IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,<br><br>Plaintiff,<br><br>- against -<br><br>FOX NEWS NETWORK, LLC,<br><br>Defendant. | ) | 10 Civ. 01660 (RJL) |

**DEFENDANT FOX NEWS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT**

Respectfully submitted,
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## PRELIMINARY STATEMENT

This case is uncomplicated and straightforward. Attempting to survive this motion, however, the EEOC seeks to complicate it and largely discusses "facts" irrelevant to the motion. For example, perhaps to gain the Court's sympathy, the Statement of Facts in the EEOC's Opposition Memorandum of Points and Authorities ("Opposition Memorandum" or "Opp. Mem.") and Catherine Herridge's accompanying declaration seek to make it appear that Fox News discriminated against Ms. Herridge when, in reality, the EEOC determined months ago, after a lengthy investigation, that there was "insufficient evidence" of any discrimination. *See* the EEOC's Determination, dated March 31, 2010, attached as Exhibit L to the affidavit of Dianne Brandi, Esq. ("Brandi Aff."), which was previously filed in support of this motion.

Another example: The EEOC states that it need not "cast a blind eye" to a Fox News executive's e-mail that it "uncovered" during the course of its investigation, which allegedly discouraged employee internal complaints and was forwarded to all employees. (Opp. Mem. at 2 n.1) The EEOC does not deny, though, that it failed to advise Fox News about the e-mail after it "uncovered" it, and Fox News did not have the opportunity to respond to the issue. (Brandi Aff. ¶ 3 and Ex. L) Even more significantly, the EEOC does not contend that the dissemination of the e-mail was a materially adverse action against Ms. Herridge, likely because the e-mail did not refer to her. Thus, for purposes of this motion, the e-mail is irrelevant. (*See* Opp. Mem. at 2 n.1)

Moreover, once again attempting to blur the issues and thus withstand this motion, the EEOC argues as follows with respect to the alleged retaliatory language in Ms. Herridge's proposed employment agreement: "Defendant's argument that the proposed language was not materially adverse to Herridge is premised on the fact that the disputed language is not contained in the final version of Herridge's employment contract." (Opp. Mem. at 13) This contention is demonstrably

untrue. The initial sub-heading in the Argument section of Fox News' Memorandum of Law is entitled, "The Proposed Language At Issue Was Not Retaliatory On Its Face." (Fox News' Mem. at 10)

Accordingly, this Reply Memorandum will unscramble the EEOC's mischief and demonstrate that the EEOC's complaint against Fox News should be dismissed as a matter of law.

## ARGUMENT

### THE COMPLAINT SHOULD BE DISMISSED AS A MATTER OF LAW BECAUSE THE EEOC HAS NOT STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND CANNOT ESTABLISH A *PRIMA FACIE* CASE OF RETALIATION AGAINST FOX NEWS.

To overcome this motion, the EEOC must assert facts which, if believed, can establish a *prima facie* case of retaliation on Ms. Herridge's behalf, to wit, that she engaged in a statutorily protected activity; she suffered a "materially adverse action" by Fox News; and a causal link connects the two. *See Gaujacq v. EDF, Inc.*, 601 F.3d 565, 577 (D.C. Cir. 2010). A materially adverse action is an action that "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id*. (quoting *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). Not all asserted retaliation is actionable; the only retaliatory actions that state a claim are those that are "materially adverse" to the employee because they produced an "injury or harm." *Burlington*, 548 U.S. at 67. Thus, unless the injury or harm pleaded is sufficient to rise to the level of a materially adverse action, the retaliation claim is not plausible on its face and should be dismissed as a matter of law. *Id.* at 68-69; *see Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949 (2009).

The EEOC has failed to surmount these legal hurdles. In its complaint and Opposition Memorandum, the EEOC has not alleged facts that would establish a *prima facie* case of retaliation on Ms. Herridge's behalf. This legal deficiency is two-fold. First, the language that Fox News

proposed in Ms. Herridge's employment agreement ("the Agreement") was not retaliatory in nature. Second, assuming, *arguendo*, that it was somehow retaliatory, the injury or harm that Ms. Herridge allegedly suffered was insufficient as a matter of law to rise to the level of a materially adverse action. For either or both of these reasons, the EEOC's retaliation claim is not plausible on its face and its complaint should be dismissed as a matter of law.

**A. The Proposed Language At Issue Was Not Retaliatory On Its Face.**

The proposed Agreement's so-called retaliatory language, upon which the EEOC bases its entire complaint, stated as follows:

> Performer agrees that she will not serve as an anchor/co-anchor, or an occasional anchor/co-anchor during the Term hereof, unless Fox, in its sole discretion, decides otherwise. Both Performer and Fox acknowledge that Performer has raised allegations of discrimination in the past concerning her non-assignment to anchor positions and concerning other matters, and that Fox has investigated Performer's allegations. Performer and Fox also acknowledge that Fox has determined that discrimination did not occur and that Performer does not agree with Fox's determination.

(Complaint ¶¶ 12-13; Brandi Aff. Ex. C at 1)

The first sentence of the above paragraph is merely a restatement of the sentence that appeared in a footnote on page 1 of Ms. Herridge's prior Agreement with Fox News, dated February 21, 2006. (Brandi Aff. Ex. B) That sentence provided: "Pursuant to the letter from Fox to Performer dated February 17, 2006, Performer may become a permanent, regular anchor during the Term, at Fox's sole discretion." (*Id.* at 1 n.1) The two sentences differ only insofar as that the 2006 version states that Herridge may become an anchor at Fox News' sole discretion, whereas the more recent version states that she would not become an anchor unless Fox News in its sole discretion decides otherwise. But the crucial language is the same: Fox News retained the right to use its "sole discretion" in deciding whether Ms. Herridge would serve as an anchor. Fox News drafted this minor language change because it had given Ms. Herridge the opportunity to be a weekend anchor in 2006

and 2007, and decided that she was better suited to be a full-time reporter. (*See* Herridge Declaration, ¶ 5, dated November 19, 2010) Although Ms. Herridge contended that Fox News' decision was discriminatory (*id*. at ¶¶ 5-6), the EEOC found insufficient evidence of discrimination (Brandi Aff. Ex. L). In any case, given that Fox News retained "sole discretion" to make the decision in both Agreements, the EEOC's retaliation argument concerning the language change is baseless.[1]

The remaining language in the alleged "retaliatory" paragraph provided that: (1) Ms. Herridge complained that Fox News' decision not to assign her to an anchor position as well as other Fox News' decisions were discriminatory; (2) Fox News investigated her allegations and determined that discrimination did not occur; and (3) Ms. Herridge did not agree with Fox News' determination. (Complaint ¶ 12; *see* Brandi Aff. Ex. C. at 1) This language was neutral and accurate. It memorialized what Ms. Herridge and Fox News already knew or, as Ms. Brandi stated, it was "simply a recitation of the facts." (Opp. Mem. at 4)

Nonetheless, the EEOC alleges that Ms. Herridge believed that Fox News' proposed language was "retaliatory" and "offensive," an "attempt to cover-up its inadequate [internal] investigation of her discrimination complaints," and "an attempt to intimidate her." (Opp. Mem. at 4) Although Ms. Herridge and the EEOC make these conclusory assertions, neither has sought to explain how the language can be fairly construed as retaliatory, offensive, intimidating or a cover-up attempt, *e.g.*, how the language could be a cover-up if it did not preclude Ms. Herridge from filing a complaint with the EEOC or elsewhere. Particularly apt to these assertions is the Supreme Court's pointed observation that an employee's "unusual subjective feelings" cannot transform an employer's lawful conduct into retaliation. *Burlington*, 548 U.S. at 68-69. Moreover, as here, "[t]hreadbare recitals of

[1] The EEOC alleges that Ms. Brandi stated during the investigation that the new language was proposed because Fox News wanted it to be clear to Ms. Herridge that she would serve as an anchor only at Fox News' discretion, and she did not want Ms. Herridge to file additional internal complaints that were meritless. (Opp. Mem. at 5-6) But the so-called new language concerning Fox News' discretion was not new, and it did not preclude Ms. Herridge from filing additional internal discrimination complaints.

the elements of a cause of action, supported by mere conclusory statements, do not suffice" in the face of a motion to dismiss. *Iqbal*, 129 S.Ct. at 1949. Similarly, a court need not consider a complaint's legal conclusions couched in the form of factual allegations, again as here. *Id*. at 1950; *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *McManus v. District of Columbia*, 530 F.Supp.2d 46, 64 (D.D.C. 2007).

Likely recognizing these deficiencies, the EEOC implausibly argues that this case "is similar to *Norden v. Samper*, 503 F.Supp.2d 130, 157 (D.D.C. 2007)," where Judge Collyer denied the employer's motion for summary judgment on the plaintiff's retaliation claim. (Opp. Mem at 15-16) To make this comparison, the EEOC states that the employer in *Norden* sought to require that Norden "waive her right to challenge future adverse employment actions … [and] Norden perceived the language to be oppressive and illegal …." (*Id*.) The obvious distinction here is that the proposed language did not require Ms. Herridge to waive her right to challenge *any future or past* Fox News actions, whether internally, at the EEOC or in court.

In sum, the complained of language in the proposed Agreement was accurate, neutral and did not require Ms. Herridge to waive any rights. For this reason alone, the language cannot be the basis for a retaliation claim, and the EEOC's complaint should be dismissed as a matter of law.

**B. Assuming, *Arguendo*, That The Language Was Retaliatory, It Did Not Rise To The Level Of A Materially Adverse Action Because Ms. Herridge Did Not Suffer An Injury Or Harm As A Result Of The Language, And Thus Unlawful Retaliation Did Not Occur.**

Assuming solely for the sake of argument that the language at issue was retaliatory, the EEOC's complaint still fails to state a claim because Ms. Herridge did not experience any "materially adverse action." (*See* Fox News' Mem. at 11-15) The EEOC advances two arguments to the contrary: (1) Ms. Herridge supposedly suffered financial harm because she was temporarily denied a salary increase, lost interest on the delayed salary increase, and lost the ability to invest the increase,

and (2) she allegedly suffered emotional distress because she feared that she would be fired and would lose her medical insurance. (Opp. Mem. at 11-15) Fox News refutes these arguments in turn.

**1. Fox News Did Not Harm Ms. Herridge Financially; In Fact, She Benefited From Fox News' Generosity**

The EEOC's financial harm argument is baseless for myriad reasons:

First, the EEOC does not dispute that Fox News paid Ms. Herridge her $460,000 salary throughout the negotiations period, and that she received her $35,000 salary increase retroactively. (*See* Brandi Aff. Exs. B, ¶ 3 and M) Fox News continued to pay Ms. Herridge her $460,000 salary in accordance with the section of her 2006 Agreement, entitled "Rights Following End of Term," which provided: "In the event that Performer continues rendering services for Fox following the expiration of the Term hereof, Performer shall continue to be paid her weekly compensation at her then-current rate…." (Brandi Aff. Ex. B at ¶ 10) The Agreement did not provide for the payment of interest, and none was paid. The Agreement also did not provide for the retroactive payment of any negotiated salary increase, but Fox News paid Ms. Herridge retroactively, which was hardly retaliation.[2]

Second, the prior Agreement between Ms. Herridge and Fox News is dated February 21, 2006; Ms. Herridge signed it on February 27, 2006; and Fox News signed it on March 7, 2006. (Brandi Aff. Ex. B at 1, 6) The Agreement was executed after more than four months of negotiations, and applied retroactively to October 22, 2005, as their prior Agreement expired on October 21, 2005. (*Id*. at Ex. B at 2) Yet neither the EEOC nor Ms. Herridge allege that Fox News paid her interest on the retroactive salary increase that she received under her prior contract, which further demonstrates the emptiness of their argument that she was entitled to interest when her current Agreement was executed.

[2] Although the EEOC and Ms. Herridge do not dispute that she continued to be paid the same $460,000 salary that she earned in 2008, they both state that she continued to be paid at "the 2005 contract salary rate." (Opp. Mem. at 6; Herridge Declaration at ¶ 16) The Court should not be misled by their terminology into thinking that she earned less than $460,000, her rate for the third year of her prior contract.

Third, the EEOC alleges that Ms. Herridge "explicitly refused to sign a new contract – for any amount of money – while the retaliatory language was included in that contract." (Opp. Mem. at 11) The EEOC has not pointed to any correspondence to Fox News from Ms. Herridge's agent, Henry Reisch of the William Morris Agency, one of the nation's premier talent agencies, to support this untrue assertion. Nor has the EEOC filed an affidavit from Mr. Reisch. Indeed, future salary increases were the key issue to Ms. Herridge; her agent conceded as much on September 12, 2008:

> I've been thinking about how to best move our discussions forward, since there seems to be significant differences of opinion on many of the material terms. Perhaps we should focus on the compensation, as this piece of the negotiation holds the key to its success or failure – in fact, agreement on an equitable number for her services can pave the way for a rapid resolution to the other outstanding issues.

(Brandi Aff. Ex. E) Ms. Herridge's agent next proposed that she be paid $900,000 in year 1 of the new Agreement, almost double her then salary, with escalating increases to $1 million in year 5. (*Id.*) These bewildering salary demands were the primary reason for the delay in reaching a new Agreement. But it did not help that on one occasion, Ms. Herridge's agent did not respond to a Fox News' proposal for *four months*, a fact that the EEOC does not dispute. (Brandi Aff. Ex. I)

Fourth, the EEOC incorrectly equates the alleged lost interest and the alleged lost ability to invest the interest because of Ms. Herridge's "delayed" salary increase with the months-long suspension without pay imposed upon the plaintiff in *Greer v. Paulson*, 505 F.3d 1306 (D.C. Cir. 2007). (Opp. Mem. at 15) There, although the plaintiff later received back pay, she went through bankruptcy and foreclosure proceedings in the interim. *Greer*, 505 F.3d at 1318. This "objectively tangible harm," said the Court of Appeals, constituted an action that was "materially adverse." *Id*. Nothing remotely serious is alleged to have occurred to Ms. Herridge; in fact, Fox News continued to pay Ms. Herridge her $460,000 salary throughout the negotiations period, which was $8,846.15 per week.

Fifth, the $35,000 salary increase that Ms. Herridge ultimately received was not tantamount to back pay. Ms. Herridge was not guaranteed a $35,000 increase, and Fox News was free to lower the amount of its generously-proposed 7.6% raise at any time during negotiations. This is particularly true because, as this Court can take judicial notice of, this nation was embedded in a deep recession throughout the negotiations period. The stock market plunged, interest rates plummeted, media advertising fell, and investment opportunities were few. The EEOC has not cited any case law for the proposition that Fox News' $35,000 salary increase offer should be viewed as back pay, and that interest and the lost ability to invest the interest should accrue. This is especially true where no interest was paid on her similar retroactive increase under Ms. Herridge's prior contract.

Sixth, even if Ms. Herridge is assumed to have lost a *de minimis* amount of interest and a speculative at best investment opportunity in a beleaguered stock market or elsewhere, the loss did not amount to a "materially adverse action," the test for whether an employee can assert a viable claim for unlawful retaliation. And finally, given that Fox News paid her salary increase retroactively, when it was not required to do so, there was no materially adverse action, but a material gain on Ms. Herridge's behalf.

**2. Ms. Herridge's Alleged Fear Does Not Equate With A Materially Adverse Action.**

The EEOC asserts that during the lengthy contract negotiations, Ms. Herridge supposedly "feared termination and feared losing her health insurance for herself and her two young children," and that fear was the equivalent of a materially adverse action. (Opp. Mem. at 7, 14) But Ms. Herridge's alleged fear was unwarranted. Under the 2006 Agreement, after the expiration of its term, Fox News was required to provide her with "at least four weeks' notice" of its intent to terminate her services. (Brandi Aff. Ex. B at ¶ 10) Fox News never provided her with such notice because it did not intend to terminate her employment.

Ms. Herridge's idiosyncratic fear of termination is legally insufficient to create a materially adverse action where none otherwise exists. This Court has consistently rejected similar emotional distress claims as not constituting the type of injury or harm that creates a materially adverse action. As Judge Leon explained in *Johnson v. Bolden*, 699 F. Supp.2d 295, 299-300 (D.D.C. 2010): "Our Circuit has made clear that the harm must be 'objectively tangible' rather than 'purely subjective injuries' … [because] not everything that makes an employee unhappy is an actionable adverse action." (citations omitted). *See also Booth v. District of Columbia*, 701 F. Supp.2d 73, 80 (D.D.C. 2010) ("public humiliation or loss of reputation … are not adverse actions"); *Beckford v. Geithner*, 661 F. Supp.2d 17, 27-28 (D.D.C. 2009) (employee's "subjective fear" of a possible termination does not constitute a material adversity because "[p]urely subjective injuries … are not adverse actions."); *Totten v. Norton*, 421 F. Supp.2d 115, 121 (D.D.C. 2006) ("Courts in this Circuit … have held that purely psychic injuries such as embarrassment do not qualify as adverse actions for purposes of the federal anti-discrimination statutes."). As these cases show, Ms. Herridge's alleged subjective fear of losing her job and health care coverage does not transform the alleged retaliatory language in the proposed Agreement into a materially adverse action.

## CONCLUSION

For all the foregoing reasons, as well as those set forth in Fox News' Memorandum of Law filed with this Court on November 4, 2010, Fox News respectfully requests that the Court dismiss the EEOC's complaint in its entirety with prejudice pursuant to either Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure, and award costs, disbursements and reasonable attorneys' fees to Fox News.

Dated: November 29, 2010

Respectfully submitted,

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