and 20, 2014, you were tried in the Superior Court of the District of Columbia on the two counts of attempted threats to do bodily harm for allegedly saying, "I can understand how someone could go postal, if I decide to take myself out I will walk into Ed DeMarco's [the former Acting Director of FHFA and your supervisor] office and blow his brains out and then kill myself," and that, you might not blow Ed DeMarco's brains out but would shoot him in the kneecap and say, "don't fuck with me." You were also alleged to have said, "[T]hat son of a bitch is not in his office today but if he was [you] would go there and rip him limb by limb from his office." You were acquitted of these charges on November 20, 2014. Now that the criminal process has concluded, I am proposing to remove you for making these statements and other instances of misconduct.

The charge and specifications follow:

Charge: Conduct Unbecoming a Federal Manager

As FHFA's Chief Operating Officer, you serve as a primary advisor to, and representative of, the Director. Your role is to develop and review the Director's strategies, policies and goals, to collaborate with key staff to ensure that supporting policies and programs are effectively implemented, and to achieve established priorities. You lead the Agency's administrative functions through subordinate executives. Your responsibilities include, among others, communicating to FHFA offices and other federal agencies, regulated entities, and external parties on behalf of the Director, which may include providing congressional briefings, making speeches to outside groups, and representing FHFA at various meetings and gatherings. During and subsequent to 2012, you engaged in Conduct Unbecoming a Federal Manager, as described below:

Specifications

1. In November of 2013, you learned that Mr. Demarco planned to give you a "Fully Successful" performance rating, rather than an "Outstanding" or "Excellent" rating, and that the "Fully Successful" rating would make you ineligible to receive a cash bonus. You expressed your disagreement with the proposed rating to Mr. Demarco at that time. In March of 2014, after you received a "Fully Successful" performance rating from Mr. DeMarco, you began to express anger towards him about your rating. On April 3, 2014, you stated to Jeffrey Risinger, the Director of the Office of Human Resources Management (OHRM), and your subordinate, that "I can understand how someone could go postal, if I decide to take myself out I will walk into Ed DeMarco's office and blow his brains out and then kill myself."

2. You also conveyed to Mr. Risinger on April 3, 2014, that you might not blow Ed DeMarco's brains out but would shoot him in the kneecap and say, "don't fuck with me."

3. On Thursday, April 24, 2014, you told Mr. Risinger that Mr. DeMarco had done nothing about your performance rating and stated, "[T]hat son of a bitch is not in his office today but if he was [you] would go there and rip him limb by limb from his office."

4. On April 24, 2014, you indicated to Mr. Risinger that you would make a scene at Mr. DeMarco's retirement party and tell everyone there the kind of person Mr. DeMarco really was, but that you wouldn't physically hurt Ed there.

5. Prior to the time that I became Director of FHFA on January 6, 2014, in late August or early September of 2012, when Eric Howard was the EEO and Diversity Director, you told Mr. Howard and the EEO Counselor, Rita Bhanot, that if there were any more complaints about Marie Harte, Deputy Human Resources Director, there would be "serious consequences," or words to that effect, and that you did not believe any of the complaints against Ms. Harte. Ms. Bhanot believed your words to mean that there would be negative consequences for Mr. Howard and/or those who filed EEO complaints, and Mr. Howard believed it was he who would bear negative consequences.

6. You told a group of employees on September 7, 2012, including the EEO and Diversity Director, Eric Howard; Mr. Risinger; Marie Harte; Deputy General Counsel, Isabella Sammons, and Associate General Counsels, Gail Baum and Janice Kullman, that you did not think that employees should be allowed to make anonymous EEO complaints and that EEO complainants should have more "skin in the game." This prompted a legal memo to you from the Office of General Counsel informing you of an employee's right to file an EEO complaint anonymously and of what constituted interference with the EEO process.

7. On April 22, 2013, you had a meeting with Jessie Weiher, an FHFA Senior Economist, in response to an email he sent you seeking clarification about pay raises following remarks you made in an all hands meeting. During your meeting with Mr. Weiher, you held up Mr. Weiher's email and said, "[L]ooking at this email . . . I found it fucking offensive." Mr. Weiher said he had to leave because you had just cursed at him. You apologized, and he stayed. Later in the meeting you said, "[Y]ou know what you can do if you're unhappy with your pay. You can just leave." He asked if you were telling him that he had to find another job and you said no, and apologized again. Mr. Weiher made notes about the encounter when he returned to his office, which he shared with Managing Associate General Counsel, Janice Kullman, after your criminal trial concluded.

8. On a number of occasions, including the following, you made comments about specific employees in inappropriate settings and/or in the presence of other employees who should not have heard the comments: a) In a meeting on November 13, 2013, regarding a contracting matter with employees from the Office of Budget and Financial Management, the Office of General Counsel, and Facilities Operations, you stated in front of all the attendees that Senior Facilities Management Specialist, David Gilson, should be put on a performance improvement plan; b) During the course of a March 26, 2014, meeting with Janice Uthe, Manager, Contracting Operations, you made a comment to the effect that Senior Management Analyst, Shelly Blackston, who was not in Ms. Uthe's office, had a

situation that was bringing outside people into the Agency after Ms. Blackston had filed an EEO complaint against the Agency; c) On other occasions, you made remarks in front of Ms. Uthe about the performance of other employees that she did not supervise, such as words to the effect that, you can be sure this will [negatively] affect Kevin [Winkler, Chief Operating Officer]'s rating and that Tony Vitale, Manager, Application Development and Data Management, and Nancy Burnett, Acting Director, Office of Minority and Women Inclusion, were not performing well.

9. In late November, 2013, in a meeting with Ed DeMarco, who at that time was FHFA's Acting Director, you became agitated in response to questions he was asking you. Mr. DeMarco stated in his sworn testimony in Superior Court on November 18, 2014, that you later apologized for this outburst and said it was something you knew you needed to work on.

10. At a meeting on National Mortgage Database matters, on February 20, 2014, in front of numerous staff, you placed your hand over the mouth of Robert Avery, the Project Director for the National Mortgage Database, to silence him from making further comments. Several of the other employees in the room were surprised by your physical action.

11. On or about late February or early March, 2014, you were talking to James Jordan and David Lee, lawyers in the Office of General Counsel, about a memo concerning the National Mortgage Database, because you disagreed with its contents. You did not want the lawyers to include information about liability for data breaches. Mr. Lee and Mr. Jordan had revised the memo several times, but you still had concerns about it. You told them that issuing the memo might be a "career ender." Mr. Jordan took your words as referring to the careers of Mr. Jordan and Mr. Lee. The lawyers subsequently revised the memo to take out the information about liability for data breaches before sending it to you.

12. On several occasions, when you couldn't hire someone you wanted or when someone in the OHRM would complain to the Inspector General or to former Acting Director DeMarco about Marie Harte, you told Mr. Risinger that you would outsource the human resources function.

13. When Janice Uthe, Manager, Contracting Operations, Office of Budget and Financial Management, complained to you about outsourcing contract services related to information technology to the Department of Interior's Business Center (IBC), you frequently told Mr. Risinger that if Ms. Uthe didn't stop complaining you would just outsource her office.

14. On April 3, 2014, you stated to Mr. Risinger, who you supervised, that you wanted Ms. Rizopoulos, who reported to Mr. Risinger, fired because you saw her having breakfast with Mr. DeMarco, despite a prior discussion with Mr. Risinger about converting Ms.

Rizopoulos to a permanent appointment because of her success with the recruiting program.

15. Sometime between April 8 and April 24, 2014, you told Mr. Risinger, "I can't wait until the 30th when the Pope [referring to former Acting Director DeMarco] leaves the building."

16. On April 22, 2014, you lost your composure in an OHRM meeting with Jeffrey Risinger, Takisha Koonce, Human Capital Program Management Officer, and Marie Harte, and expressed your desire to fire anyone who had complained about you.

17. On multiple occasions, including on April 22, 2014, you told Mr. Risinger in a very serious tone that you wanted to jump out of your window or blow your brains out. You also repeatedly expressed your hatred for Mr. DeMarco to Mr. Risinger.

18. Sometime after you became aware of your "Fully Successful" rating, you asked Mr. Risinger, your subordinate, to negotiate with your supervisor, Mr. DeMarco, for a higher rating for you that would result in you receiving a bonus. Then in an email from you to Mr. Risinger dated April 24, 2014, you stated the following:

> Jeff: Please make sure Ed does not give me a partial bonus. I want the goose egg that reflects the unfair rating he gave me. If he suggests a 5 or 10 to further insult me I want it stopped before he leaves. I want it 0 to reflect what he told me to my face. If he does otherwise I will seek legal counsel.
> He continues not to resolve my jpp escalation! He has been non-responsive. There is no excuse for his behaviour (sic).
> Rick.

In consideration of the above specifications, I believe that your statements and actions constitute conduct unbecoming a federal manager. First, with respect to the statements that you would shoot or otherwise physically injure Mr. DeMarco, I note that the evidence presented at your trial demonstrates that you did not deny making these remarks, and in other instances you have indicated that they were taken out of context. I believe that, regardless of whether you intended these remarks as threats or not and regardless of whether they were taken out of context as you have indicated, they are extreme and violent in nature, have no place being uttered in any context in the federal workplace, and have the capacity to create great fear, insecurity, and angst among the employees of the Agency, both at the time they were made and in the future. That these statements were made by the Chief Operating Officer of the Agency, who is responsible for the safety and security of the work force, is not only affirmatively harmful to the work environment, it is also seriously damaging to the reputation of the Agency.

Second, the specifications listed as a whole demonstrate a pattern and practice of conduct, comments, and actions that reflect a tendency to make grossly inappropriate statements, a willingness to ignore or impede federally-protected employee rights, and a failure to correct your

actions despite clear knowledge that your conduct was wrong and possibly illegal. For these reasons and based upon the specifications listed above, I believe that your conduct was wholly inappropriate and constitutes conduct unbecoming a federal manager.

Penalty Analysis

In proposing to remove you from your position, I have taken into account the nature and seriousness of your misconduct and its relationship to your duties. The behavior and statements noted above are directly related to your official duties as COO. As COO, you are one of the most highly ranked executives at FHFA. As noted in your position description, your executive position is based on your "influence over and accountability for effectively accomplishing the FHFA mission." You directly supervise several office directors, including the Human Resources Director position previously held by Mr. Risinger and the security function of the Agency, and your responsibilities include leading and motivating a staff of employees. You serve as a key advisor to, and representative of, the Director of FHFA. You develop and review the Director's strategies, policies and goals, and collaborate with key staff to ensure that supporting policies and programs are effectively implemented to attain established priorities. You direct the Agency's administrative functions through subordinate executives. Among your responsibilities are communicating to FHFA offices and other federal agencies, regulated entities, and external parties on behalf of the Director, which may include providing congressional briefings, making speeches to outside groups, and representing FHFA at various meetings and gatherings.

While I am aware of your acquittal on criminal charges, in this process your behavior is adjudicated under a different standard: for such cause as will promote the efficiency of the service, 5 U.S.C. 7513(a), and under a different burden of proof: preponderance of the evidence, 5 U.S.C. 7701(c)(1)(B). Your removal will promote the efficiency of the service because your behavior was egregious and repeated. Although I was not at the Agency when this behavior began, I have fully reviewed the record, which in its entirety reflects a pattern of conduct unbecoming a federal manager. Now that I am aware of the full panoply of this conduct, it is clear how serious it is, especially making statements that you would inflict serious bodily harm on Mr. DeMarco. Your position in the Agency is prominent; and your responsibilities include contacts with the regulated entities, the public, and Congress. Your position as a senior executive at this Agency requires the highest levels of trust, good judgment and professionalism, and your remarks have led FHFA officials, employees, and stakeholders to lose confidence in your leadership and to lose trust and respect for you and your ability to lead and would make it impossible for you to fulfill your responsibilities.

The Agency cannot tolerate an environment where an employee says, "I can understand how someone could go postal, if I decide to take myself out I will walk into Ed DeMarco's office and blow his brains out and then kill myself," or "[T]hat son of a bitch is not in his office today but if he was [you] would go there and rip him limb by limb from his office." These kinds of statements are intolerable whether they were intended as threats or not. Employees should not be subject to these kinds of statements, which have no place in the federal workplace. As we all are fully and painfully aware, not long before your comments about Mr. DeMarco, there was a fatal shooting at the Navy Yard not far from our office at Constitution Center. So we know full well

that words like the ones you used do sometimes come to fruition and because of this, I believe that allowing you to return to work at the Agency would create ongoing fear and disruption amongst the staff, which would be contrary to the interests of the efficiency of the service and, therefore, justifies removal.

I also take very seriously the other specifications enumerated above. A leader in your position should not show disrespect to employees by using profanity or implying that their jobs or careers are at risk if they disagree with you. Commenting to employees who do not have a need to know about private employment matters of other Agency employees similarly shows disrespect for employee privacy, as well as poor judgment. Your disregard for the EEO process, expressed as your desire for complainants to "have more skin in the game," and discouraging of EEO complaints, is also particularly disturbing. As the COO, you should have been aware of the EEO rights of employees and the EEO process or, if you did not know, you should have educated yourself. Making such statements to the EEO and Diversity Director and staff, as well as others, shows a grave lack of judgment.

As many of your comments seem to exhibit a desire to intimidate or penalize employees who complain, not only do they demonstrate poor judgment, but they could lead to potential liability for FHFA for retaliation claims. The fact that you are the Chief Operating Officer -- one of the highest ranking officers of this Agency -- means your influence is broad. Remarks to or about employees who complain will make employees reluctant or even afraid to disagree with you, or to make any complaints you might disagree with. An atmosphere of intimidation is not conducive to the productive flow of ideas and communication that is vital to FHFA. Profanity, intimidation, outbursts, or words such as those you used towards Mr. DeMarco and Mr. Weiher, are unacceptable and lead me to conclude that your removal promotes the efficiency of the service.

I have considered your length of service of three years with the Federal government, all served at FHFA. Your length of service is not a mitigating factor. I have considered your performance as well. Although your first rating at FHFA was "Outstanding", your most recent rating was "Fully Successful." I do not consider your ratings a mitigating factor either. While you do not have any prior disciplinary record, given your short length of service, I do not consider that either a mitigating or aggravating factor.

You have had notice that the behaviors described above are unacceptable. In September, 2012, you received a memo from the Office of General Counsel that outlined the dangers to FHFA of retaliation against employees. Yet, following that legal memo, you persisted in making retaliatory statements to employees, including that you would outsource their department, that what they were doing could be a career ender, that you wanted to fire anyone who complained about you, and that if they did not like their pay they could leave. You were also clearly aware that anger was an issue you had to work on -- something you acknowledged to Mr. DeMarco after an outburst with him, and something that appeared in the narrative on your 2013 performance appraisal which you received on March 10, 2014. Disregard of this specific notice to you acts as an aggravating factor.

While I have been made aware that you take prescription medications, you have indicated that they do not adversely impact your ability to perform, and I am not aware of any medical reasons to mitigate the penalty.

Further, the penalty of removal is justified by the level of position you occupy to FHFA. Not only are you an executive, but you are one of the highest ranking executives at FHFA. As such, you are held to the highest standards of professionalism.

Finally, I do not believe that any lesser penalty is appropriate, will deter such conduct in the future by you or others, or will promote the efficiency of the service or FHFA. The proposed penalty is appropriate and necessary and for such cause as will promote the efficiency of the federal service and FHFA.

Procedure

The procedures governing this action, as well as the rights extended to you, are set forth in Chapter 1 of Title V of the Code of Federal Regulations, Part 752. In accordance with these regulations, you have the right to reply to this notice orally and/or in writing. While you would normally have seven calendar days from your receipt of this notice to submit a written and/or oral reply to this proposal, I am extending this time until 5:00 p.m. on January 5, 2015, because of the intervening holidays.

During this notice period you will remain on administrative leave.

You have the right to review the information that has been relied upon to support this action. Therefore, copies of the relevant documents are attached. It is preferable that you submit a full and complete written response and any affidavits or other evidence, including medical evidence, to support your answer prior to making an oral reply. If you wish to make an oral reply, you should notify me via email within five (5) calendar days of receiving this notice, and I will make arrangements for your oral reply between January 6 and January 12, 2015. Please indicate if you will attend in person or wish for me to make arrangements for a phone or video conference. Please address your written reply to Director Melvin L. Watt, and send it to me at wattmebj@fhfa.gov or fax to number 202-649-4001, or send via regular mail to 400 7th Street, SW, Washington, D.C. 20024.

You have the right to be represented by an attorney or other representative of your choice in replying and responding to these charges. You will bear your own legal expenses. Please inform me in writing of your designated representative, if you elect to have one. If you choose a federal employee as a representative, note that he or she may be disallowed as a representative if he or she presents a conflict of interest. I understand that you are currently represented by counsel. However, if you have any questions regarding these procedures or your rights, please let me know and I will provide a response.

I will not make a decision on this matter until all the evidence of record, including any timely written and/or oral replies, have been received. Whether or not you reply, I will provide you a written notice of my decision, including the specific reasons for the decision.

Sincerely,

Melvin L. Watt

Attachments: Evidence File

cc: David Shapiro, Esq. (via hand delivery)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD HORNSBY, Plaintiff, v. MELVIN L. WATT, Director, Federal Housing Finance Agency, Defendant.	)	Civil No. 1:16-cv-00517 (GK)

[PROPOSED] ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS

Upon consideration of Defendant's Motion to Dismiss and the materials submitted in support of and in opposition thereto, and good cause having been shown, it is hereby

ORDERED that Defendant's Motion to Dismiss is GRANTED.

DATED:

_____
GLADYS KESSLER
United States District Judge