National Employment Lawyers Association

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Friday, April 5, 2024

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DISABILITY ACCOMMODATIONS FOR FEDERAL & PUBLIC WORKERS: A Caselaw Update

NELA Spring Seminar
Denver, Colorado
April 5, 2024

By Brian East

This paper represents a survey of selected federal-court disability-accommodation cases involving governmental employers, and decided in the last year or so.

1. Reasonable accommodation is an affirmative obligation for employers.

Because the ADA Amendments Act reduced the number of disputes about whether the plaintiff has a covered disability, many ADA cases now relate to claims that the employer failed to provide reasonable accommodations, which are required by 42 U.S.C. § 12112(b)(5) and 29 C.F.R. § 1630.9.

> Many federal civil rights laws prohibit discrimination of various kinds. But for certain classifications—namely, religion and disability—Congress requires more. Employers must affirmatively provide "reasonable accommodations" to people of faith and the disabled. See, e.g., 42 U.S.C. § 2000e(j) (Title VII of the 1964 Civil Rights Act); 42 U.S.C. § 12112(b)(5)(A) (Americans with Disabilities Act); 42 U.S.C. § 12133[sic] (Rehabilitation Act). This requirement no doubt imposes costs on employers. But it's a legislative policy judgment that we are duty-bound to implement.

Montague v. United States Postal Serv., No. 22-20113, 2023 WL 4235552, at *1 (5th Cir. June 28, 2023).

2. Individuals must normally request an accommodation, unless the need for one is known or obvious.

Although there are exceptions, the general rule is that the employee has to request an accommodation in order to prevail on a failure-to-accommodate claim, unless the need for one is known or obvious.

Most courts also observe that there is no need to use a particular process or form in requesting an accommodation. *See Perkins v. City of New York*, No. 22-196-CV, 2023 WL 370906 (2d Cir. Jan. 24, 2023) (Summary Order) (Rule 12) (district court mistakenly assumed that the first request for

accommodation was never made, but even though that request was not sent successfully though the automated portal, the plaintiff made that first request through other means).

Nor are "magic words" required. *Kelly v. Town of Abingdon, Virginia*, 90 F.4th 158, 167 (4th Cir. 2024); *Holly v. Vicksburg Warren Sch. Dist*., No. 3:22-CV-265-CWR-LGI, ___ F. Supp. 3d ___, 2023 WL 8530581, at *7–8 (S.D. Miss. Dec. 8, 2023); *Annie F. v. Mayorkas*, EEOC DOC 2022001221, 2023 WL 3040349, at *7 (Apr. 13, 2023). On the other hand, it can avoid unnecessary disputes if the individual uses words like "disability," "ADA," and "reasonable accommodation."

But sometimes even magic words like "reasonable accommodation" will not suffice. Some courts have held that there must be a logical connection—between the disability and the workplace changes requested—that is sufficient to permit the employer to infer that the request relates to the employee's disability. *Kelly v. Town of Abingdon, Virginia*, 90 F.4th 158, 167–68 (4th Cir. 2024) (although entitled an accommodation request, the letter from the plaintiff's lawyer focused on improving office functioning generally; it did not mention the plaintiff's disabilities, nor did it explain how the proposed changes might alleviate those disabilities).

There is often a factual dispute as to whether the plaintiff made a sufficient accommodation request. *See, e.g. Zaleski v. McDonough*, No. 21-13004, 2024 WL 188377, at *6 (E.D. Mich. Jan. 17, 2024) (sufficient evidence based on employee asking manager if there is something they could do other than penalize her for disability-related absences); *Verne v. New York City Dep't of Educ*., No. 21 CIV. 5427 (JPC), ___ F. Supp. 3d ___, 2023 WL 6387274, at *14 (S.D.N.Y. Sept. 29, 2023) (factual dispute about timing and adequacy of accommodation request).

Several courts have dismissed accommodation claims because of they found the accommodation requests lacking. For example, in *Bright v. Martin*, No. 22-30767, 2023 WL 4044437 (5th Cir. June 15, 2023) (per curiam), the court recognized that an "employee need not use a specific phrase to request an accommodation," but the request must be clear enough. The plaintiff stated to his supervisor that he could not stay and had to go, but he failed to explain that the need was immediate and that he had to leave even before his replacement arrived. And in *Taylor v. University of Mississippi Medical Center*, No. 23-60246, 2024 WL 512559 (5th Cir. Feb. 9, 2024) (per curiam), an IT professional revealed his diagnosis of depression when he was hired in 2012. Over the years, he complained to his supervisors about the workload and the stress, and the mental and physical exhaustion it caused him. But he did not expressly tie these complaints to his depression until he resigned, nor did he expressly request a reasonable accommodation, so the court rejected his accommodation claim. *See also Owens v. Governor's Off. of Student Achievement*, 52 F.4th 1327, 1334 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 2465 (2023) ("By informing GOSA of her need to telework following her childbirth, Owens made a specific demand for an accommodation in satisfaction of the first part of our failure-to-accommodate test. But the second part of our test—demonstrating that the requested accommodation is reasonable—requires that an employee put her employer on notice of the disability for which she seeks an accommodation and provide enough information to allow an employer to understand how the accommodation would address the limitations her disability presents. Because Owens did neither, we conclude that Owens did not demonstrate that her requested accommodation was reasonable.").

Note that a request may not be necessary if it is discouraged or futile. *See Adina P. v. McDonough*, EEOC DOC 2021004593, 2023 WL 4647882, at *10 (June 26, 2023) ("To the extent that the Agency asserts that Complainant abandoned her request for a permanent BLS waiver, we find that S2 and D1's actions clearly served to discourage Complainant from continuing to pursue the permanent BLS waiver.").

It is also important to ensure that the accommodation request is addressed to the employer or its agent. In *Milteer v. Navarro County, Texas*, 2023 WL 5284835 (N.D. Tex. Aug. 16, 2023), the plaintiff alleged that two separate entities constituted a single employer under the "integrated enterprise" theory. But the court rejected that argument, and because the accommodation request was not made to his actual employer, it was insufficient to support an accommodation claim.

The Fifth Circuit has held that a request for FMLA leave will not suffice as a request for accommodation under the ADA, but it appears that there is a circuit split on this, explicit or otherwise. Still, even in circuits holding requesting FMLA leave is not a request for accommodation, it is also not a bar to an accommodation claim if there is a sufficient request for accommodation beyond seeking FMLA leave. In *Issa v. Texas Dep't of Crim. Justice*, No. 1:22-CV-01107-ADA, 2023 WL 4923971 (W.D. Tex. Aug. 1, 2023), *report and recommendation adopted*, 2023 WL 5352319 (W.D. Tex. Aug. 18, 2023), a pregnant prison guard had labor-like pain and asked to leave, but was refused. When she finally got off work some hours later and drove to the hospital, her baby was stillborn. The court denied the employer's motion to dismiss as to the plaintiff's claims under Sec. 504 of the Rehabilitation Act, finding that although requesting FMLA leave is not a request for accommodation, it is also not a bar to an accommodation claim if there is a sufficient request for accommodation beyond seeking FMLA leave. *Id*. at *11. The court found that the request here was sufficient because the "allegations show that Issa's request was for a reason related to a medical condition. For two-and-a-half hours, Issa repeatedly told her supervisors that she was in pain and needed to go to the hospital.… These allegations show that Issa made a request for an accommodation for a medical-related condition." *Id*. at *12.

3. Engaging in the flexible interactive process is important.

Identifying reasonable accommodations often requires the employer and employee to engage in a flexible, interactive process. 29 C.F.R. § 1630.2(o)(3). *See also* 29 C.F.R. Pt. 1630 App., § 1630.9 ("Process of Determining the Appropriate Reasonable Accommodation").

Although the failure to engage in the interactive process is not a separate claim, such a failure may justify denying a motion for summary judgment in an accommodation case. *Bley v. Indep. Sch. Dist. No. I-002 of Oklahoma Cnty*., No. CIV-21-1026-R, 2023 WL 3333082, at *7 (W.D. Okla. May 9, 2023), citing *Dansie v. Union Pac. R.R. Co.*, 42 F.4th 1184, 1194 n.2 (10th Cir. 2022).

As a result, the best defense to an accommodation claim may be evidence that the employer made a serious effort to accommodate. *See, e.g., Narayanan v. Midwestern State Univ*., No. 22-11140, 2023 WL 6621676, at *3 (5th Cir. Oct. 11, 2023); *Santacruz v. Via Metro. Transit*, No. SA-21-CV-00719-FB, 2023 WL 2147265, at *7 (W.D. Tex. Feb. 16, 2023), *report and recommendation adopted*, No. SA-21-CV-719-FB, 2023 WL 2572211 (W.D. Tex. Mar. 20, 2023).

In many cases the court found sufficient evidence that the employer was at fault for the breakdown in the interactive process. *See, e.g., Cogdell v. Carnahan*, No. CV 19-2462 (RC), 2023 WL 6388850, at *10 (D.D.C. Sept. 29, 2023) ("reasonable jury could find that the GSA caused the breakdown by failing to respond to Cogdell's request for reconsideration"); *Enechi v. City of New York*, No. 20 CIV. 8911 (AT), 2023 WL 6293941, at *6 (S.D.N.Y. Sept. 27, 2023) ("Here, a reasonable jury could conclude that Defendants tried to force Plaintiff into accepting a voluntary demotion without exploring options for a reasonable accommodation, thus supporting an inference that discrimination was a but-for cause of Defendants' adverse actions."); *Babnik v. Vill. of Antioch*, No. 18-CV-04490, 2023 WL 4817655, at *8 (N.D. Ill. July 27, 2023); *Bley v. Indep. Sch. Dist. No. I-002 of Oklahoma Cnty*., No. CIV-21-1026-R, 2023 WL 3333082, at *7 (W.D. Okla. May 9, 2023); *Hausburg v. McDonough*, No. 8:20-CV-2300-JSS, 2023 WL 3847326, at *20 (M.D. Fla. June 6, 2023) (sufficient evidence that supervisors attempted to stall the accommodation process so that plaintiff could be removed from his position); *Lowe v. Pettway*, 665 F. Supp. 3d 1313, 1331–32 (N.D. Ala. 2023) (sheriff's office terminated plaintiff even though his supervisors knew he was hospitalized for mental-health and substance-abuse treatment).

See also Ellis v. Pub. Serv. Elec. & Gas, No. 2:20-CV-17893 (WJM), 2023 WL 6389324, at *6–7 (D.N.J. Sept. 29, 2023);.*Dickerson v. U.S. Dep't of Veterans Affs*., No. CV H-21-3805, 2023 WL 5837503, at *4 (S.D. Tex. Sept. 8, 2023), *reconsideration denied sub nom. Dickerson v. McDonough*, No. 2024 WL 23177 (S.D. Tex. Jan. 2, 2024) (documentation the employee presented—two "duty status reports" that included physician's clinical findings—was sufficient because they showed a disability requiring accommodation); *Scaff v. Gap, Inc*., No. 3:21-CV-00815, ___ F. Supp. 3d ___, 2023 WL 3467739, at *11–12 (M.D. Tenn. May 15, 2023) (at least possible, even if unlikely, that the employee attempted to provide medical documentation); *Alena C. v. McDonough*, EEOC DOC 2023001110, 2023 WL 8353828, at *5–6 (Nov. 1, 2023) (employee with learning impairment sought extra time and other testing accommodation but the employer never responded, never told her that similar accommodations might be available at the local level, and changed up the test so that group studying was ineffective); *Jasper S. v. DeJoy*, EEOC DOC 2022003684, 2023 WL 5623898 (Aug. 17, 2023) ("blanket practice of not considering a particular reasonable accommodation—light duty—for employees in the Rural Carrier craft who do not have work-related injuries … is sufficient to state a claim"); *Marjorie F. v. McDonough*, EEOC DOC 2022001439, 2023 WL 4294812, at *5 (June 14, 2023) ("There is no indication that S1 or the LRAC sought clarification from Complainant regarding other alterative available options to accommodate her disability."); *Jay C. v. McDonough*, EEOC DOC 2022003169, 2023 WL 3841324, at *7 (May 25, 2023) (alleged "alternative accommodation" of the opportunity to contact the Employee Assistance Program is not an accommodation at all because any employee may do so; "we are troubled by the fact that there is absolutely no evidence in the record that the Agency engaged in the interactive process with Complainant at all before rejecting his accommodation requests, let alone made any attempt to accommodate"); *Julietta K. v. Vilsack*, EEOC DOC 2022001460, 2023 WL 3318257, at *5 (Apr. 27, 2023) (agency's alternative accommodations—liberal leave, sit/stand desk, two health breaks, etc.—did not effectively address employee's limitations, as teleworking would).

Some courts have found *as a matter of law* that the employer failed to engage in the interactive process. *See, e.g., Oross v. Kutztown Univ*., No. CV 21-5032, 2023 WL 4748186, at *23 (E.D. Pa. July 25, 2023), *partial reconsideration granted on other grounds*, 2024 WL 83506 (E.D. Pa. Jan.

8, 2024) ("There is also no dispute that Professor Oross requested an accommodation of teaching his classes and conducting office hours remotely in the Fall Semester of 2021. Based on the previous discussion concerning pretext, supra, and the undisputed record in this case, the Court finds, as a matter of law, that the University did not make any effort, let alone a good faith effort, to accommodate Plaintiff and that Professor Oross could have easily been accommodated without causing an undue burden on the University.") (footnote omitted). And in *Holly v. Vicksburg Warren Sch. Dist.*, No. 3:22-CV-265-CWR-LGI, ___ F. Supp. 3d ___, 2023 WL 8530581, at *8 (S.D. Miss. Dec. 8, 2023), an assistant principal sought five days beyond FMLA leave because of complications from a Cesarian section. The court stated (cites, quotes, and paragraph break omitted; emphasis in original):

> But underneath the obfuscation is the kernel of an argument: how was the District supposed to know whether five days off would actually support Holly's recovery from a bowel resection? But the ADA already answers that question. In these situations, an employer must engage in the interactive process, or a flexible dialogue, with the employee with the goal of finding an appropriate accommodation for the limitation. In other words, *the District could have asked her*. The District had plenty of time to inquire. It just never availed itself of the opportunity. Instead, it leapt to termination without any back-and-forth. And that unwillingness to engage in a good faith interactive process is a violation of the ADA.

An employer may also be liable for its failure to communicate clearly that the accommodation proposed by the plaintiff will not work. Similarly, an employer that fails to indicate that it needs more information or more definiteness may violate its obligation to engage in the interactive process. *See, e.g.*, *Tafolla v. Heilig*, 80 F.4th 111, 123 (2d Cir. 2023) ("Moreover, at no time did the defendants suggest to Tafolla that she needed to submit additional medical documentation to support her accommodation requests, nor did the defendants seek clarification from Tafolla or her doctor regarding the nature of the accommodation she requested."). *Babnik v. Vill. of Antioch*, No. 18-CV-04490, 2023 WL 4817655, at *8 (N.D. Ill. July 27, 2023) ("If the Village or the Department needed more information from Babnik, they should have asked for it."); *Annie F. v. Mayorkas*, EEOC DOC 2022001221, 2023 WL 3040349, at *8 (Apr. 13, 2023) (regardless of any lack of clarity in the accommodation request, the agency made no effort to engage in the interactive process).

Sometimes, an employer's willingness to grant part of the accommodations is still inadequate. In *Tafolla v. Heilig*, 80 F.4th 111 (2d Cir. 2023), a clerk-typist for the DA's office requested accommodations for spinal injuries she had received in a car wreck. There were two separate medical restrictions: no lifting over five pounds, and no bending or pushing. The employer honored the first, but it apparently did not understand that the second restriction related to *any* pushing or pulling, regardless of weight, and it therefore assigned archiving duties that violated that second restriction. According to the court, a jury could find that the defendants did not fully grant the accommodation request. *Id*. at 120–22. Moreover, the employer's response to just "get it done" could be reasonably construed as ending the interactive process, as could the employer's response that it did not offer light duty assignments, and assigning new files to archive. *Id*. at 122. The court also rejected the employer's argument that the fact that the plaintiff ended up taking extended medical leave effectively terminated the interactive process. The plaintiff had never stated that

intent, and to the contrary continued to convey that she would return to work. Moreover, the fact that she later took that leave had to be viewed in light of what had transpired before, i.e., the plaintiff's reasonable belief that her employer was not going to accommodate her. *Id*. at 123–24.

See also Hausburg v. McDonough, No. 8:20-CV-2300-JSS, 2023 WL 3847326, at *19 (M.D. Fla. June 6, 2023) ("Although Dankic's emails seek additional information regarding Plaintiff's request for an emotional support dog, Defendant has presented no evidence that he otherwise engaged in the interactive process regarding Plaintiff's other reasonable accommodation requests or argued that those requests were insufficient to trigger Defendant's duty.").

There may also be a factual dispute about whether any accommodation was needed. *See, e.g.*, *Hampton v. Utah Dep't of Corr*., 87 F.4th 1183, 1196 (10th Cir. 2023) (even though employer argued that the plaintiff had passed his qualification test on a standard handgun, there was evidence that his grip failed with multiple shots); *Zaleski v. McDonough*, No. 21-13004, 2024 WL 188377, at *5 (E.D. Mich. Jan. 17, 2024) (although employer claimed the plaintiff's position had no lifting requirement, there was evidence that manager insisted that she be able to lift 30 pounds); *Harp v. Garland*, No. CIV-19-1138-G, 2023 WL 6380019, at *2 (W.D. Okla. Sept. 29, 2023) (appeal pending) (although there was evidence that the plaintiff performed her job adequately immediately following her accommodation request, but mental state deteriorated as a result of employer's refusal to let her attend counseling sessions); *Cogdell v. Carnahan*, No. CV 19-2462 (RC), 2023 WL 6388850, at *7 (D.D.C. Sept. 29, 2023).

The employer's delay in accommodating may also be actionable discrimination, depending on the circumstances. In *Perkins v. City of New York*, No. 22-196-CV, 2023 WL 370906 (2d Cir. Jan. 24, 2023) (Summary Order), the plaintiff was a deaf case manager for the NYC human services office, and she did a lot of phone work, and also performed field visits. She requested a monitor or computer with a video camera to be used as a videophone, and access to Video Remote Interpreting through her phone or a tablet for field visits. There were many delays lasting several months, as wells as technical problems with the city's response. The court found that her complaint plausibly alleged that the employer's response to the accommodation requests was a deliberate choice that went beyond negligence or bureaucratic inaction. *Id*. at *4. The appeals court also rejected the defense argument that it was enough to show that the videophone *sometimes* worked (though with flaws), and the plaintiff was able to use her personal cell phone to assist with her professional tasks. The complaint sufficiently alleged that this was ineffective because it meant that the plaintiff was unable to accomplish certain tasks at her work; was unable to equally participate, understand, and/or communicate with clients and others for her work; and had to cancel appointments and had cases taken away from her. *Id*. at *5.

See also Cowell v. Illinois Dep't of Hum. Servs., No. 3:21-CV-478-NJR, 2024 WL 551891, at *11 (S.D. Ill. Feb. 12, 2024): (8-month delay in providing standing desk for employee with chronic back pain and disk replacements); *Issa v. Texas Dep't of Crim. Just*., No. 1:22-CV-01107-ADA, 2023 WL 4923971, at *6, *12 (W.D. Tex. Aug. 1, 2023), report and recommendation adopted, 2023 WL 5352319 (W.D. Tex. Aug. 18, 2023) (PDA and Rehab Act) (denying repeated requests for relief for two-and-a-half hours while her pregnancy-related medical emergency worsened); *Stewart v. Mountainland Tech. Coll*., No. 220CV00086JNPDBP, 2023 WL 1864288, at *12–13 (D. Utah Feb. 9, 2023) (fact question); *Felix v. New York City Dep't of Educ*., No. 21 CIV. 6109

(LGS), 2023 WL 4706097, at *10 (S.D.N.Y. July 24, 2023) ("reasonable jury could conclude that requiring Plaintiff to work in Room 411 for even six months, when Plaintiff made clear the effects on her health, demonstrates the lack of 'good faith efforts'"); *Vicky R. v. Del Toro*, EEOC DOC 2021003873, 2023 WL 5622669, at *4–5 (Aug. 4, 2023) (four-month delay was unnecessary, and employee was entitled to be compensated for the aggravation of her disabilities); *Marjorie F. v. McDonough*, EEOC DOC 2022001439, 2023 WL 4294812, at *5 (June 14, 2023).

Note, too, that the employer may not be able to rely on performance problems as non-discriminatory reasons for adverse actions if those problems are the result of a failure to accommodate. *See Arnulfo T. v. Austin*, EEOC DOC 2021003604, 2023 WL 3567932, at *7 (May 9, 2023) ("We also find that, without providing effective accommodation, Complainant was not provided with an equitable opportunity to successfully complete the PIP started in March 2020.")

Of course, the *plaintiff's own failure* to engage in the interactive process can undercut an accommodation claim. In *Equal Employment Opportunity Commission v. Methodist Hospitals of Dallas*, 62 F.4th 938 (5th Cir. 2023), the court also found that the plaintiff caused a breakdown in the interactive process when she failed to respond to the employer's letters offering her additional leave. *Id*. at 948. Although the employer should not have told the plaintiff to resign, the panel found that no reasonable jury could find that this comment "created an objectively reasonable perception that the process was clearly at an end or that no reasonable accommodation would be forthcoming," because both sides continued to engage in the interactive process. *Id*. at 949. And in *Hurt v. Sch. Dist. No. 1 in Cnty. of Denver Colorado*, 664 F. Supp. 3d 1227, 1239–40 (D. Colo. 2023), *appeal dismissed*, No. 23-1136, 2023 WL 7215340 (10th Cir. June 1, 2023), the employee sought a new position that would have apparently violated her doctor's restrictions on travelling, but she failed to provide updated medical documentation in response to employer's request. *See also Roland T. v. DeJoy*, EEOC DOC 2023003953, 2024 WL 277854, at *2–3 (Jan. 3, 2024) (employee failed to provide medical information); *Taunya P. v. McDonough*, EEOC DOC 2023003443, 2024 WL 322819, at *6 (Jan. 18, 2024) (plaintiff was at fault for the breakdown because she resigned before the agency made a final determination as to accommodations).

But cf. Julietta K. v. Vilsack, EEOC DOC 2022001460, 2023 WL 3318257, at *7–9 (Apr. 27, 2023) (employee did not fail to engage in the interactive process by retiring; she only did that when the agency clearly refused her teleworking request, and constructively discharged her).

4. There are various kinds of accommodations courts have found reasonable.

(a) Leave can be a reasonable accommodation.

Most courts recognize that a period of leave may be a reasonable accommodation. For example, in *Issa v. Texas Dep't of Crim. Justice*, No. 1:22-CV-01107-ADA, 2023 WL 4923971 (W.D. Tex. Aug. 1, 2023), *report and recommendation adopted*, 2023 WL 5352319 (W.D. Tex. Aug. 18, 2023), a pregnant prison guard had labor-like pain and asked to leave her post, but was refused. When she finally got off work some hours later and drove to the hospital, her baby was stillborn. The court denied the employer's motion to dismiss the Sec. 504 claims, finding that the request for leave, even for immediate leave, was reasonable.

See also Lowe v. Pettway, 665 F. Supp. 3d 1313 (N.D. Ala. 2023) (leave for substance-abuse treatment); *Liu v. DeJoy*, 664 F. Supp. 3d 1030, 1046 (C.D. Cal. 2023) ("Here, there is at least a triable issue of fact whether a six-week leave of absence could have enabled Liu to perform the essential functions of his job upon return."); *Holly v. Vicksburg Warren Sch. Dist*., No. 3:22-CV-265-CWR-LGI, ___ F. Supp. 3d ___, 2023 WL 8530581, at *7–9 (S.D. Miss. Dec. 8, 2023); *Harp v. Garland*, No. CIV-19-1138-G, 2023 WL 6380019 (W.D. Okla. Sept. 29, 2023) (appeal pending) (leave to attend counseling sessions).

There is a circuit split, however. The Seventh Circuit has held that the "[i]nability to work for a multi-month period removes a person from the class protected by the ADA." *Carnahan v. McLean Cnty. Sheriff's Off.*, No. 21-CV-1125, 2023 WL 2916555, at *4 (C.D. Ill. Apr. 12, 2023), *quoting Bryne v. Avon Products, Inc*., 328 F.3d 379, 381 (7th Cir. 2003).

Even in the great majority of circuits recognizing that leave may be a reasonable accommodation, *indefinite* leave is generally seen as an unreasonable accommodation. *See*, *e.g.*, *Narayanan v. Midwestern State Univ*., No. 22-11140, 2023 WL 6621676, at *4 (5th Cir. Oct. 11, 2023); *Menoken v. Burrows*, 656 F. Supp. 3d 98, 105 (D.D.C. 2023).

But not everything an employer labels as "indefinite" really is. *See, e.g., Dansie v. Union Pac. R.R. Co*., 42 F.4th 1184, 1195–96 (10th Cir. 2022) (the leave plaintiff requested—up to 5 days per month to recover from his illness and treatment—was reasonable and not indefinite); *Liu v. DeJoy*, 664 F. Supp. 3d 1030, 1046 (C.D. Cal. 2023).

Sometimes, offering leave as an accommodation is itself discriminatory, when there are other accommodations that would be reasonable and would allow the employee to keep working. *See, e.g., Moat v. Metro. Gov't of Nashville*, No. 3:21-CV-00807, 2023 WL 4035909, at *14 (M.D. Tenn. June 15, 2023) (temporary light duty instead of forced disability insurance benefits at half pay); *Julietta K. v. Vilsack*, EEOC DOC 2022001460, 2023 WL 3318257, at *7 (Apr. 27, 2023) ("While one of the Agency's proposed accommodations was liberal leave, the Commission has held that forcing an employee to take leave when another accommodation would permit the employee to continue working is not an effective accommodation and evinces a failure by the Agency to act in good faith."); *Annie F. v. Mayorkas*, EEOC DOC 2022001221, 2023 WL 3040349, at *8–10 (Apr. 13, 2023) (similar) (instructions to take leave instead of granting telework).

But cf. Equal Emp. Opportunity Comm'n v. Methodist Hosps. of Dallas, 62 F.4th 938, 949–50 (5th Cir. 2023) (sidestepping the question of whether offering only unpaid leave was itself unreasonable because the court found it a reasonable *first* offer, and the plaintiff "withdrew from the process" before seeing if further accommodations might have been offered).

(b) Teleworking can be a reasonable accommodation in some cases.

Working remotely can be a reasonable accommodation, but like other accommodations, it will depend on the specific circumstances. Because there is often judicial antipathy towards this accommodation, a detailed evidentiary record is often required.

In *Montague v. United States Postal Serv*., No. 22-20113, 2023 WL 4235552 (5th Cir. June 28, 2023) (unpublished), a public-relations employee of the Post Office requested part-time teleworking—working from home in the mornings and at the office in the afternoons—because her neuropathy resulted in morning flare-ups preventing her from driving to work. The court found that genuine factual disputes precluded summary judgment, and reversed the opinion below. As Judge Ho observed:

> It's often said that 90% of life is showing up. But the right number no doubt varies from job to job. It may be reasonable to work part of the day at home for some jobs—but not for others. The correct answer turns on the nature of the job and the facts of the case.

Id. at *1. The employer had suggested two potential alternatives: having the plaintiff's husband drive her, or taking a taxi. But her husband's own work prevented the former, and she could not afford a taxi every day, nor did the employer offer to reimburse her (which the court noted might be a reasonable accommodation in certain circumstances). *Id*. at *4 and n.2. Thus, a jury could conclude that these alternatives were not reasonable.

Courts have also recognized that technological improvements make teleworking more feasible than before. *See, e.g., Smithson v. Austin*, 86 F.4th 815, 822 (7th Cir. 2023) ("In the past, we have held that working at home is not a reasonable accommodation as a general matter. But as we recently noted, the COVID pandemic led to developments in work-from-home technologies that change the calculus for this assessment. In the post-COVID pandemic economy and with the advent of new technologies making working from home more feasible, we must now assess whether in-person attendance is essential on a context-specific basis.") (citations omitted). *See also Cowell v. Illinois Dep't of Hum. Servs*., No. 3:21-CV-478-NJR, 2024 WL 551891, at *10 (S.D. Ill. Feb. 12, 2024):

> The Court finds that a genuine issue of material facts exists as to whether in-person attendance was an essential function of her job, especially during the short four to five week period she requested to telework. By July 2020, when Cowell requested to work remotely, the pandemic had been raging for several months. As Nottmeier admitted, technologies like WebEx and Zoom created the ability to meet virtually. Nottmeier testified that coordinating patient care required staff to meet locally, but that's the only requirement he outlined. Cowell's job description did not mention coordinating patient care, only coordinating admissions and discharge for the facility. Nottmeier and Lawson also stated that no Chester employee could telework as they were deemed "essential" by IDHS during the pandemic. Any such official announcement is not in the record, and classifying employees as "essential" in the context of the pandemic is a different matter entirely from in-person attendance being an essential function of Cowell's job.

A *temporary* period of teleworking may be easier to prove reasonable. *See Bley v. Indep. Sch. Dist. No. I-002 of Oklahoma Cnty*., No. CIV-21-1026-R, 2023 WL 3333082, at *7 (W.D. Okla. May 9, 2023.

In *Nenita S. v. Yellen*, EEOC DOC 2023001482, 2024 WL 277834, at *7–8 (Jan. 4, 2024), the court found a factual dispute as to whether the employer violated the Rehabilitation Act when it granted four days per week of teleworking instead of the five days the plaintiff and her doctor requested. The court also found no evidence that the CBA prohibited such an accommodation.

See also Sharpe v. Garland, No. 1:23CV1219 (DJN), 2024 WL 329945, at *4 (E.D. Va. Jan. 29, 2024) (fact dispute whether plaintiff could have performed the essential job functions via teleworking); *Adina P. v. McDonough*, EEOC DOC 2021004593, 2023 WL 4647882, at *11 (June 26, 2023) (although employer may choose among reasonable accommodations, the chosen accommodation must be effective; two 30-day telework periods, plus two days per week teleworking going forward, were arbitrarily limited and ineffective); *Jay C. v. McDonough*, EEOC DOC 2022003169, 2023 WL 3841324, at *6 (May 25, 2023) (employee had successfully teleworked for a long time, with a "striking lack of evidence … [of] any performance issues"); *Julietta K. v. Vilsack*, EEOC DOC 2022001460, 2023 WL 3318257, at *5 (Apr. 27, 2023) (agency improperly denied requested accommodation of four days of telework per week); *Verlie S. v. Austin*, EEOC DOC 2022000512, 2023 WL 3040219, at *5–8 (Apr. 6, 2023).

In at least one case, the court found as a matter of law that the request for remote teaching could have easily been accommodated without causing an undue burden. *Oross v. Kutztown Univ*., No. CV 21-5032, 2023 WL 4748186, at *23 (E.D. Pa. July 25, 2023), *partial reconsideration granted on other grounds*, 2024 WL 83506 (E.D. Pa. Jan. 8, 2024).

But in other cases, courts have found that under the specific circumstances presented, on-premises work was an essential function, so teleworking was not required. *See, e.g., Eleni M. v. Mayorkas*, EEOC DOC 2023001504, 2024 WL 322685, at *2, 4 (Jan. 18, 2024) (agency established that four days of telework per week was unreasonable because many of the essential job functions required the employee to be at the office; there was no showing that the alternative accommodations offered—including episodic telework, and help with reassignment to a position that would allow more teleworking—were ineffective).

And in *Susan M. v. McDonough*, EEOC DOC 2022003501, 2023 WL 8354013, at *4–5 (Nov. 16, 2023), an employee with migraines asked to telework four days per week. The agency offered alternative accommodations of teleworking one day per week, plus moving to a quieter location, dimming overhead lighting, noise-canceling headphones, a flexible schedule, and screen protectors to eliminate glare. Although the employee argued that these alternatives were ineffective, there is no evidence that she ever told anyone that she was having difficulty, or that they were not effective, and instead reported that she was doing well with the alternative accommodations. *See also Brendon L. v. McDonough*, EEOC DOC 2023003238, 2023 WL 8713848, at *7 (Nov. 28, 2023) (alternative accommodations of flexible schedule or four tens were effective).

(c) There are many other accommodations to consider.

The ADA includes a non-exhaustive list of reasonable accommodations, 42 U.S.C. 12111(9), but courts have recognized many other types of reasonable accommodations, even if inconsistent with the employer's standard policies. *See, e.g.*, *Hampton v. Utah Dep't of Corr*., 87 F.4th 1183, 1195–

96 (10th Cir. 2023) (alternative make of handgun for law-enforcement officer with missing fingers); *Wise v. DeJoy*, 71 F.4th 744, 749–50 (10th Cir. 2023) (help with heavy packages or carts); *Perkins v. City of New York*, No. 22-196-CV, 2023 WL 370906 (2d Cir. Jan. 24, 2023) (Summary Order) (videophone technology plus access to Video Remote Interpreting via an iPad for field visits by deaf employee); *Cowell v. Illinois Dep't of Hum. Servs*., No. 3:21-CV-478-NJR, 2024 WL 551891, at *10 (S.D. Ill. Feb. 12, 2024) (modified work schedule once a month to arrive and leave two hours earlier to allow for infusions); *Verne v. New York City Dep't of Educ*., No. 21 CIV. 5427 (JPC), ___ F. Supp. 3d ___, 2023 WL 6387274, at *14 (S.D.N.Y. Sept. 29, 2023) (early teaching schedule); *Cogdell v. Carnahan*, No. CV 19-2462 (RC), 2023 WL 6388850, at *7–8 (D.D.C. Sept. 29, 2023) (job coach); *Jordan v. Sch. Bd. of the City of Norfolk*, No. 2:22-CV-167, 2023 WL 5807844, at *11–12 (E.D. Va. Sept. 7, 2023) (transfer to another location); *Babnik v. The Village of Antioch*, No. 18-CV-04490, 2023 WL 4817655, at *7–9 (N.D. Ill. July 27, 2023) (temporary period of light duty); *Felix v. New York City Dep't of Educ*., No. 21 CIV. 6109 (LGS), 2023 WL 4706097, at *9 (S.D.N.Y. July 24, 2023) (transferring teacher out of room with poor air quality and ventilation, no windows, and a moldy odor, which caused plaintiff to develop migraines and COPD episodes despite two air purifiers provided by the department); *Altheimer-Umphlett v. DeJoy*, No. 20 CV 7406, 2023 WL 4365993, at *14 (N.D. Ill. July 6, 2023) (closer parking); *Santana v. Mount Vernon City Sch. Dist./Bd. of Educ*., No. 20-CV-3212 (NSR), 2023 WL 2876653, at *9 (S.D.N.Y. Apr. 7, 2023) (move to first-floor classroom); *Alena C. v. McDonough*, EEOC DOC 2023001110, 2023 WL 8353828, at *5–6 (Nov. 1, 2023) (extra time and other testing and test-prep accommodations); *Marjorie F. v. McDonough*, EEOC DOC 2022001439, 2023 WL 4294812, at *5 (June 14, 2023) (working in a quieter workspace); *Arnulfo T. v. Austin*, EEOC DOC 2021003604, 2023 WL 3567932, at *7 (May 9, 2023) (caption phone like CapTel for hard-of-hearing employee).

See also Jasper S. v. DeJoy, EEOC DOC 2022003684, 2023 WL 5623898 (Aug. 17, 2023) ("blanket practice of not considering a particular reasonable accommodation—light duty—for employees in the Rural Carrier craft who do not have work-related injuries … is sufficient to state a claim").

Federal-sector employees have a right to reasonable accommodations under Sec. 501 of the Rehabilitation Act, 29 U.S.C. § 791. But in *Orozco v. Garland*, 60 F.4th 684 (D.C. Cir. 2023), involving a blind FBI intelligence analyst seeking accessible software, the court went further. It held that federal employees also have a private right of action to enforce *Section 508* of the Rehabilitation Act, 29 U.S.C. § 794d. And Sec. 508 requires federal agencies and the USPS—"[w]hen developing, procuring, maintaining, or using electronic and information technology"—to make sure that such technology is accessible to and usable by federal employees and members of the public in a way that is "comparable to the access to and use of the information and data" by folks without disabilities (absent undue hardship). Note, too, that Sec. 508 differs from the accommodation obligation under Sec. 501 in that the latter allows an employer to offer an alternative accommodation, if effective. But Sec. 508, when applicable, may constrain the employer to obtain accessible technology.

Note that the legislative history of the Pregnant Workers Fairness Act also recognizes that under the ADA, essential functions may need to be excused *temporarily* as a reasonable accommodation. H.R. Rep. No. 27(I), 117th Cong., 1st Sess. 2021, 2021 WL 1940249, at *27–28 (Leg. Hist. May

4, 2021) ("There is precedent under the ADA for the temporary excusal of essential functions … [f]or example, under the ADA, courts have found workers are entitled to reasonable accommodations if they only need a finite leave of absence or a transfer that would allow them to perform the essential functions of the job 'in the near future.'") (*citing Robert v. Bd. of Cty. Comm'rs of Brown Cty., Kans*., 691 F.3d 1211, 1218 (10th Cir. 2012)).

Courts have also recognized various workplace accommodations for religious practices under Title VII. Because the employer's obligation to accommodate disabilities is at least as robust as the obligations under Title VII, *cf. Groff v. DeJoy*, 600 U.S. 447 (2023), the latter may be persuasive authority for accommodation claims under the ADA or similar laws. For example, the Supreme Court recently listed three potential Title VII accommodations—shift-swapping, incentive pay to get coverage, and arranging for coverage by bringing in employees from other locations. *Id*. at 473.

Other sources of accommodation ideas include the Job Accommodation Network (JAN), and various EEOC guidance documents. Most recently, the new or updated EEOC guidance materials include:

Visual Disabilities in the Workplace and the Americans with Disabilities Act, Question 10 (July 26, 2023), which lists various examples of:

- assistive technology (e.g. text-to-speech software);
- accessible materials (e.g. Braille or large print);
- modification of workplace/employer policies or procedures (e.g., allowing the use of guide dogs), testing (e.g. allowing alternative testing), or training;
- ambient adjustments (e.g. brighter office lights);
- sighted assistance or services (e.g. a qualified reader).

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Question D.19 (May 15, 2023), which lists various accommodation for Long COVID, including:

- a quiet workspace, use of noise cancelling or white noise devices, and uninterrupted worktime to address brain fog;
- alternative lighting and reducing glare to address headaches;
- rest breaks to address joint pain or shortness of breath;
- a flexible schedule or telework to address fatigue; and
- removal of "marginal functions" that involve physical exertion to address shortness of breath.

Hearing Disabilities in the Workplace and the Americans with Disabilities Act, Question 9 (Jan. 24, 2023), which lists various examples of the following:

- sign language interpreters
- assistive technology
- assistive listening devices
- augmentative communication devices that allow users to communicate orally by typing words that are then translated to sign language or a simulated voice

- communication access real-time translation (CART), which translates voice into text at real-time speeds
- appropriate written memos and notes (especially used for brief, simple, or routine communications)
- note-taking assistance for those using CART services or sign language interpretation (to allow individuals using CART services or sign language interpretation to remain focused on translations)
- work area adjustments (e.g., desk away from noisy areas or emergency alarms with strobes).

The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees, Question 6 (May 12, 2022), which lists examples of accommodations that may be required when an employer uses algorithmic decision-making tools to assess job applicants or employees, including:

- providing an accessible version of a knowledge test to a job applicant whose limited manual dexterity (e.g., allowing oral responses)
- extended time or an alternative version of the test, including one that is compatible with accessible technology (like a screen-reader).

(d) Reassignment can be a reasonable accommodation if others will not work.

Reassignment is specifically listed in the statute as an example of a reasonable accommodation, 42 U.S.C. § 12111(9)(B), although it is normally seen as the accommodation of last resort. *Adina P. v. McDonough*, EEOC DOC 2021004593, 2023 WL 4647882, at *12 (June 26, 2023) ("Reassignment is the reasonable accommodation of last resort and should be considered only when there are no effective accommodations that would enable an employee to perform the essential functions of her current position or accommodating the employee in the current position would cause an undue hardship. As the record supports the finding that there were other effective accommodations, reassignment does not apply herein.").

There is a circuit split regarding whether reassignment means placing the individual in an open position, or whether it only requires letting the employee compete for open positions. In *Equal Employment Opportunity Commission v. Methodist Hospitals of Dallas*, 62 F.4th 938 (5th Cir. 2023), the Fifth Circuit collected the cases and weighed in on the circuit split, finding that—like the reassignment in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), which conflicted with a seniority system—a reassignment that would be inconsistent with the employer's policy of hiring the "most qualified applicant" would not be reasonable in the run of cases. But employees may still be entitled to reassignments that contravene such best-qualified policies, if they can show special circumstances.

Note, too, that the plaintiff bringing a reassignment claim is normally required to show that a vacant position existed at the relevant time. *Compare Ellis v. Pub. Serv. Elec. & Gas*, No. 2:20-CV-17893 (WJM), 2023 WL 6389324, at *8 (D.N.J. Sept. 29, 2023) (factual dispute whether position was vacant), with *Menoken v. Burrows*, 656 F. Supp. 3d 98, 105–06 (D.D.C. 2023) (position was already occupied), *Moore v. DeJoy*, No. 4:21-CV-2322, 2023 WL 5105254, at *6 (S.D. Tex. Aug. 9, 2023) (finding no evidence that the reasonable accommodations sought—light-

duty or an all-riding assignment—were available when the plaintiff requested them); *Sinclair v. Dep't of Transportation*, No. AT-0752-22-0108-I-1, 2023 WL 4291418, at *5 (M.S.P.B. June 30, 2023), *review denied sub nom. Wes S. v. Buttigieg*, EEOC DOC 2023004409, 2023 WL 9190479 (Dec. 12, 2023) (no evidence of a vacancy).

Finally, it may be reasonable to reassign an employee to a lower-paid position, but only if no lateral position is available. *See Ellis v. Pub. Serv. Elec. & Gas*, No. 2:20-CV-17893 (WJM), 2023 WL 6389324, at *7–8 (D.N.J. Sept. 29, 2023); *Joanna G. v. DeJoy*, EEOC DOC 2021004968, 2023 WL 5275164, at *10 (July 24, 2023).

5. Courts are in general agreement on the elements of an accommodation claim.

Courts are in general agreement that the elements of failure-to-accommodate claim include that (1) the plaintiff was a qualified person with a disability; (2) the employer had notice of the disability; (3) the plaintiff could perform the essential functions of the position with a reasonable accommodation; and (4) the employer nonetheless refused to make the accommodation. *See, e.g.*, *Sharpe v. Garland*, No. 1:23CV1219 (DJN), 2024 WL 329945, at *4 (E.D. Va. Jan. 29, 2024); *Arkorful v. New York City Dep't of Educ.*, No. 18-CV-3455 (NG) (ST), 2024 WL 298999, at *12 (E.D.N.Y. Jan. 24, 2024); *Zaleski v. McDonough*, No. 21-13004, 2024 WL 188377, at *4 (E.D. Mich. Jan. 17, 2024); *Cogdell v. Carnahan*, No. CV 19-2462 (RC), 2023 WL 6388850, at *6 (D.D.C. Sept. 29, 2023).

6. The Supreme Court has given direction on the burdens of proof that each part bears.

A plaintiff who requires an accommodation bears the burden of proposing an accommodation and showing that it "seems reasonable on its face." Determining the reasonableness of a proposed accommodation is generally a question of fact. Once the plaintiff proposes a facially reasonable accommodation, the burden shifts to the employer to show that accommodating the plaintiff would impose an "undue hardship" on the employer or that the accommodation would eliminate an essential job requirement. *Moat v. Metro. Gov't of Nashville*, No. 3:21-CV-00807, 2023 WL 4035909, at *11 (M.D. Tenn. June 15, 2023), *quoting U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002); *Cassie v. City & Cnty. of Denver*, No. 20-CV-02952-MEH, 2023 WL 5507788, at *28 (D. Colo. Aug. 25, 2023); *Liu v. DeJoy*, 664 F. Supp. 3d 1030, 1046 (C.D. Cal. 2023).

One way to show reasonableness is by pointing to the statutory examples of accommodations. *See Hampton v. Utah Dep't of Corr.*, 87 F.4th 1183, 1195 (10th Cir. 2023).

7. Accommodations are required for reasons other than performing essential functions.

The ADA regulations at 29 C.F.R. § 1630.2(o)(1) state that reasonable accommodation means a modification or adjustment:

> (i) to the job application process so a qualified applicant with a disability can be considered for a desired job; or

(ii) to the work environment, or to the manner or circumstances under which a job is customarily performed, so a qualified individual with a disability can perform the essential job functions; or

(iii) that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.

Most cases are analyzed in relation to accommodations to allow performance of essential job functions. But there is a growing body of case law under subpart (iii) above, often involving accommodations required to reduce pain or anxiety. Problematically, in *Hopman v. Union Pac. R.R.*, 68 F.4th 394 (8th Cir. 2023), *cert denied*, No. 23-362, ___ S. Ct. ___, 2024 WL 674724 (Feb. 20, 2024) (Mem), the court held that subpart iii only requires accommodations to employer-sponsored programs or services, like counseling services, cafeterias, lounges, gyms, auditoriums, transportation, and the like. Thus, the court held that the ADA did not require the employer to allow a service animal at work, given that the employee could do the essential job functions. *Hopman* should be scrutinized in any case brought under the "equal benefits and privileges" clause in subpart iii above, or in any case seeking accommodations to allow the use of a service animal. The Scotusblog coverage of *Hopman* has links to the briefing. Here are some non-exhaustive additional questions to consider:

1) Is there an argument grounded (in part) in the general language in 42 U.S.C. § 12112(a) about discrimination in the "terms, conditions, and privileges of employment"?

2) Is there an argument that accommodations to reduce pain or anxiety are really about being able to perform the essential functions, because the continued refusal to accommodate would lead to the inability to perform the job?

3) As argued in *Hopman*'s Supreme Court reply brief, at pp. 7 et seq., doesn't the "equal benefits" language in 29 C.F.R. § 1630.2(o)(1)(iii) have a broader dictionary-type definition than the 8th Circuit appreciated?

8. Accommodations are not required in claims for associational discrimination.

The ADA prohibits discrimination against employees because of their association with a person with a disability. 42 U.S.C. § 12112(b)(4). Note, however, that an individual is not entitled to an accommodation because of the needs of a person with a disability with whom they are associated. The association provision requires equal treatment, not an accommodation. *See, e.g., Espina v. City of San Antonio*, No. SA-21-CV-01176-JKP, 2022 WL 3362286, at *6 (W.D. Tex. Aug. 15, 2022).

9. Requesting accommodation is protected activity in retaliation and interference claims.

Under federal law, requesting a reasonable accommodation is considered "protected activity" and thus such a request may support a claim for retaliation or interference. *See, e.g., Tafolla v. Heilig*, 80 F.4th 111, 126 (2d Cir. 2023); *Heiden v. New York City Health & Hosps. Corp*., No. 20-CV-10288 (LJL), 2023 WL 171888, at *21 (S.D.N.Y. Jan. 11, 2023) (evidence that prior to the

accommodation request, the decisionmaker was not intending to fire the plaintiff based on the performance review).

See also Wes L. v. Blinken, EEOC DOC 2021005122, 2023 WL 3686988, at *5–7 (May 15, 2023) (sufficient evidence of retaliation for requesting accommodation); Jordan v. Sch. Bd. of the City of Norfolk, No. 2:22-CV-167, 2023 WL 5807844, at *12–13 (E.D. Va. Sept. 7, 2023) (similar); *Felix v. New York City Dep't of Educ*., No. 21 CIV. 6109 (LGS), 2023 WL 4706097, at *11–12 (S.D.N.Y. July 24, 2023) (similar).

But not every failure to accommodate is also a retaliation claim; otherwise the claims would be duplicative and circular. *Cowell v. Illinois Dep't of Hum. Servs*., No. 3:21-CV-478-NJR, 2024 WL 551891, at *12 (S.D. Ill. Feb. 12, 2024).

Note, too, that it is illegal to interfere with accommodation requests. In *Aline A. v. Kendall*, EEOC DOC 2021003999, 2024 WL 277792, at *4 (Jan. 3, 2024), although the employer granted the accommodation, the supervisor repeatedly requested medical documentation for permanent conditions, requested that the accommodation be reviewed on an annual basis, pushed for lengthy vanpool rides instead of teleworking, and excluded employee from work calls by not putting her on speaker or using another program like video calling. "In sum, we conclude that S1's actions amounted to unlawful retaliatory and disability-based harassment in an attempt to deny Complainant's previously approved reasonable accommodations (telework and medical leave) for her disabilities." *Id*.

Finally, note that a state agency or other "arm of the state" may have 11th Amendment immunity from ADA retaliation claims in the employment context, like it would from other ADA employment claims. *See Dupree v. Owens*, No. 21-12571, ___ F.4th ___, 2024 WL 439462 (11th Cir. Feb. 6, 2024). On the other hand, such claims may be actionable under Sec. 504 if the employer is a recipient of federal financial assistance, and reinstatement and fees may still be available under the ADA via an *Ex parte Young* action.

10. The statutory defense to an accommodation claim is "undue hardship."

Undue hardship is the only statutory defense to an accommodation claim, and although it is the employer's burden, it can be met with detailed evidence.

But an employer's conclusory statements are insufficient. *Bertuzzi v. Copiague Union Free Sch. Dist.*, No. 17CV4256JSARL, 2023 WL 6594357, at *11 (E.D.N.Y. 2023), *report and recommendation adopted as modified on other grounds*, 2023 WL 6211002 (E.D.N.Y. Sept. 25, 2023). *See also Adina P. v. McDonough*, EEOC DOC 2021004593, 2023 WL 4647882, at *12 (June 26, 2023) ("[G]eneralized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. The record is devoid of evidence that providing Complainant a reasonable accommodation would cause an undue hardship.") (cite omitted); *Arnulfo T. v. Austin*, EEOC DOC 2021003604, 2023 WL 3567932, at *7 (May 9, 2023) ("[A]gency has failed to provide case-specific evidence proving

that granting Complainant reasonable accommodation in the form of caption call, such as CapTel, would have caused an undue hardship in these particular circumstances.").

In some cases, even specific evidence is insufficient to prove an undue hardship. *See, e.g., Julietta K. v. Vilsack,* EEOC DOC 2022001460, 2023 WL 3318257, at *6 (Apr. 27, 2023) (agency failed to show that teleworking four days a week would have posed an undue hardship; although directive limited teleworking for those supporting the group-loan programs, the supervisor explained that the group program duties were not essential to the complainant's position; the supervisor also explained that the telework request was denied because others feared they would be "flooded" with similar requests, rather than considering the request on an individual basis).

In other cases, courts have found a factual dispute as to the undue-hardship defense. *See, e.g., Liu v. DeJoy*, 664 F. Supp. 3d 1030, 1047–48 (C.D. Cal. 2023) (cite omitted):

> Drawing inferences in favor of Liu, USPS was forced to assign routes to other MVOs whether it accommodated Liu or terminated Liu. Thus, USPS has failed to show that there is no triable issue of fact that accommodating Liu would have been unreasonable or impose an undue burden on its business. … USPS has not presented evidence that Liu was the sole employee responsible for accomplishing the job duties of a MVO. While USPS had to call in an off-duty MVO to cover Liu's assigned route on November 22, 2017, this does not support the finding that Liu's requested accommodation 'would change the nature and extent' of other MVO's positions or reallocate to them essential functions of Liu's position.

And in *Sharpe v. Garland*, No. 1:23CV1219 (DJN), 2024 WL 329945, at *5 (E.D. Va. Jan. 29, 2024), the court found that there are workarounds for a requirement for "wet signatures," the possibility of anticipated slow workflow was too vague, the final list of reasons did not clarify how these items related to the plaintiff or her job, and the phone refresh could be done remotely.

Finally, although it relates to *Title VII* undue-hardship defense to *religious* accommodations, the Supreme Court's recent decision in *Groff v. DeJoy*, 600 U.S. 447 (2023), may provide important guidance for ADA cases. That is because the Court's analysis was based on the plain language of the statute, and Title VII's statutory defense is almost identical to the ADA's. *Compare* Title VII, 42 U.S.C. § 2000e(j) ("without undue hardship on the conduct of the employer's business") *with* the ADA, 42 U.S.C. § 12112(b)(5)(A) ("undue hardship on the operation of the business of such covered entity"). Moreover, the Court's analysis of the dictionary definitions of the words in "undue hardship" should be equally applicable to the ADA's defense. Here is that quote:

> Here, the key statutory term is "undue hardship." In common parlance, a "hardship" is, at a minimum, "something hard to bear." Random House Dictionary of the English Language 646 (1966) (Random House). Other definitions go further. See, *e.g.*, Webster's Third New International Dictionary 1033 (1971) (Webster's Third) ("something that causes or entails suffering or privation"); American Heritage Dictionary 601 (1969) (American Heritage) ("[e]xtreme privation; adversity; suffering"); Black's Law Dictionary, at 646 ("privation, suffering, adversity"). But under any definition, a hardship is more severe than a mere burden. So even if Title

> VII said only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Those costs would have to rise to the level of hardship, and adding the modifier "undue" means that the requisite burden, privation, or adversity must rise to an "excessive" or "unjustifiable" level. Random House 1547; see, *e.g.*, Webster's Third 2492 ("inappropriate," "unsuited," or "exceeding or violating propriety or fitness"); American Heritage 1398 ("excessive"). The Government agrees, noting that " 'undue hardship means something greater than hardship.' " Brief for United States 30; see *id.*, at 39 (arguing that "accommodations should be assessed while 'keep[ing] in mind both words in the key phrase of the actual statutory text: "undue" and "hardship" ' " (quoting *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 456 (C.A.7 2013)).
>
> When "undue hardship" is understood in this way, it means something very different from a burden that is merely more than *de minimis, i.e.*, something that is "very small or trifling." Black's Law Dictionary, at 388. So considering ordinary meaning while taking *Hardison* as a given, we are pointed toward something closer to *Hardison*'s references to "substantial additional costs" or "substantial expenditures." 432 U.S. at 83, n. 14, 97 S.Ct. 2264.

Groff, *supra*, 600 U.S. at 468–69.

NELA 19

The Employment Litigation Section

What We Do & How We Can Partner



U.S. Department of Justice
Civil Rights Division

Taryn Wilgus Null, Senior Trial Attorney, Employment Litigation Section
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U.S. v. City of Houston



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U.S. v. City of Houston



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Who We Are and What We Do

Why Partner?

When and How to Reach Out

Who We Are

Employment Litigation Section

Who We Are

- Based in Washington, D.C.
- State and local government workplaces

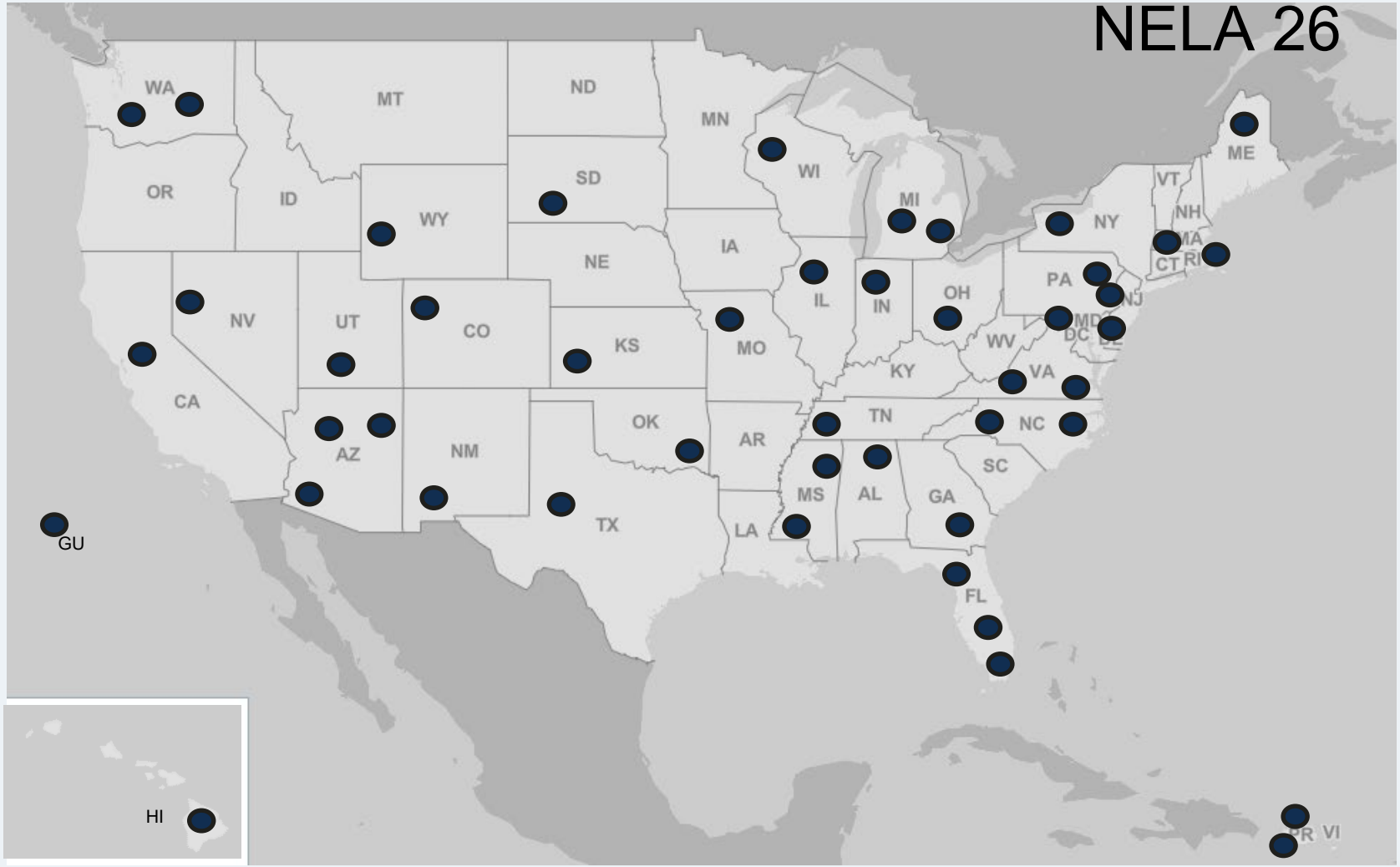


Photo by Orhan Cam, Adobe Stock

U.S. Attorney's Office

Who We Are

- 93 U.S. Attorneys around the country
- Part of the Department of Justice
- Civil division
  - Defensive litigation
  - Affirmative civil enforcement


NELA 26
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VI

What We Do

What We Do

- Protect employees' rights based on:

Title VII

USERRA
Uniformed Services Employment and Reemployment Rights Act

PWFA
Pregnant Workers Fairness Act

Title VII Areas of Interest

NELA 30

Sexual Harassment in the Workplace Initiative

Sexual Harassment in the Workplace Initiative

- Renewed emphasis on bringing sexual harassment cases
- Outreach to various stakeholders
- File amicus briefs and statements of interest in sexual harassment cases
- Research to identify promising ways to prevent & correct harassment
- SH.Initiative@usdoj.gov



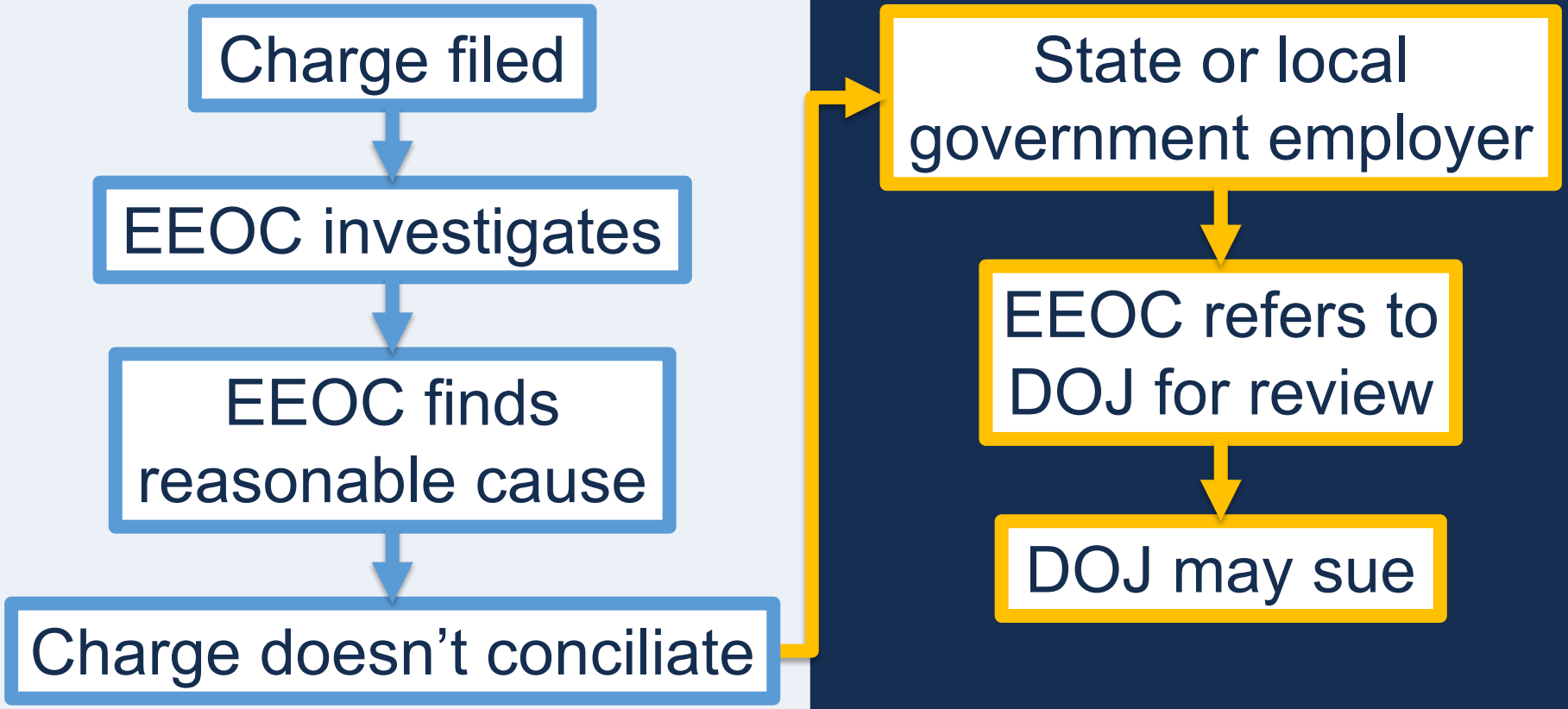
Photo by Nadine Shaabana on Unsplash

Two Types of Title VII Cases

Cases based on EEOC charges

Systemic cases

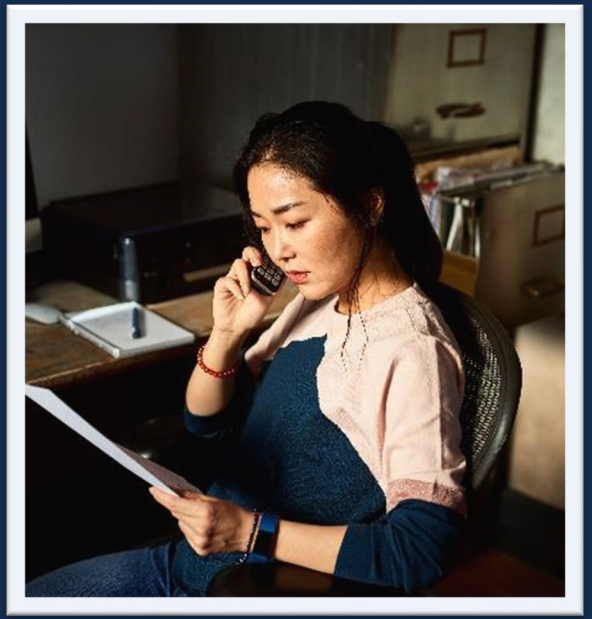
Cases based on EEOC Charges

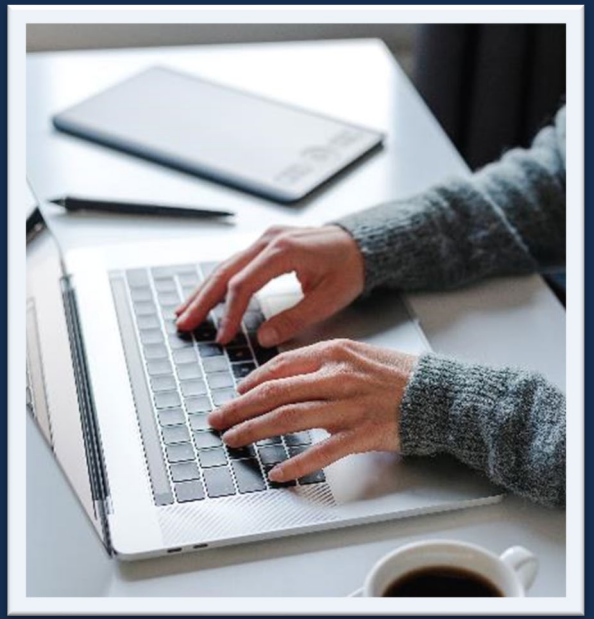


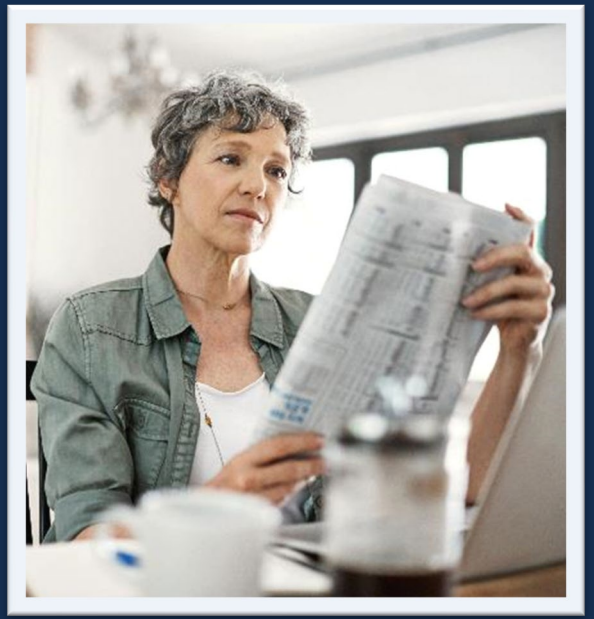

Interagency
Memorandum of
Understanding
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DEPARTMENT OF JUSTICE
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Systemic Cases

NELA 35







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U.S. v. City of Tampa



Photo by nappy: https://www.pexels.com/photo/man-carrying-his-baby-3569597/

Pregnant Workers Fairness Act

- New federal law
- Took effect on June 27, 2023



Photo by Jurii, Adobe Stock

Why Partner With Us?

When to Reach Out

U.S. v. Mobile County Sheriff

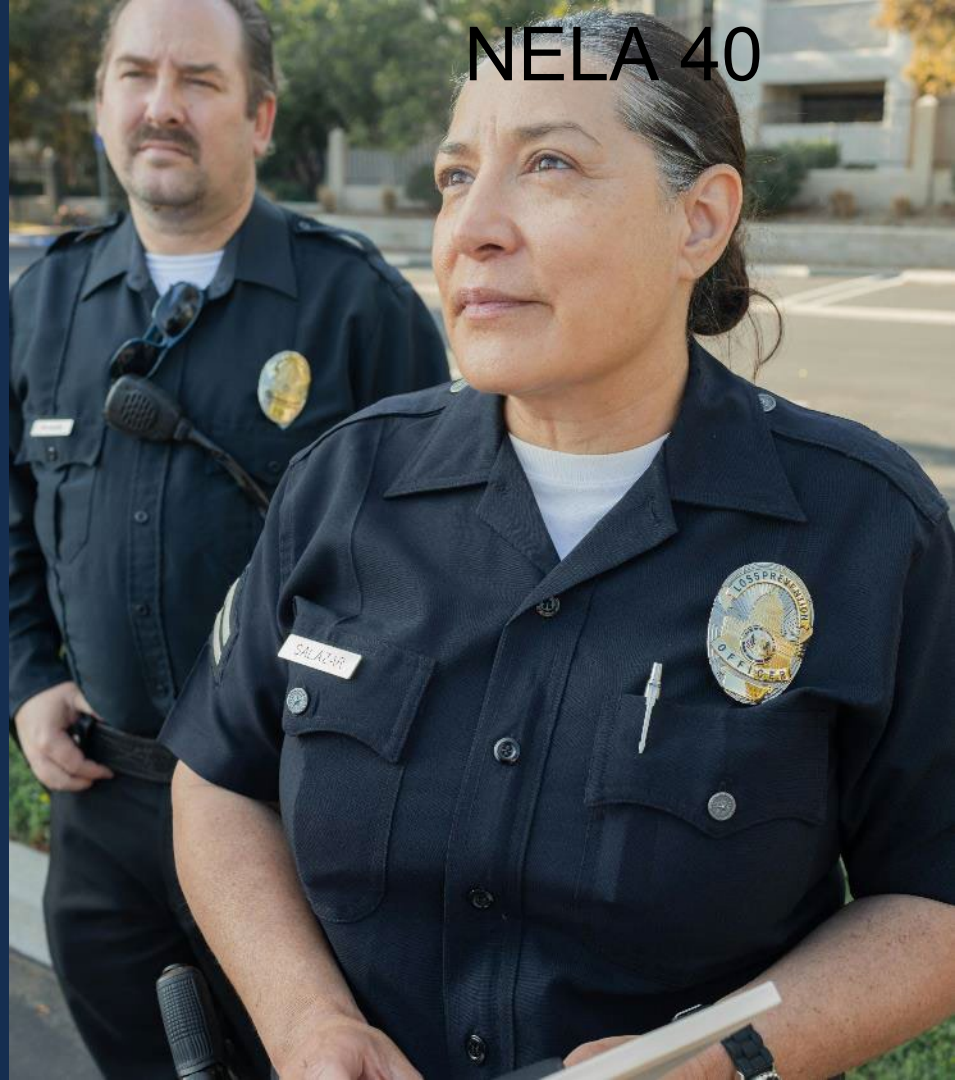


Photo by Kindel Media: https://www.pexels.com/photo/a-policewoman-holding-papers-7715202/

Statements of Interest

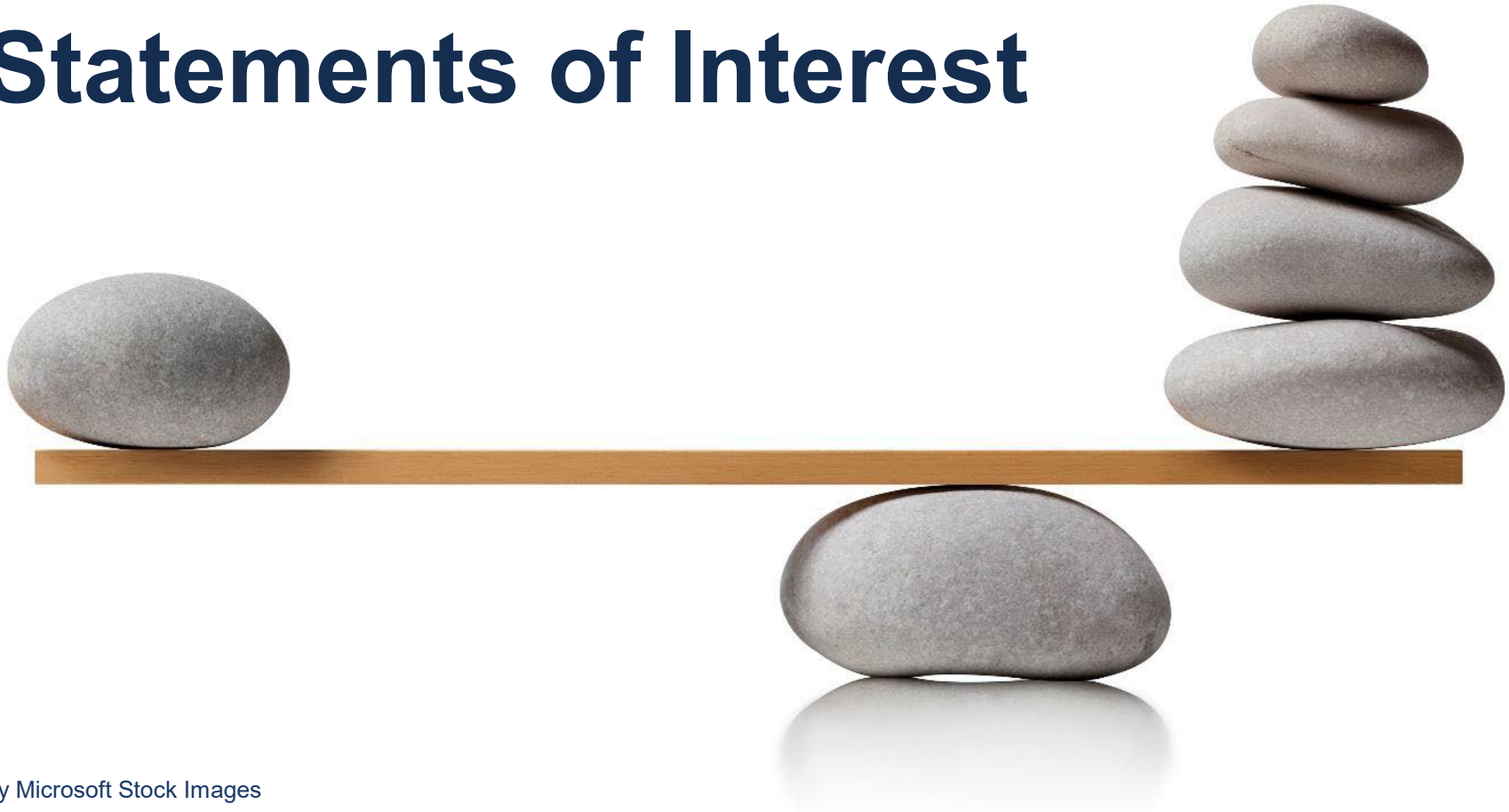


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NELA 42

Zinner v. State of Tennessee

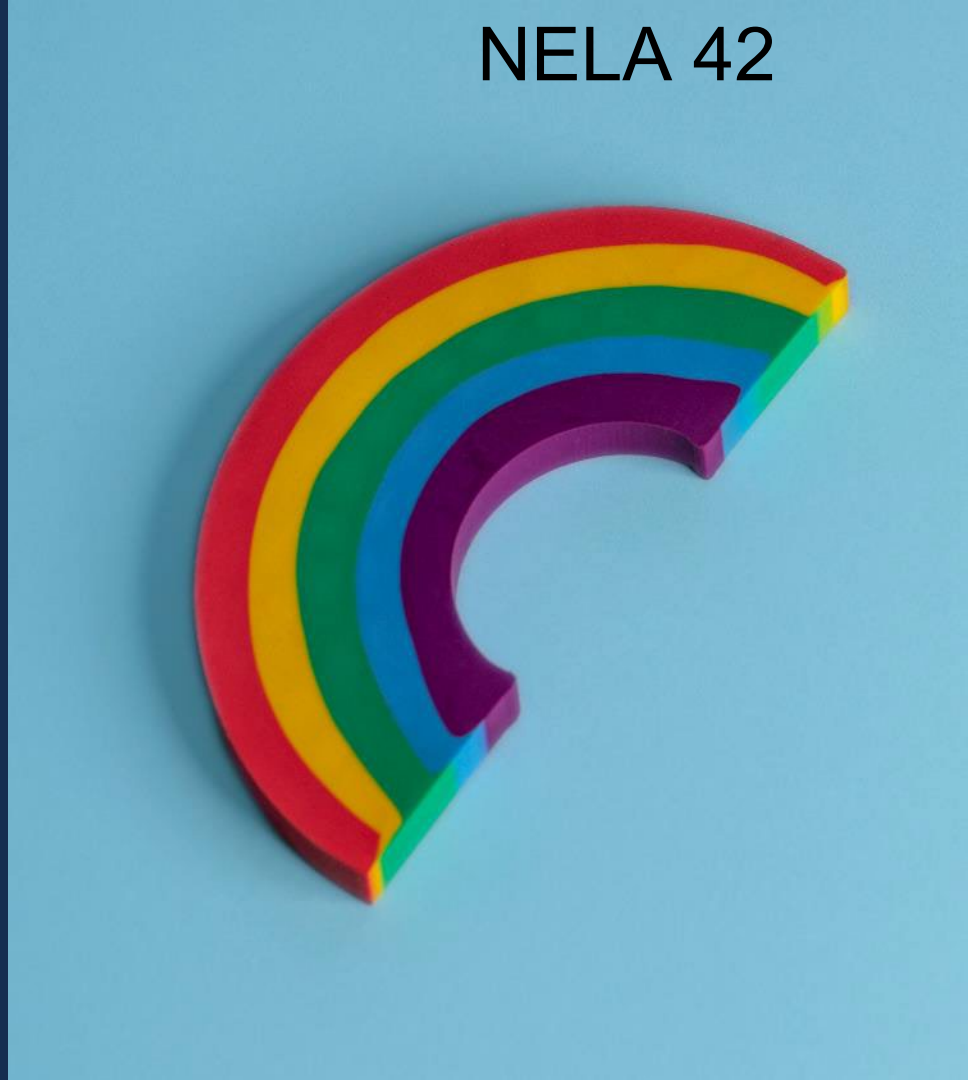


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How to Reach Out

Contact Us

ELS's Outreach Team | ELS.Outreach@usdoj.gov



U.S. Department of Justice
Civil Rights Division

Contact Us

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www.justice.gov/usao-co/civil-rights-enforcement

Questions?



Follow the Civil Rights Division on X (Twitter)

@CivilRights



U.S. Equal Employment Opportunity Commission

Memorandum of Understanding Between The U.S. Equal Employment Opportunity Commission and The U.S. Department of Justice – Civil Rights Division Regarding Title VII Employment Discrimination Charges Against State and Local Governments

The purpose of this Memorandum of Understanding (MOU or Agreement) is to further the objectives of Congress under Title VII of the Civil Rights Act of 1964, as amended (Title VII), with respect to employment discrimination charges filed against state and local governments. This MOU broadly promotes interagency coordination and seeks to maximize effort, promote efficiency, and eliminate duplication and inconsistency in the enforcement of the federal employment discrimination laws. It includes provisions for coordination of the investigation of charges of discrimination on the basis of any characteristic protected by Title VII. Further, the MOU includes provisions for sharing information as appropriate and to the extent allowable under law.

This MOU does not supersede the May 12, 2011, Memorandum of Understanding between the Equal Employment Opportunity Commission (EEOC) and the Department of Justice Civil Rights Division (CRT) relating to the sharing of Employer Information Report (EEO-1) data or the existing MOU between EEOC and the Office of Special Counsel for Immigration Related Unfair Employment Practices. In addition, this MOU applies only to coordination efforts and charges involving bases covered by Title VII.

EEOC and CRT share authority for the enforcement of Title VII with respect to state and local governmental employers.

As set forth in Title VII, EEOC receives and investigates charges of discrimination against state and local governmental employers and, if it finds cause to believe that a Title VII violation has occurred, attempts to conciliate those charges. However, under the statute, the Department of Justice is the sole federal entity that has the authority to sue such employers for Title VII violations. That authority has been delegated to CRT. Therefore, if EEOC's efforts to conciliate a Title VII charge against a state or local government are unsuccessful, EEOC refers the charge and its investigative file to the Employment Litigation Section (ELS) of CRT.

Following a charge referral from EEOC, CRT makes a determination whether to bring a lawsuit based on the charge. In making this determination, CRT relies on the information obtained by EEOC in its investigation, as well as the results of any supplemental investigation that CRT may conduct. If CRT decides not to bring a lawsuit, it issues to the charging party a notice of right to sue.

In addition, both EEOC and CRT have authority to initiate Title VII investigations of the employment practices of state and local governmental employers. EEOC Commissioners have the authority to file a Commissioner Charge alleging that such an employer is engaged in discrimination in violation of Title VII. EEOC processes Commission Charges in the same way it processes other charges under Title VII. If EEOC's efforts to conciliate a Commissioner Charge against a state or local government are unsuccessful, EEOC refers the charge to CRT, and CRT has the authority to bring a lawsuit based on the charge. CRT also has the authority to initiate an investigation of the employment practices of a state or local governmental employer to determine whether the employer is engaged in a pattern or practice of discrimination in violation of Title VII. CRT then may bring a lawsuit under Title VII against the employer whenever it has reason to believe that the employer is engaged in such a pattern or practice.

There are other areas in which CRT's and EEOC's enforcement may overlap. For example, while CRT is the only federal entity to which Title VII gives authority to bring suits against state and local governmental employers, Title VII gives EEOC the authority to sue labor organizations that represent the employees of such employers and employment agencies that refer workers to such employers. Furthermore, while CRT has the authority to bring suits against state and local government employers, only EEOC has the authority to issue subpoenas during EEOC investigations and petition district courts to enforce those subpoenas. In addition, while CRT has the authority under Title VII to sue state and local governmental employers who engage in wage discrimination on the basis of sex, EEOC has the authority under the Equal Pay Act to sue such employers for paying unequal wages to men and women who perform substantially equal jobs. Finally, when a state or local governmental employer discriminates against an individual or group in violation of Title VII and the Age Discrimination in Employment Act (ADEA), CRT has the authority to sue the employer under Title VII but not the ADEA, and EEOC has the authority to sue the employer under the ADEA but not Title VII.

Given their shared and overlapping responsibilities, EEOC and CRT have a common interest in ensuring that enforcement of Title VII is consistent, effective, and not duplicative. With respect to particular charges, EEOC and CRT share a common interest in ensuring that allegations of discrimination in violation of Title VII are effectively investigated and, where a violation is found, appropriate remedies are obtained. EEOC and CRT enter into this Agreement recognizing that effective coordination and cooperation is important to further the public interest in eliminating and remedying unlawful employment discrimination.

The Agreement is intended to authorize collaboration between the agencies to the fullest extent desired by the parties and permitted by law, including with regard to investigation, resolution, and litigation of charges; development of policy guidance; engaging in outreach and public education; training of each agency's staff; and sharing of resources, as may be appropriate to further the purposes of this Agreement. Nothing in this Agreement, however, affects or changes EEOC's enforcement priorities, including those set forth in its Strategic Enforcement Plan or the District Complement Plans, and CRT acknowledges and accepts that allocation of EEOC staff and other resources will be governed by those priorities.

The parties to this MOU agree as follows:

1. **Sharing of Information**

a. EEOC and CRT shall share any information that supports each agency's enforcement of Title VII. Such information shall include, but is not limited to: complaints; charges; investigative files; reports filed or data produced by employers; data, reports, and other information regarding employment tests or other selection devices; and statistical analyses or summaries.

b. Requests for information under this section can be made by the following individuals:

    i. For EEOC

        - The Chair
        - A Commissioner
        - The General Counsel
        - The Deputy General Counsel
        - The Director, Office of Field Programs
        - The Director, Field Management Programs
        - Any EEOC District Director, the Director Washington Field Office, or their designees
        - Any EEOC Regional Attorney or his/her designee
        - The EEOC MOU Coordinator

    ii. For CRT

        - The Assistant Attorney General, Civil Rights Division
        - Any Deputy Assistant Attorney General, Civil Rights Division or their respective designees
        - The Chief of ELS
        - The DOJ MOU Coordinator

c. Requests for information under this section should be directed to the following individuals:

    i. EEOC requests for information should be directed to any of the individuals listed in (b)(ii) with the exception of the Assistant

Attorney General, Civil Rights Division.

ii. CRT requests for information should usually be directed to the District Director, the Washington Field Office Director, or the Regional Attorney where CRT believes that the information is located. CRT requesting officials may also direct their requests for information to any of the EEOC officials listed in (b)(i) with the exception of the Chair, a Commissioner, or the General Counsel.

d. EEOC and CRT responses to requests for information under this section shall be made to the official who requested the information. The responding agency will provide copies of the requested documents or make the requested documents available to the requesting agency for inspection and copying and/or loan within ten days of receipt of the request, or as soon as practicable thereafter consistent with the availability of the responding agency's staff and other resources and the responding agency's own priorities.

e. Any transfer of information under this MOU shall only be made where not otherwise prohibited by law and in accordance with paragraphs 2 and 3 of this Agreement. Information transferred between EEOC and CRT under this Agreement shall not be used by the receiving agency for purposes other than the enforcement of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act.

f. This Agreement does not prohibit the sharing of information between EEOC and CRT by any means other than those identified in this section to the extent that such means are agreed to by both agencies and not prohibited by law.

g. Sections (b) and (c) of this paragraph do not apply to the sharing of information related to a particular charge of discrimination that occurs when:

i. the charge is referred to ELS after EEOC's efforts to conciliate the charge have failed; or

ii. EEOC and ELS work collaboratively during the EEOC's processing of the charge prior to such a referral.

2. **Disclosure of Information to Third Parties**

   a. All requests by non-parties to this Agreement, including charging parties, respondents, and their attorneys, that are received by EEOC and request disclosure of information that was initially compiled, collected, or created by CRT or was provided by CRT pursuant to section 1 of this Agreement, shall be coordinated with CRT. The decision of CRT regarding disclosure of such information shall be honored by EEOC. To facilitate coordination, EEOC shall segregate and maintain information relating to a charge of discrimination that was initially compiled, collected, or created by CRT in a separate file or tab in its investigative file relating to the charge.

   b. All requests by non-parties to this Agreement, including charging parties, respondents, and their attorneys, that are received by CRT and request disclosure of information that was initially compiled, collected, or created by EEOC or was provided by EEOC pursuant to section 1 of this Agreement, shall be coordinated with EEOC. The decision of EEOC regarding disclosure of such information shall be honored by CRT. To facilitate coordination, CRT shall segregate and maintain in a separate file information relating to a charge of discrimination that (1) is not included in the EEOC investigative file for the charge and (2) was initially compiled, collected, or created by EEOC.

   c. Under this MOU, EEOC may send information that was initially compiled, collected, or created by CRT to a State or Local Fair Employment Practice Agency (FEPA) with which EEOC has a current charge resolution contract and work sharing agreement containing provisions required by Section 706 and 709 of Title VII under conditions agreed to by EEOC and CRT.

   d. Before producing as part of initial disclosures under the Federal Rules of Civil Procedure documents from an EEOC investigative file that disclose the impressions, analysis, or other confidential communications of an EEOC attorney or investigator, whether among EEOC employees or between EEOC and ELS employees, and before responding to a discovery request seeking such documents, ELS attorneys will conduct an initial review of the EEOC file and prepare and provide to the EEOC legal unit a draft privilege log along with a copy of any documents contained in the EEOC file that, based on its initial review, ELS intends to produce.

e. Before producing as part of initial disclosures under the Federal Rules of Civil Procedure documents from an EEOC investigative file that disclose the impressions, analysis, or other confidential communications of an ELS attorney or other employee, whether among ELS employees or between EEOC and ELS employees, and before responding to a discovery request seeking such documents, EEOC attorneys will conduct an initial review of the EEOC file and prepare and provide to ELS a draft privilege log along with a copy of any documents contained in the EEOC file that, based on its initial review, EEOC intends to produce.

3. **Confidentiality**

a. Information shared under section 1 of this Agreement, as well as information shared between EEOC and CRT related to a particular charge of discrimination which EEOC has referred to ELS following a conciliation failure or when the two agencies have worked together prior to such a referral, shall be considered confidential. The sharing of information under these circumstances shall not constitute a waiver of any otherwise applicable privilege or protection from discovery or other disclosure. Otherwise applicable confidentiality requirements of Sections 706(b) and 709(e) of Title VII apply to such information and documents, and CRT shall treat such information as if the confidentiality requirements of Sections 706(b) and 709(e) of Title VII applied to officers and employees of CRT to the same extent that they apply to officers and employees of EEOC. In addition, EEOC and CRT will observe any confidentiality requirements imposed by the Privacy Act on such information.

b. When CRT receives, from a source independent of EEOC, the same information that is subject to subparagraph (a) of this section, this section does not preclude making public the information received from the independent source. However, CRT will observe any confidentiality requirements that otherwise would apply to such information, including any confidentiality requirements imposed by the Privacy Act, and will inform EEOC before disclosing the information from the independent source.

c. When EEOC receives, from a source independent of CRT, the same information that is subject to subparagraph (a) of this section, this section does not preclude making public the information received from the

independent source. However, EEOC will observe any confidentiality requirements that otherwise would apply to such information, including any confidentiality requirements imposed by Sections 706(b) and 709(e) of Title VII or the Privacy Act, and will inform CRT before disclosing the information from the independent source.

d. Any communications between CRT and EEOC relating to a complaint or charge of discrimination or to a CRT or EEOC investigation pursuant to Title VII are and shall be treated as privileged or protected from disclosure as work product to the same extent that the communication would be privileged or protected from disclosure if the communication had been made among CRT officers or employees or among EEOC officers or employees.

e. Any communications between a CRT attorney and a charging party in the course of an EEOC investigation are and shall be treated as privileged or protected from disclosure to the same extent that the communication would be privileged or protected from disclosure if the communication had been made between an EEOC attorney and the charging party.

4. **Notification and Consultation Procedures**

EEOC and CRT shall establish procedures for notification and consultation at various stages of their respective investigative and enforcement activities in order to develop potential joint enforcement initiatives, increase efficiency, ensure coordination, and minimize duplication. Such procedures may include, but are not limited to:

a. Appointment of MOU Coordinators

CRT and EEOC seek to ensure consistent Title VII enforcement procedures and to make the most efficient use of their available resources through coordination and communication. Therefore, within thirty (30) days of the effective date of this MOU, EEOC and CRT shall each appoint an MOU Coordinator who will be available to assist, as necessary, in ensuring a full understanding of and compliance with the terms of this MOU.

b. Establishment of Field Cooperation Procedures

i. At least once a year, EEOC's Director of the Office of Field Programs will have the EEOC Office of General Counsel and the Chief of ELS or

their respective designees discuss with the EEOC District Directors enforcement priorities and the status of cooperation and coordination between CRT and EEOC's field offices, procedures for enhancing coordination between CRT and EEOC field offices, and any other topic that enhances the agencies' mutual enforcement interests.

ii. EEOC's District Directors and ELS will establish procedures for consultation and cooperation with ELS staff regarding individual charges against state and local governmental employers prior to a failure of conciliation and referral of a particular charge to CRT. Under these procedures, ELS staff will work through the District Director or his or her designee prior to communicating with individual EEOC investigators, unless otherwise agreed to by the District Director (or designee). Additionally, ELS recognizes that EEOC's efforts under this initiative may be limited by the agency's own priorities and resources. To enhance cooperation and improve enforcement efforts, the procedures developed may include, but not be limited to:

- ELS attorneys consulting periodically with EEOC staff assigned to the charge;
- ELS attorneys reviewing information or documents obtained or created by EEOC in the course of its investigation;
- ELS attorneys identifying any relevant legal issues and conducting appropriate research;
- ELS attorneys providing input to EEOC staff regarding investigative plans, including testimony and documents to be sought;
- ELS attorneys consulting with EEOC regarding issuance of subpoenas, including the testimony and documents to be sought;
- ELS participation in witness interviews conducted by EEOC when such participation may eliminate the need to re-interview a witness in any later supplemental investigation by

ELS in the event that the charge is referred to CRT following a cause determination and failure of conciliation.

iii. Cases Requiring Prompt Judicial Action During the Pendency of the EEOC Investigation. Section 706(f)(2) of Title VII authorizes the EEOC, or the Attorney General in a matter involving a government, governmental agency or political subdivision, to bring an action for appropriate temporary or preliminary relief pending final disposition of a charge, whenever the EEOC concludes, based on a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of Title VII. Accordingly, the EEOC and CRT agree on the following procedures for coordinating the process of obtaining preliminary relief under Title VII for cases involving a government, governmental agency, or political subdivision.

a. Charges Involving Harassment. In a matter involving a government, governmental agency or political subdivision, the EEOC will promptly notify CRT when the EEOC's preliminary investigation of a charge alleging harassment under Title VII, including sexual harassment, reveals credible evidence that prompt judicial action is necessary to carry out the purposes of Title VII. CRT will then promptly determine whether to utilize Section 706(f)(2) of Title VII to seek temporary or preliminary relief pending final disposition of the charge.

To facilitate and expedite Section 706(f)(2) procedures, if the EEOC identifies a charge of discrimination alleging harassment against a government, governmental agency or a political subdivision that the EEOC determines is appropriate for temporary or preliminary relief under Section 706(f)(2), it will provide to CRT those documents relating to the charge that the EEOC determines will facilitate such determination, subject to the confidentiality requirements of Section 3 herein. Other terms of cooperation are to be agreed upon by the EEOC and CRT, to the extent they are not stated in this MOU.

b. Other Cases Requiring Prompt Judicial Action. The procedures for harassment cases stated in Section 4(b)(iii)(a) shall apply

to all charges alleging other forms of discrimination against a government, governmental agency or political subdivision under Title VII that are identified by the EEOC as appropriate for Section 706(f)(2) relief.

iv. EEOC and CRT will exchange information obtained in the course of their respective enforcement activities relating to potential systemic or pattern or practice discrimination by state and local governmental employers. Such information shall be provided to the receiving agency's MOU Coordinator or the MOU Coordinator's designee and shall include, but not be limited to, the following:

- EEOC will provide to ELS a copy of any Commissioner Charge alleging systemic discrimination by a state or local governmental employer as soon as practicable after the charge is filed.
- EEOC will provide to ELS a copy of any charge that alleges that a state or local governmental employer is engaged in a pattern or practice of discrimination as soon as practicable after the charge is filed.
- ELS will notify EEOC of each pattern or practice investigation opened by ELS as soon as practicable after notice of the investigation is given to the relevant employer.

v. In developing procedures under this MOU, EEOC and CRT are guided by the following principles:

- EEOC is responsible for making an independent determination regarding the existence of reasonable cause to believe that a violation of Title VII has occurred, for formulating conciliation proposals, for approving conciliation agreements, and for determining whether and when conciliation has failed.
- EEOC is responsible for making an independent determination regarding the appropriate resources to be allocated to the investigation of charges of discrimination filed against state or local government employers. EEOC and ELS shall work collaboratively to ensure that ELS recommendations regarding

investigations do not operate to the detriment of the resource needs and overall enforcement priorities of EEOC.

- In working collaboratively on the investigation of a charge of discrimination, ELS and EEOC will communicate regularly regarding the status of the investigation, respond to inquiries and provide feedback as promptly as possible, and otherwise avoid creating delay in the EEOC's processing of the charge.
- The standards that apply to CRT's determination of whether to bring a lawsuit based on a charge are not necessarily identical to those that apply to EEOC's cause determination, and CRT's litigation decisions may be based on factors that include, but are not limited to, the merits of the charge or the strength of the factual record compiled by EEOC.
- EEOC's Legal Unit (i.e., the Regional Attorney and/or EEOC legal staff responsible for a matter) shall be included in any subpoena-related consultation and the final determination whether to petition the U.S. District Court to enforce the subpoena rests with the Legal Unit.
- EEOC's Legal Unit and ELS shall consult with each other in any matter in which there is the possibility of dual EEOC/CRT legal enforcement, for example, matters involving allegations under both Title VII and the ADEA by the same employees against the same or related employers.
- ELS attorneys shall assert a privilege when a state or local government employer attempts to secure from CRT the impressions, analysis, or other confidential communications of an EEOC investigator or attorney, whether among EEOC employees or between EEOC and ELS employees.
- EEOC attorneys shall assert a privilege when a state or local government employer attempts to secure from EEOC the impressions, analysis, or other confidential communications of an ELS attorney, whether among ELS employees or between EEOC and ELS employees.

- Until the Assistant Attorney General for Civil Rights has authorized a lawsuit, neither EEOC nor CRT staff can represent that CRT will or will not file a lawsuit on a particular charge.

c. Coordination with Other Agencies

To the extent that information from, or coordination with, other agencies will support CRT's enforcement of Title VII, EEOC will as practicable facilitate communication between CRT and such other agencies, including but not limited to any state or local agency with which EEOC contracts.

d. Sharing of Staff Resources

In support of the joint enforcement of Title VII with respect to state and local governmental employers, and consistent with their respective enforcement authorities, the EEOC and CRT will share staff resources if available and based on each agency's own priorities.

e. Other Coordination Procedures

Representatives from CRT and the EEOC shall meet as necessary to discuss topics of mutual interest to both agencies that further the purposes of this Agreement and, when appropriate, establish procedures for coordination of efforts related to such topics. The topics may include, but not be limited to:

i. Access to and exchanges of electronically stored information and databases;

ii. Procedures for coordinated collection, sharing, and analysis of data;

iii. Analytical approaches to identifying and remedying employment discrimination;

iv. Training programs and materials;

v. Detailing or temporarily assigning employees between the agencies to increase collaboration;

vi. Outreach; and

vii. Policy statements and guidance, as appropriate, to further the purposes of this Agreement.

5. **Review and Modification**

EEOC and CRT shall conduct periodic reviews of the implementation of this Agreement on an ongoing basis. The Assistant Attorney General for the Civil Rights Division and the Chair of the Equal Employment Opportunity Commission will each keep the other informed, either directly or through designees, of any new program, activity, or project that may be initiated or of any augmentation or revision of an existing program, activity, or project that affects the implementation of this Agreement.

The provisions of this MOU may be reviewed and jointly modified as appropriate when it is determined by CRT and EEOC that such review and modification is in the interest of their respective enforcement responsibilities.

6. **Effect of Agreement**

This Agreement is an internal Government agreement. It is not intended to, and does not, confer upon any private person, or employer, or other entity any rights against the United States or any of its agencies or officers.

Nothing in this Agreement shall be interpreted as limiting, superseding or otherwise affecting either party's normal operations or decisions in carrying out its statutory or regulatory duties. This Agreement does not limit or restrict the parties from participating in similar activities or arrangements with other entities.

This Agreement does not itself authorize the expenditure or reimbursement of any funds. Nothing in this Agreement obligates the parties to expend appropriations or enter into any contract or other obligation.

7. **Effective Date**

This MOU will take effect immediately once signed by both parties and shall continue in force indefinitely. It may be terminated by either party upon 90 days written notice to the other agency. Except as expressly provided in this Agreement, this MOU constitutes the entire agreement between CRT and EEOC with respect to the matters set forth herein.

8. **Signatures**

Signed at Washington, DC, this 21st day of December of 2018

FOR THE U.S. DEPARTMENT OF JUSTICE	FOR THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
_____	_____
ERIC DREIBAND Assistant Attorney General Civil Rights Division U.S. Department of Justice	VICTORIA A. LIPNIC Acting Chair U.S. Equal Employment Opportunity Commission

U.S. Department of Justice
Civil Rights Division
civilrights.justice.gov

The Pregnant Workers Fairness Act & State & Local Government Workplaces

***Note**: The Pregnant Workers Fairness Act (PWFA) will become effective on June 27, 2023. The U.S. Equal Employment Opportunity Commission (EEOC) will only accept complaints about possible violations of the PWFA that occurred on or after June 27, 2023. After the law goes into effect, the EEOC also will publish regulations with more information about it.*

The Pregnant Workers Fairness Act (PWFA) is a new federal anti-discrimination law that covers employers, including **state and local governments**, with 15 or more employees. It says employers must make "reasonable accommodations" to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship."

In other words, **if a qualified employee needs a change to their job or needs to change something about their workplace** because they are pregnant or have a medical condition connected to pregnancy or childbirth, **the employer must make a change unless it is too expensive or difficult.** Employers also cannot retaliate against someone who complains about a violation of the PWFA.

The PWFA expands upon rights that pregnant workers already have under federal law. For example, Title VII of the Civil Rights Act already protects pregnant workers from being treated worse, harassed, or fired by their employer because they are pregnant. The same law also says employers cannot retaliate against workers who complain of pregnancy discrimination.

How does the PWFA work?

When a worker needs a change to the work environment or a change to their job, they should ask for it. The employer might ask questions to understand what the worker needs. This is called the interactive process.

Does the employer have to make the exact change the worker asks for?

An employer might offer changes that are different from what the worker requested. As long as the offered change would address the worker's needs, it might be a "reasonable accommodation," which is what the PWFA requires. If the employer won't agree to a change it could make without undue hardship, the employer might be violating the PWFA.

What is a qualified employee?

A qualified employee is someone who can do the essential functions of their job with or without a reasonable accommodation from their employer. A worker who cannot do one or more tasks that are essential to the job can still be a "qualified employee" if their inability is temporary, that job task could be done in the near future, and the worker's inability to do that job task can be reasonably accommodated.

See next page for a few possible examples of accommodations that workers might request and information about how to file a complaint.

U.S. Department of Justice
Civil Rights Division

What are a few examples of the types of accommodation requests that might come up in state and local government workplaces?

- A police officer who is five months pregnant asks for a new uniform because their current uniform no longer fits.
- A correctional officer who is pregnant asks to bring food on duty, and for coverage to take two additional bathroom breaks during each shift.
- A city emergency medical technician asks for a temporary desk assignment because a pregnancy-related medical condition makes it dangerous for the worker to lift patients.
- A county animal shelter worker who is pregnant asks to sit in a chair at the shelter's intake desk instead of standing.
- A professor at a state university asks to teach virtually while on bed rest for two weeks because of their pregnancy-related condition.

Contact ELS

202-514-3831
TTY: 202-514-6780

ELS.Outreach@usdoj.gov

Please note that ELS cannot provide legal advice.

Learn More: www.justice.gov/crt/laws-we-enforce#pwfa

How to File a PWFA Complaint and How DOJ Enforces this Law

If you think an employer is discriminating or retaliating in violation of the PWFA, you should file a complaint with the U.S. Equal Employment Opportunity Commission as soon as possible because the law has strict time limits. You can contact the EEOC at **www.eeoc.gov or 1-800-669-4000**.

If the EEOC agrees that an employer violated the PWFA, the EEOC will try to conciliate, or settle, the complaint. If the employer is a state or local government, and the EEOC does not resolve the complaint, the EEOC will send it to the U.S. Department of Justice's Employment Litigation Section (ELS).

DOJ can decide to file a lawsuit in federal court, and the person or people affected by the PWFA violation can become part of, or "intervene in," that case. If DOJ decides not to file its own lawsuit, DOJ can send the person who filed the charge a Notice of Right to Sue, which allows them to file a lawsuit on their own or with the assistance of a lawyer that they choose and pay.

The Employment Litigation Section (ELS)

ELS works to stop discrimination in state and local government workplaces based on a person's:

- Race;
- Color;
- Religion;
- Sex (including pregnancy, childbirth, and related conditions, as well as sexual orientation and gender identity); or
- National origin.

ELS also works to end retaliation, which is when an employer takes an action that harms someone because they complained about discrimination. We protect the rights of applicants and employees in state and local government jobs by enforcing Title VII of the Civil Rights Act of 1964 (Title VII) and the Pregnant Workers Fairness Act (PWFA), which are both federal anti-discrimination laws.

See next page for examples of possible Title VII violations and learn more about ELS's work.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
We also protect military servicemembers' rights by enforcing another federal anti-discrimination law: USERRA.This law makes it unlawful for employers to discriminate against someone because of their past, current or future military status, service, or obligation. USERRA also often requires an employer to return a servicemember back to their civilian job after they have performed a period of military service.

Executive Order 11246
ELS enforces Executive Order 11246, which states that federal contractors and subcontractors cannot discriminate in their job decisions because of race, color, religion, sex (including pregnancy, childbirth, and related conditions, as well as sexual orientation and gender identity), or national origin.

U.S. Department of Justice
Civil Rights Division

Examples of Possible Violations of Title VII

- A city police department's policy says female officers cannot go on patrol once they are three months pregnant. It also pays female K-9 trainers less than male trainers who have the same experience and qualifications.
- A fire department uses a written test to hire new firefighters even though the test has an unequal impact on Black applicants and is not sufficiently related to important skills needed for the job.
- A supervisor at a county parks department harasses a Chinese American employee based on national origin, and the parks department does not prevent or correct the harassment.
- A state health department prohibits Muslim employees from praying during unpaid break times.

Contact ELS

202-514-3831
TTY: 202-514-6780

ELS.Outreach@usdoj.gov

Please note that we cannot provide legal advice.

Learn More: www.justice.gov/crt/employment-litigation-section

File a Discrimination or Retaliation Complaint

The laws that make discrimination and retaliation unlawful also require that a complaint be filed right away so the right federal agency can investigate. If you don't file in time, you can lose your rights, and contacting ELS will not pause the clock for these strict time limits. These are the federal agencies where a discrimination or retaliation complaint must be filed, and how to reach them.

Title VII and the Pregnant Workers Fairness Act	U.S. Equal Employment Opportunity Commission, www.eeoc.gov	https://www.eeoc.gov/how-file-charge-employment-discrimination 1-800-669-4000 TDD: 800-669-6820
USERRA	U.S. Department of Labor, Veterans' Employment and Training Service, www.dol.gov/agencies/vets	https://www.dol.gov/agencies/vets/programs/userra/fileaclaim 1-866-237-0275 7-1-1 for relay services
Executive Order 11246	U.S. Department of Labor, Office of Federal Contract Compliance Programs, www.dol.gov/agencies/ofccp	https://www.dol.gov/agencies/ofccp/contact/file-complaint 1-800-397-6251 7-1-1 for relay services

Combating Sexual Misconduct

The Civil Rights Division is committed to protecting people from sexual misconduct. Sexual misconduct includes sexual harassment, sexual assault, and gender-based violence. The Division enforces criminal and civil federal civil rights laws that vindicate the rights of survivors and hold perpetrators accountable.

By the numbers:

Data from April 2022 through April 2023

- **Over $3.75 million** awarded to victims & survivors
- **$65,000** paid in civil penalties
- **9** civil complaints filed
- **16** civil cases in active litigation
- **Over 15** criminal indictments
- **21** criminal convictions
- **4** amicus briefs and statements of interest
- **Over 6,000** people trained through **79** training programs

Federal Civil Rights Protections

HOUSING: You are protected from sexual misconduct in the rental, sale, or financing of housing (Fair Housing Act and the Equal Credit Opportunity Act).

EDUCATION: You are protected from sexual misconduct in education programs and activities (Title IX of the Education Amendments of 1972; Title IV of the Civil Rights Act of 1964).

EMPLOYMENT: You are protected from sexual misconduct in the workplace and application process, and at offsite functions or on official business (Title VII of the Civil Rights Act of 1964 and 18 U.S.C. § 1589).

CRIMINAL: You are protected from sexual misconduct in day-to-day activities, as well as during arrests and in correctional facilities (human trafficking statutes; Matthew Shepard Act; 18 U.S.C. § 242; Civil Rights of Institutionalized Persons Act; Violent Crime Control & Law Enforcement Act of 1994; and the Safe Streets Act of 1968).

U.S. Department of Justice
Civil Rights Division

civilrights.justice.gov

Recent Sexual Misconduct Cases

The Justice Department investigated a county agency whose former director had subjected at least 10 female employees and community service workers he supervised to sexual harassment and sexual assault, including rape. The Justice Department **settled** a civil suit with the county, alleging civil rights violations. The county agreed to pay $1.1 million to the victims and to implement further reforms to prevent sexual harassment in the workplace. The Justice Department also **indicted** the former director, who was **convicted** and **sentenced** to 17 years in prison.

The Justice Department investigated a university where an athletic trainer subjected female student-athletes to repeated, unwelcome sexual touching during treatment in campus training facilities. The university failed to respond adequately to reports about sexual harassment by the trainer, and retaliated against employees who reported the allegations. The Justice Department entered into an **agreement** with the university that required the university to improve its processes for responding to sexual harassment complaints and to pay $1.6 million total to certain student-athlete survivors. The Justice Department also **charged** the athletic trainer with engaging in sexual misconduct with student-athletes in violation of civil rights.

The Justice Department investigated a landlord who owned hundreds of rental units and sexually harassed multiple tenants and housing applicants for more than 15 years. The Justice Department **settled** the lawsuit, requiring the landlord to pay $4.5 million to victims and in civil fines. The landlord can no longer own or manage rental properties in the future. The local prosecutor has also **charged** the landlord for sexual crimes against his tenants.

The Justice Department **investigated** a police department's handling of sexual assault cases based on concerns of gender bias. The Justice Department **settled** the matter through a consent decree that requires the police department to implement full, trauma-informed, and victim-centered investigations into reports of sexual misconduct by officers. The Justice Department is enforcing that decree to ensure compliance.

Where should victims of sexual misconduct report?

- If you or someone else is in immediate danger, first call 911 or local police.
- To preserve certain rights, you may have to first file a formal complaint with another federal or state agency within certain time limits (e.g., employment claims must be filed with the Equal Employment Opportunity Commission or a similar state agency).

To report sexual misconduct to the Civil Rights Division, visit civilrights.justice.gov.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

GERDA ZINNER and STORY VANNESS,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 3:23-cv-535
	)	
STATE OF TENNESSEE, et al.,	)	Judge Aleta A. Trauger
	)	
Defendants.	)	

STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States . . . ." The United States has a strong interest in eradicating employment discrimination, which includes ensuring the correct interpretation and application of Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. § 2000e *et seq.*, with respect to claims alleging discrimination because of an individual's sex. Moreover, the Attorney General is charged with enforcing Title VII where the employer is a state or local "government, governmental agency, or political subdivision." § 2000e-5(f)(1). Accordingly, the United States has a strong interest in the matter pending before the Court.

The United States submits this Statement of Interest to address the application of Title VII's prohibition on sex discrimination to employer-based health insurance programs that

contain exclusions that limit gender-affirming care for transgender persons.[1] The United States expresses no view on any factual dispute before the Court, nor on any legal question presented other than the aforementioned issue.

STATEMENT OF THE CASE

Plaintiff Gerda Zinner is an Academic Advisor at the University of Tennessee at Chattanooga, where she has worked since September 2019. Compl. ¶ 2, ECF No. 1. Plaintiff Story VanNess was a special education teacher at Knox County Board of Education from July 2016 to July 2022. *Id.* ¶ 3. Both women are transgender. *Id.* ¶ 42. Tennessee's health insurance program for state and local education agency employees has a blanket exclusion for "surgery or treatment for, or related to, sex transformations," irrespective of whether that treatment qualifies as medically-necessary treatment for gender dysphoria. *Id.* ¶¶ 8, 11, 12 (alterations omitted). Gender dysphoria is the clinically significant distress that can result from the dissonance between a transgender employee's gender identity and sex assigned at birth. *Id.* ¶ 5.

Ms. Zinner received from her medical providers, including her doctor and two therapists, a determination that a vaginoplasty was medically-necessary treatment for her gender dysphoria. *Id.* ¶ 62. Similarly, Ms. VanNess received from her medical providers, including her doctor, therapist, and two surgeons, a determination that facial gender-affirming surgery and breast augmentation were medically-necessary treatment for her gender dysphoria. *Id.* ¶ 94. But as a

[1] Different courts have used terms such as "gender reassignment," "gender confirmation," or "gender-affirming" to refer to this health care. Because the Complaint refers to the treatment and care sought by Plaintiffs as gender-affirming, the United States uses the term "gender-affirming care" here. *See* Compl. ¶¶ 12, 46–53, ECF No. 1.

result of Tennessee's exclusion, neither Ms. Zinner nor Ms. VanNess were able to receive insurance coverage for the gender-affirming surgeries that their medical providers had recommended. *Id.* ¶¶ 74, 77–78, 97, 98, 101 (alleging that the exclusion was the sole basis for the insurance coverage denials). Both breast augmentation and vaginoplasty are otherwise covered by Tennessee's health insurance program. *Id.* ¶ 135.

Ms. Zinner and Ms. VanNess sued the State of Tennessee, the State Insurance Committee and its members, the Local Education Insurance Committee and its members, the Department of Finance and Administration and its Commissioner, the University of Tennessee and its President, and the Knox County Board of Education. In Count II of their Complaint, Ms. Zinner and Ms. VanNess assert a sex discrimination claim based on transgender status under Title VII. They allege, among other things, that Defendants subjected them to disparate treatment in their compensation because of sex. *Id.* ¶ 165. Defendants assert that the health insurance program is not discriminatory because the exclusion applies to all program participants regardless of sex and that Plaintiffs fail to sufficiently allege discriminatory intent. Defs.' Mem. Supp. Mot. Dismiss 19, ECF No. 53.

ARGUMENT

When employers exclude health insurance coverage for medical treatment only when it is needed to provide gender-affirming care to individuals whose gender identity does not conform with the sex they were assigned at birth, they facially discriminate based on transgender status, which inherently discriminates based on sex under Title VII. *First*, such exclusions discriminate based on sex by making coverage contingent on whether the care seeks to align an employee's

sex characteristics with their gender identity when it is inconsistent with their sex assigned at birth. *Second*, denying health insurance coverage because a medical treatment seeks that alignment makes the employee's sex a "but-for" cause of the coverage denial. This Court should therefore join every other district court that has addressed challenges to analogous health insurance exclusions on the merits under Title VII and hold that Plaintiffs sufficiently state a claim under Title VII. *Kadel v. Folwell*, 620 F. Supp. 3d 339, 386–87 (M.D.N.C. 2022); *Lange v. Houston Cnty.*, 608 F. Supp. 3d 1340, 1356–60 (M.D. Ga. 2022), *appeal docketed*, No. 22-13626 (11th Cir. Oct. 21, 2022); *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1029–31 (D. Alaska 2020); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 995–97 (W.D. Wis. 2018).

Title VII bars an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. 2000e-2(a)(1). In *Bostock v. Clayton County*, the Supreme Court explained that discrimination includes "mak[ing] a difference in treatment or favor (of one compared with others)." 140 S. Ct. 1731, 1740 (2020) (internal quotation marks omitted) (quoting Webster's New International Dictionary 745 (2d ed. 1954)). The phrase "because of" means, at a minimum, that when the employee's sex is a "but-for" cause of difference in treatment, it is "because of" sex. *Id.* at 1739. Health insurance benefits are "compensation, terms, conditions, or privileges of employment" under Title VII. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 559, 682 (1983) (quoting 42 U.S.C. § 2000e-2(a)(1)). And there is "no reason to believe that Congress intended a special definition of discrimination in the context

of employee group insurance coverage." *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 710 (1978).

Therefore, because the exclusion facially discriminates based on transgender status, Ms. Zinner and Ms. VanNess sufficiently state a claim for sex discrimination under Title VII. Moreover, when there is a facially discriminatory employment policy, employees do not need to plead discriminatory intent—contrary to what Defendants contend. *See Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000) ("[A] facially discriminatory employment policy . . . is direct evidence of discriminatory intent." (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) and *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379–80 (6th Cir. 1993)).

I. Gender-Affirming Care Exclusions Discriminate Based on Sex by Making Insurance Coverage Contingent on Whether the Care Seeks to Align an Employee's Sex Characteristics with Their Gender Identity.

Where an employer denies health insurance coverage for medical treatment solely when the treatment is needed to align an employee's sex characteristics with their gender identity when it is inconsistent with their sex assigned at birth—even though the same treatment would be covered if provided for a different medically-necessary purpose—that constitutes facial discrimination against transgender individuals. In such a situation, the health insurance program conditions coverage on whether a procedure is provided to alter an individual's sex characteristics to match their gender identity and not their sex assigned at birth. In doing so, the program "unavoidably discriminates against persons with one sex identified at birth and another today." *Bostock*, 140 S. Ct. at 1746.

The challenged exclusion under Tennessee's health insurance program bars coverage for otherwise-eligible medical treatments only when—and precisely because—they are provided to treat a medical diagnosis that is unique to transgender employees. The program thus treats employees differently based on their transgender status, which inherently constitutes discrimination based on sex under Title VII. As the Supreme Court has recognized, "it is impossible to discriminate against a person for being . . . transgender without discriminating against the individual based on sex." *Bostock*, 140 S. Ct. at 1741. In a case consolidated with *Bostock*, the Sixth Circuit likewise concluded that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex." *EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018), *aff'd*, *Bostock*, 140 S. Ct. 1731 (2020). By discriminating against transgender employees, health insurance programs that exclude gender-affirming care "unavoidably discriminate[ ] against persons with one sex identified at birth" but who identify with a different sex "today." *Bostock*, 140 S. Ct. at 1746. As such, discrimination based on transgender status inherently constitutes discrimination based on sex.

Tennessee's program is not saved by the fact that it purports to deny health insurance benefits based on an employee's medical diagnosis rather than based on an employee's sex. Instead, the exclusion here amounts to facial discrimination by proxy against transgender employees, where the proxy is a medical diagnosis that does not apply to non-transgender employees. *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *see also Hecox* v. *Little*, Nos. 20-35813, 20-35815, 2023

WL 5283127, at *26 (9th Cir. Aug. 17, 2023) (Christen, J., concurring in part and dissenting in part) (citation omitted) (observing in a case alleging transgender discrimination that "[p]roxy discrimination is a form of facial discrimination"). Indeed, Defendants admit that they denied Ms. Zinner and Ms. VanNess's medical treatments at issue in this case because of "the *purpose* of the procedure—sex transformation." Defs.' Mem. Supp. Mot. Dismiss 5, ECF No. 53 (emphasis in original). The "explicit terms" of such a health insurance program, therefore, are "not neutral," *Aerospace & Agr. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991), as they expressly restrict, on the basis of sex, the benefits afforded to transgender employees for medically-necessary care.

Defendants correctly point out that an employer has discretion to decide which health insurance benefits it offers to enrollees. But once an employer decides to provide certain benefits, it may not distribute them in a discriminatory way. *See Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) ("A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . simply not to provide the benefit at all."). As a result, denying health insurance coverage for medical treatment solely when the treatment is gender-affirming, but covering the very same treatment for any other purpose, is not simply an "underinclusive[ ] set of risks that the State has elected to insure," which is what Defendants assert here. Defs.' Mem. Supp. Mot. Dismiss 21–22, ECF No. 53 (citing *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974)). Selectively denying health insurance benefits that are otherwise available to non-transgender employees discriminates against

transgender employees based on sex "with respect to [their] compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1).

II. When an Employer Denies Health Insurance Coverage Because a Medical Treatment Seeks to Align an Employee's Sex Characteristics with Their Gender Identity, the Employee's Sex is a "But-For" Cause of the Coverage Denial.

Moreover, Plaintiffs satisfy Title VII's causation standard because the exclusion constitutes discrimination "because of" sex. *Bostock* stated that "Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation." *Bostock*, 140 S. Ct. at 1739 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346 (2013)). As *Bostock* explained, this means that "if changing the employee's sex would have yielded a different" outcome for that individual employee, then the employer discriminated on the basis of sex. *Id.* at 1741.

To apply that logic here, if a transgender employee assigned male at birth seeks a medically-necessary vaginoplasty to affirm her identity as a woman, then Tennessee's exclusion of coverage for gender-affirming care will forbid insurance coverage for it. But change the employee's birth-assigned sex to female, and, under the facts alleged in the complaint, the same health insurance program will cover her access to a vaginoplasty for any other medically-necessary reason, such as to repair an injury or to treat a disease. Thus, Defendants' assertion that the exclusion at issue "complies" with *Bostock* because changing the employee's birth-assigned sex would not yield a different outcome is misplaced. Defs.' Mem. Supp. Mot. Dismiss 20, ECF No. 53. Changing the employee's birth-assigned sex *does* change the outcome, despite

the treatment (in this example, a vaginoplasty) remaining identical. Such health insurance programs therefore discriminate "because of" sex.

Other courts have held similarly. For instance, the State of North Carolina's health insurance program excluded coverage for treatments related to "sex changes or modifications." *Kadel*, 620 F. Supp. 3d at 354. *Kadel* highlighted that if the plaintiff were a non-transgender woman who sought hormone treatments, breast augmentation, vaginal repair, and vaginal construction surgery, the health insurance program would have covered those treatments. *Id.* at 387. But because her sex assigned at birth was male, coverage was not provided. *Id.* The court thus concluded "a straightforward application of the but-for test" determined that the plaintiff's "birth-assigned sex was a but-for cause of her injury." *Id.*; *see also Lange*, 608 F. Supp. 3d at 1357–59 (holding that the insurance program at issue covering mastectomies for cancer treatment and hormone replacement therapy for menopause, but not for gender-affirming care, amounts to a violation of Title VII under *Bostock*); *Fletcher*, 443 F. Supp. 3d at 1030 (holding that because the insurance program at issue covered vaginoplasty for congenital defects, but not for gender-affirming care, it constituted a discriminatory policy); *Boyden*, 341 F. Supp. 3d at 995 (describing an exclusion that "denies coverage for medically-necessary surgical procedures based on a patient's natal sex" as a "straightforward case of sex discrimination" (citing *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 948 (W.D. Wis. 2018))). Under the reasoning of these cases, excluding coverage for a medical treatment only when it is provided to treat gender dysphoria represents a "straightforward case of discrimination." *Boyden*, 341 F. Supp. 3d at 995 (citation omitted).

Defendants' argument that the exclusion applies to everyone "regardless of their biological sex" thus fails. Defs.' Mem. Supp. Mot. Dismiss 20, ECF No. 53. As *Kadel*, *Lange*, *Fletcher*, and *Boyden* all show, coverage for certain medical procedures under Defendants' health insurance program cannot be determined without knowing the employee's sex "identified at birth" and comparing it with their gender identity "today." *Bostock*, 140 S. Ct. at 1746. If their sex assigned at birth and gender identity align, the program provides coverage. But if their sex assigned at birth and gender identity differ, the program excludes coverage. Tennessee's health insurance program therefore discriminates "because of" sex.[2]

Considering *Lange* in more detail is instructive because the employer defended a health insurance coverage exclusion for gender-affirming surgery by making an identical argument to Defendants here: that the exclusion applies to everyone regardless of their sex. 608 F. Supp. 3d at 1358. *Lange* highlighted that under *Bostock*, it is not a "defense for an employer to say it discriminates against both men and women because of sex." *Id.* (quoting *Bostock*, 140 S. Ct. at 1741). That defense is unavailable because Title VII "works to protect individuals of both sexes from discrimination, and does so equally." *Id.* (quoting *Bostock*, 140 S. Ct. at 1741); *see also* *Bostock*, 140 S. Ct. at 1741 (holding that Title VII protects both sexes even if an employer

[2] Other courts have reached similar conclusions under Section 1557 of the Affordable Care Act ("ACA"), which bars sex discrimination in health programs and activities receiving federal financial assistance, 42 U.S.C. 18116(a), and under the Equal Protection Clause of the Fourteenth Amendment. *See Hammons v. Univ. of Md. Med. Sys. Corp.*, No. 20-cv-2088, 2023 WL 121741, at *10 (D. Md. Jan. 6, 2023) (ACA claim); *C.P. v. Blue Cross Blue Shield of Ill.*, No. 20-cv-6145, 2022 WL 17788148, at *6 (W.D. Wash. Dec. 19, 2022) (same); *Fain v. Crouch*, 618 F. Supp. 3d 313, 327 (S.D. W. Va. 2022) (equal protection claim), appeal pending, No. 22-1927 (4th Cir. filed Sept. 6, 2022); *Flack*, 328 F. Supp. 3d at 951–53 (ACA and equal protection claims).

"treat[s] men and women as groups more or less equally"). Discriminating against both groups, then, does not "avoid[ ] Title VII exposure." *Lange*, 608 F. Supp. 3d at 1358 (quoting *Bostock*, 140 S. Ct. at 1741). Thus, even if exclusion of gender-affirming care applies to both transgender men and transgender women, the exclusion still does not avoid Title VII liability—it simply "doubles it" instead. *Id.* Similarly, the exclusion violates Title VII even if both transgender and non-transgender employees are denied coverage for gender-affirming care.[3]

CONCLUSION

For the reasons set forth above, Ms. Zinner and Ms. VanNess sufficiently allege that Tennessee's health insurance program facially discriminates based on sex. Thus, the Court should hold that Ms. Zinner and Ms. VanNess sufficiently state a claim under Title VII.

[3] Defendants' reliance on *Olivarez v. T-Mobile* also misses the mark. In *Olivarez*, the court was persuaded that "ordinary business practice," not unlawful discrimination based on gender identity, led to a transgender employee's termination after the employee took six months of leave and then sought further leave for "the indefinite future." 997 F.3d 595, 98 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 713 (2021). No facts about Ms. Zinner's or Ms. VanNess's use of leave—or any facts related to either Ms. Zinner's or Ms. VanNess's job performance—are alleged here. Put differently, unlike the employer in *Olivarez*, Defendants here do not rely on Ms. Zinner's or Ms. VanNess's job performance as the basis for their adverse employment actions.

Defendants do not rely on *L.W. & United States v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023), to challenge the merits of Ms. Zinner and Ms. VanNess's Title VII claims. Nor could they—*Skrmetti* only addressed claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, not Title VII. *Id.* at 412–13. *Skrmetti* did recognize, however, that Title VII protects transgender status. *Id.* at 420.

Respectfully submitted,

Date: September 26, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2023, the foregoing document was filed electronically and was served by electronic means via the Court's electronic filing system to:

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Pro Tips for Adjudication from MSPB Administrative Judges (A Handout)

A quick primer and some things to know to provide more effective and efficient representation to employees of the Federal Government in employment cases.

- **What is the MSPB and what kind of cases does it adjudicate?**
    - MSPB functions as a court system for employees, applicants, and annuitants to seek review of certain enumerated agency actions. It is an executive branch agency.
    - The MSPB process includes pre-trial discovery, alternative dispute resolution, the right to an adversarial hearing, and a written decision from a neutral administrative judge. *See, generally,* 5 C.F.R. Part 1201; Judges' Handbook, https://www.mspb.gov/appeals/files/ALJHandbook.pdf
    - Evidentiary hearing (bench trial) conducted by an administrative judge. Hearings may be held in-person, by video conference, or a hybrid, at the election of the appellant.
    - The administrative judge must issue an initial decision that explains their findings of fact and conclusions of law applicable to the appeal. *See* 5 C.F.R. §1201.111.
    - Initial Decisions may be appealed to three-member Board and/or to a Circuit Court of Appeals. *See* 5 C.F.R. §§ 1201.114-120. From there, to the Supreme Court.
    - Key Statutes: Civil Service Reform Act (CSRA) Pub.L. No. 95-454, 92 Stat. 1111, codified in scattered sections of Title 5, U.S. Code. Key provisions: 5 U.S.C. §§ 7121, 7511-7513, 7701-7702. Title VII of the Civil Rights Act (42 U.S.C. § 2000e-16, et seq.); Rehabilitation Act 29 U.S.C. § 791 et. seq. (this statute makes the Americans with Disabilities Act (ADA) applicable); Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634; Uniformed Service Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301, et seq.; Whistleblower Protection Act (WPA), Pub.L. No. 101-12, 103 Stat. 16, codified in scattered sections of Title 5, U.S. Code. Key provisions: 5 U.S.C. §§ 1221, 2303(b)(8); Whistleblower Protection Enhancement Act (WPEA) codified in scattered sections of Title 5, U.S. Code. Key provision: 5 U.S.C. § 2303(b)(9).
    - Employee appeals of adverse actions
        - Agency charges employee with a deficiency in performance or conduct and takes an adverse action.
            - Employee must be a statutorily defined employee under 5 U.S.C. §§ 4302 or 7511 for the MSPB to have jurisdiction.
            - Such employees may appeal the action to the MSPB and raise a variety of affirmative defenses, to include Constitutional violations, discrimination, reprisal for whistleblowing, and harmful error.

- Adverse Actions directly appealable to MSPB are suspensions of more than 14-days, demotion or removals (termination of employment) taken under 5 U.S.C. Chapter 75 (for conduct) or Chapter 43 (for performance). *See* 5 U.S.C. §§ 4303, 7512-7513.
- The employee may also elect to contest the action through a grievance under a collective bargaining agreement, as a mixed case through the EEOC, or seek resolution from the Office of Special Counsel. *See* 5 U.S.C. § 7121. The agency must inform the employee of the options and the election must be knowing and informed. *See Atanus v. Merit Systems Protection Board*, 434 F.3d 1324, 1327 (Fed. Cir. 2006)(holding grievance election not binding where employer failed to inform employee of right to appeal to MSPB).
- If applicable, the initial decision will include an order to the agency to mitigate or rescind the applicable action and return the appellant as nearly as possible to status quo. *See Abbott v. U.S. Postal Service*, 2023 MSPB 14, p. 14 (3/23/23).

▪ Employee claims that an agency acted in reprisal for protected whistleblowing.
- A claim of whistleblower reprisal is that an employee has made a protected disclosure or engaged in protected activity and their disclosure or protected activity was a contributing factor in a negative personnel action. *See* 5 C.F.R. § 1209.1, et seq.
- Some employees must first file a complaint with the Office of Special Counsel and exhaust that remedy, depending on whether the personnel action is appealable under CSRA or not. If it is otherwise appealable, then the claim may be asserted as an affirmative defense without additional procedural or pleading requirements. If it is not otherwise appealable, the additional exhaustion and pleading requirements apply. 5 U.S.C. § 1214.
- If the employee, exhausts remedies they may file an appeal of the personnel action to MSPB. Personnel Actions are broadly defined. *See* 5 U.S.C. § 2302(a)(2)(A).
- If the employee plausibly alleges their prima facie case, they are entitled to an evidentiary hearing on the merits.
- At hearing the employee must prove a prima facie case of whistleblower reprisal by preponderant evidence – they made a protected disclosure or engaged in a protected activity which was a contributing factor in a covered personnel action. If the employee proves a prima facie case, the agency must prove that it would have taken the same action absent the employee's whistleblowing by clear and convincing evidence.
- The administrative judge has broad authority to award corrective action, which shall include attorney fees. 5 U.S.C. §§ 7701, 1221(g).

        - Initial decisions may be appealed to the three-member Board and/or any U.S. Circuit Court of Appeals. From there, to the Supreme Court. See All-Circuit Review Act, 5 U.S.C. § 7703.
    - Employee claims that an agency took an action in violation of VEOA.
        - Employees with Veterans Preference rights can appeal an agency action, usually a selection decision, where they believe the veterans preference statutes have been violated.
        - Claims must be first exhausted with the Department of Labor before an employee can file an appeal. *Graves v. Department of Veterans Affairs*, 117 M.S.P.R. 491, ¶ 8 (2012). If no material facts are disputed, an administrative judges may decide the merits of a VEOA appeal without a hearing. *Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 9 (2008).
    - Employee claims that an agency took an action in violation of USERRA.
        - Employees who perform uniformed service can appeal any agency action that either fails to afford them their reemployment rights or denies them employment, promotion or any benefit of employment based on their uniformed service or retaliation for exercising USERRA rights. *See* 38 U.S.C. §§ 4311-4318. There is no exhaustion requirement and no specific statute of limitations applicable to USERRA appeals.
    - Annuitant appeals a final action of OPM.
        - Federal annuitants may appeal a final decision of OPM that denies or adjusts retirement payments, attempts to recoup an overpayment, or related to an application for benefits.
    - There are sundry regulatory bases for appeal, too numerous for today's purposes.

- **What does the MSPB not do?**
    - Adjudicate discrimination complaints related to actions that are not directly appealable to the Board under CSRA.
        - Federal employees aggrieved by alleged discrimination in less serious actions can pursue the federal sector EEOC complaints process. 29 C.F.R. Part 1614 (EEOC).
        - Claims involving both CSRA issues and discrimination fall within the mixed case/appeal process. 5 C.F.R. §§ 1201.152-175. The MSPB will adjudicate both the CSRA issues and the discrimination claims. The scheme for judicial review of mixed cases runs through U.S. District Courts first. *See Perry v. Merit Systems Protection Board*, 137 S. Ct. 1975 (2017).
    - Resolve labor union/management disputes, unfair labor practices, or exceptions to arbitration awards. (FLRA)
    - Provide legal advice.

        - The MSPB is prohibited from providing advisory opinions. *See* 5 U.S.C. §1204(h).
    - Investigate anything.
        - The Office of Special Counsel is responsible for investigating allegations of activities prohibited by civil service laws, rules or regulations, including violations of the merit principles and prohibited personnel practices delineated at 5 U.S.C. §§ 2301(b) and 2032(b).
    - Hear non-Federal cases from private industry, local, city, county or state employees (with some very rare exceptions.)

- **What are some process differences between an MSPB appeal and cases in other fora?**
    - 5 C.F.R. § 1201.25: Response File Obviates Some Discovery.
    - 5 U.S.C. 7701: Guaranteed Day in Court/No Summary Judgment (except for VEOA).
    - Rules of Evidence and Procedure Not As Stringent *E.g., Bowen v. Department of Navy*, 112 M.S.P.R. 607, 618 (2009) (the Federal Rules are guidance, not strictly binding).
    - 5 C.F.R. § 1201.33: Subpoenas are available, but often unnecessary.
    - Employee is really defendant (mostly) *Jackson v. Veterans Administration*, 768 F.2d 1325, 1329 (Fed. Cir. 1985) ("By seeking review, an employee puts the agency in the position of a plaintiff bearing the burden of first coming forward with evidence to establish the fact of misconduct, the burden of proof, and the ultimate burden of persuasion").
    - An MSPB appeal will move quickly. *See* https://www.mspb.gov/about/annual_reports/MSPB_Strategic_Plan_for_FY_2022_2026_1910964.pdf

- **IMPORTANT DOs?**
    - Be prepared, generally.
    - Be prepared to move forward efficiently.
    - Read orders from start to signature, <u>every</u> <u>time.</u>
        - While the MSPB's administrative judges have stock templates, many modify those templates to suit their preferences or the needs of particular cases.
    - Take the "meet and confer" process seriously.
        - "Meet and Confer" is required by the Board's regulations. 5 C.F.R. §1201.55.
    - Ask when you're unsure about something. E.g., "Judge, for closing arguments at the hearing, do you prefer written or oral?"
        - Ex parte communications with the adjudicating judge are prohibited. *See* 5 C.F.R. § 1201.102. Be prepared to ask questions at a scheduled conference or request a conference for that purpose. MSPB staff can respond to basic procedural questions, but requests for extensions or other modifications to orders must be upon written motion.

- **IMPORTANT DON'Ts?**
    - Try to submit pleadings by email.

        - MSPB can only accept service through e-Appeal, mail, commercial delivery and facsimile. 5 U.S.C. § 1201.14. Pleadings or other communications sent by email will be rejected.
    - Split submissions illogically.
    - Assume motions are granted (even if joint or unopposed).
    - File frivolous motions.
        - Summary judgement is not available in most MSPB appeals, yet experienced attorneys will still file them.
    - Make frivolous objections.
        - Many standard trial objections are inapplicable in a MSPB hearing. E.g., ***Thomas v. Veterans Administration***, 1 M.S.P.R. 419, 424 (1979) ("the statements of the other two persons constitute hearsay, and under strict rules of evidence, would not be admitted. However, there is ample authority for the admission of hearsay evidence in administrative proceedings such as these").
    - Use the hearing for "on the fly" discovery.
    - Wait until the last minute.
        - The deadline set by the administrative judge is the *last day* in which to do something, not the only day.

Tips for Dos and Don’ts from MSPB Administrative Judges

A quick primer and some things to know to provide more effective and efficient representation to employees of the Federal Government in employment cases.

What is the MSPB and what kind of cases does it adjudicate?

MSPB functions as a court system for employees, applicants, and annuitants to seek review of agency personnel actions



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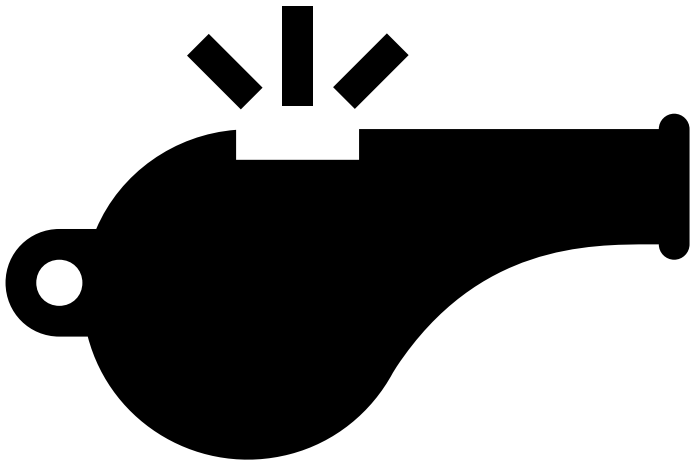
Employee appeals of adverse actions



Agency charges employee with a deficiency in performance or conduct and takes an adverse action.

What is the MSPB and what kind of cases does it adjudicate?

MSPB is the court system for review of employee claims that an agency acted in reprisal for protected whistleblowing.



What is the MSPB and what kind of cases does it adjudicate?



MSPB also hears and decides appeals of actions covered by USERRA, VEOA, and OPM.

The MSPB does *NOT*

- Adjudicate discrimination complaints related to actions that are not directly appealable to the Board
- Resolve labor union/management disputes, unfair labor practices, or exceptions to arbitration awards. (FLRA)
- Provide legal advice
- Investigate federal agency wrongdoing
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IMPORTANT DON'Ts?

- Try to submit pleadings by email
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- Wait until the last minute





QUESTIONS?

Litigating Whistleblower Protection Act cases at the OSC and MSPB
NELA Spring Seminar – April 5-6, 2024

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This paper gives an overview of the "nuts and bolts" of litigating a Whistleblower Protection Act case at the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB). Just as for federal-sector employment discrimination claims, there can be unexpected hurdles and pitfalls to try to avoid.

Who Is Covered by the WPA?

The first step is to determine whether your client or potential client is covered by the WPA, 5 U.S.C. § 2302. In general, the WPA covers employees and applicants in the Executive Branch – not Congress or the federal judiciary – but there are a number of carveouts. Excluded from the WPA are the following Executive Branch agencies:

(1) FBI, 5 U.S.C. § 2302(a)(2)(C)(ii)(I). There is a separate FBI whistleblower statute, with limited internal enforcement mechanisms, 5 U.S.C. § 2303.

(2) The "intelligence community," *i.e.*, "the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office." 5 U.S.C. § 2302(a)(2)(C)(ii)(I).

(3) Other intelligence-related entities: "as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action." 5 U.S.C. § 2302(a)(2)(C)(ii)(II).

(4) Government Accountability Office. 5 U.S.C. § 2302(a)(2)(C)(iii).

The WPA also does <u>not</u> protect political appointees, or those whose positions are otherwise "excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character," or who are otherwise excluded by the President. 5 U.S.C. § 2302(a)(2)(B).

Further, those Executive Branch agencies or positions that are outside the federal civil service (not covered by Title 5 of the U.S. Code) are also excluded from the WPA, such as the U.S. Postal Service, active duty military, and commissioned officers in the Public Health Services.

The MSPB has recently held that certain employees who work in the White House (Executive Office of the President) are covered by the WPA, including those who work for the "Office of Administration." *Maloney v. Executive Office of the President*, 2022 MSPB 26, ¶ 27 (2022). The MSPB considered whether the employee was covered by Title V of the U.S. Code, as not all White House employees are so covered. *Id.* at ¶¶ 21-23.

What Conduct Is Protected?

The WPA protects a wide range of disclosures – not only protests within an agency, but also disclosures to the Office of Special Counsel, an Inspector General, or to Congress. Section 2302(b)(8) lists the categories of protected disclosures:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
. . .
(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
(i) any violation of any law, rule, or regulation, or
(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—
(i) any violation (other than a violation of this section) of any law, rule, or regulation, or
(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or

(C) any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (B) that is—
(i) not classified; or

(ii) if classified—
(I) has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and
(II) does not reveal intelligence sources and methods.

5 U.S.C. § 2302(b)(8).

The determination of what disclosures are protected under the WPA have been discussed in numerous reported court decisions (mostly from the U.S. Court of Appeals for the Federal Circuit), as well as numerous MSPB decisions – both those of the three-member Board and of individual Administrative Judges. Note that starting in 2012 (on a trial basis) and permanently as of 2018, appeals of Board decisions can now be brought in any circuit court "of competent jurisdiction" (*i.e.*, the circuit in which the employee worked), not just the Federal Circuit. 5 U.S.C. § 7703(b)(1)(B). Hence, the Federal Circuit's prior "monopoly" on WPA appeals is no longer in effect, although it remains to be seen what percentage of WPA appeals will instead be brought in the regional circuit courts of appeal.

The OSC published a helpful summary of the WPA process at the OSC a decade ago. *See* Carolyn N. Lerner & Jason M. Zuckerman, *The U.S. Office of Special Counsel's Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing* (Office of Special Counsel 2015). A civil service treatise, updated annually, includes a lengthy chapter on the WPA. *See* Peter Broida, *A Guide to Merit Systems Protection Board Law and Practice* (Dewey 40th ed. 2023).

What Adverse Employment Actions Are Prohibited under the WPA?

The WPA sets forth a list of prohibited personnel practices (PPP), some of which go beyond the scope of what can be recognized as adverse actions under other employment discrimination and retaliation statutes. The WPA defines prohibited personnel practices as encompassing:

(i) an appointment;
(ii) a promotion;
(iii) an action under chapter 75 of this title or other disciplinary or corrective action;
(iv) a detail, transfer, or reassignment;
(v) a reinstatement;
(vi) a restoration;
(vii) a reemployment;
(viii) a performance evaluation under chapter 43 of this title or under title 38;
(ix) a decision concerning pay, benefits, or awards, or concerning education or

> training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
> (x) a decision to order psychiatric testing or examination;
> (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and
> (xii) any other significant change in duties, responsibilities, or working conditions.

5 U.S.C. § 2302(a)(2)(A).

While most personnel actions can readily fit into one or more of these 12 categories, retaliatory investigations of whistleblowers are not expressly included (or excluded). The Federal Circuit and the Board have held that a retaliatory investigation, by itself, is not necessarily an adverse personnel action, but it can be an adverse action if there was a significant change in working conditions. In *Sistek*, the Federal Circuit explained that:

> **To be sure, a retaliatory investigation, either on its own or as part of a broader set of circumstances, may qualify as a personnel action if it rises to the level of a "significant change in ... working conditions." The plain language of the statute requires as much—so long as the change in working conditions is significant**. *See Smith v. Dep't of the Army*, No. SF-1221-12-0349-W-6, 2017 MSPB LEXIS 3445, at *51–52 (M.S.P.B. Aug. 7, 2017) (collecting cases evaluating significance of change). Consistent with the statutory text, the Senate Report for the WPEA amendments expressly acknowledges that investigations may qualify as personnel actions "if they result in a significant change in job duties, responsibilities, or working conditions." S. REP. NO. 112-155, at 20. The Government conceded at oral argument that there may be extreme circumstances in which an investigation alone could constitute a significant change in working conditions. *See* Oral Arg. at 18:11–19:20 (discussing hypothetical in which an employee is interviewed for an hour every day). Or, **as the Board itself has held, a retaliatory investigation could contribute toward the creation of a hostile work environment that is actionable as a significant change in working conditions**. *Smith*, 2017 MSPB LEXIS 3445, at *52 (citing *Savage v. Dep't of the Army*, 122 M.S.P.R. 612, 627 (2015)

Sistek v. Department of Veterans Affairs, 955 F.3d 948, 955 (Fed. Cir. 2020) (emphasis added).

Similarly, in *Spivey*, the Board explained that:

> An investigation into an allegation of misconduct is not a personnel action per se. *Sistek v. Department of Veterans Affairs*, 955 F.3d 948, 955 (Fed. Cir. 2020) (concluding that

> "retaliatory investigations, in and of themselves, do not qualify as personnel actions" under the whistleblower protection statutory scheme); *see* 5 U.S.C. § 2302(a)(2)(A). As explained in the legislative history of the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465:
>
> > [A]gency investigations of employees are not explicitly covered under the statutory definition of a "personnel action." Instead, such investigations come within that definition only if they result in a significant change in job duties, responsibilities, or working conditions or have effects that otherwise fit within one of the items listed under the statutory definition of "personnel action."
>
> S. Rep. No. 112-155, at 20 (2012), as reprinted in 2012 U.S.C.C.A.N. 589, 608. **Further, the Board will consider evidence of the conduct of an agency investigation when it is so closely related to a personnel action that it could have been pretext for gathering evidence to use to retaliate against an employee for whistleblowing**. *See, e.g., Johnson v. Department of Justice*, 104 M.S.P.R. 624, ¶ 7 (2007); *Russell v. Department of Justice*, 76 M.S.P.R. 317, 323-24 (1997); *Geyer v. Department of Justice*, 70 M.S.P.R. 682, 688, aff'd, 116 F.3d 1497 (Fed. Cir. 1997) (Table).

Spivey v. Dept. of Justice, 2022 MSPB 24, ¶ 10 (MSPB July 29, 2022) (emphasis added).

Burden of Proof under the WPA

The WPA is unlike other employment discrimination statutes, which typically have a three-part burden shifting framework (the *McDonnell Douglas* framework). However, the plain language of the WPA makes clear that the burden is much higher on the agency than on the complainant.

Under the WPA, the complainant must set forth facts showing that she made protected disclosures, and that the agency took or threatened an adverse personnel action against the complainant because of those disclosures. 5 U.S.C. § 2302(b)(8). The complainant need only show that the disclosures were "**a contributing factor in the personnel action**" and may do so "**through circumstantial evidence, such as evidence that (A) the official taking the personnel action knew of the disclosure or protected activity; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action**." 5 U.S.C. § 1221(e)(1) (emphasis added); *see also* 5 C.F.R. § 1209.4(e)(1) and § 1209.7(a). The MSPB's regulations define "contributing factor" as "any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure." 5 C.F.R. § 1209.4(d).

The burden then shifts to the agency to "**demonstrate[] by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure**." 5 U.S.C. § 1221(e)(2) (emphasis added). If the agency is unable to meet that heightened burden, then corrective action can be awarded. *Id.*; *see also* 5 C.F.R.§ 1209.4(e)(2) and § 1209.7(b). The MSPB's regulations define "clear and convincing evidence" as "that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than 'preponderance of the evidence.'" 5 C.F.R. § 1209.4(e).

The "*Carr*" Factors for Analyzing the Agency's Heightened Burden of Proof.

The Federal Circuit has held that in adjudicating WPA claims, OSC and the MSPB must consider three non-exclusive factors, known as the *Carr* factors, in determining whether the agency has met its "clear and convincing evidence" burden. *Miller v. Department of Justice*, 842 F.3d 1252, 1257 (Fed. Cir. 2016); *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

Critically, these factors are "**non-exclusive**" factors that are "**merely appropriate and pertinent considerations for determining whether the agency carries its burden of proving by clear and convincing evidence that the same action would have been taken absent the whistleblowing**." *Miller*, 842 F.3d at 1257 (emphasis added) (quoting *Whitmore v. Department of Labor*, 680 F.3d 1353, 1374 (Fed. Cir. 2012)).

The three non-exclusive *Carr* factors are:

1. the strength of the agency's evidence in support of its personnel action;
2. the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and
3. any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

Id. (quoting *Carr*, 185 F.3d at 1323). However, our experience has been that OSC investigators will exclusively look at the three *Carr* factors, and will <u>not</u> consider direct evidence of retaliatory intent, such as an "enemies list," as part of this analysis.

Further, the Federal Circuit has recently held that *Carr* factor three is essentially a one-way ratchet favoring the agency – if there are no other comparators, then that only helps the agency:

> But we have said that "the absence of any evidence relating to *Carr* factor three can effectively remove that factor from the analysis." *Whitmore*, 680 F.3d at 1374; *see Ingram*, 777 F. App'x at 983–84 ("Though the absence of evidence regarding similarly

> situated employees cannot favor the government, 'the absence of any evidence related to *Carr* factor three can effectively remove that factor from the analysis.'" (citation omitted)). Because the agency need not prove every factor weighs in its favor, the absence of evidence related to *Carr* factor three is not fatal to the agency.
>
> We instead "consider the record as a whole and balance the *Carr* factors to determine whether substantial evidence supports the Board's finding that the [agency] clearly and convincingly proved it would have removed [the employee] independent of his protected disclosures." *Robinson*, 923 F.3d at 1019; *see also Ingram*, 777 F. App'x at 984 ("The lack of evidence on the third *Carr* factor appears neutral, and we hold substantial evidence supports the AJ's finding that the evidence supporting the first two *Carr* factors carries the Army's burden."). And our consideration of *Carr* factors one and two should not transform the Board's three-factor balancing test into a production requirement for the agency with respect to *Carr* factor three simply because *Carr* factor two weighs nominally in the employee's favor. Thus, while it is true that "the absence of any evidence concerning *Carr* factor three may well cause the agency to fail its case overall," it will not necessarily do so. *Whitmore*, 680 F.3d at 1374; *Siler*, 908 F.3d at 1299.

Rickel v. Dept. of the Navy, 31 F.4th 1358, 1366 (Fed. Cir. 2022); *accord McIntosh v. Dept. of Defense*, 53 F.4th 630, 646 (Fed. Cir. 2022) ("Because no pertinent evidence was presented on *Carr* factor three, it is effectively removed from the analysis.") (citing *Rickel*).

Methods of Raising Whistleblower Claims

There are several methods by which a federal employee or applicant can raise a retaliation claim under the WPA. This presentation will focus on filing a retaliation complaint with the OSC and then proceeding to the MSPB if OSC is unable to resolve the complaint.

Another way to assert rights under the WPA is through "otherwise appealable action appeals," *i.e.* as an affirmative defense arguing that an adverse action "was based on the appellant's whistleblowing or other protected activity." 5 C.F.R. § 1209.2(b)(2). These typically arise through an appeal to the MSPB of an adverse action taken under Chapter 75 (5 U.S.C. § 7513) or an appeal to the MSPB of a performance-based action taken under Chapter 43 (5 U.S.C. § 4303).

Finally, it is possible for the OSC itself to file a complaint with the MSPB ("original jurisdiction" cases), which almost never happens.

Regardless of which approach is taken, caution must be exercised if the complainant also decides to assert a discrimination claim under Title VII, or pursue a union grievance through a collective bargaining agreement (CBA). The MSPB statute and regulations have complex procedures and

outcomes relating to the "election of remedies" issue, which must be carefully reviewed by the complainant's counsel prior to choosing a specific route. *See* 5 C.F.R. § 1209.4(d); Carolyn N. Lerner & Jason M. Zuckerman, *The U.S. Office of Special Counsel's Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing*, at 38-39 (Office of Special Counsel 2015).

Filing a WPA Complaint with the OSC

In order to exhaust remedies under the WPA in bringing a retaliation complaint, the first step is to file a complaint with the OSC. The OSC website now has a portal allowing for online filing. The key point is that since OSC is understaffed and unlikely to be able to conduct a timely or meaningful investigation of the great majority of WPA complaints, practitioners should focus on drafting a complaint that can be turned around and used for the inevitable MSPB complaint. Thus, the OSC complaint should have the following categories:

(1) Jurisdictional statement – if needed, an explanation of why the employee (or applicant) and the agency are covered by the WPA.

(2) Statement of the protected disclosures that the employee or applicant made, with sufficient detail as to (a) what was disclosed; (b) to whom it was disclosed; (c) when it was disclosed; and (d) why the disclosures rise to the level of conduct protected under Section 2302(b)8).

(3) Statement of the adverse actions taken against the employee or applicant, with sufficient detail as to (a) what actions were taken and, if needed, an explanation of how they fall under Section 2302(a)(2)(A); (b) when those actions were taken; and (c) who took, recommended, or otherwise had a role in those actions.

(4) Statement regarding causation, typically allegations that the decisionmaker knew of the protected activity, which occurred within a sufficiently close time period of the adverse action, and any rebuttal to the agency's proffered justification for the adverse action, such as showing that the agency's justification is pretextual.

It is important to include all known disclosures and adverse actions in the OSC complaint, because if an appeal to the MSPB is necessary, the MSPB can only consider those issues that were timely raised with the OSC.

OSC will acknowledge receipt and assign the complaint to an investigator. 5 U.S.C. § 1214(a)(1)(B). OSC has the right to terminate an investigation within the first 30 days, "without further inquiry," if the same allegation was already made and investigated, or is already pending

with the MSPB, or the OSC lacks jurisdiction, or the complaint was filed more than three years after the PPP. 5 U.S.C. § 1214(a)(6)(A).

Typically, the investigator will ask the complainant for additional information and documents. The investigator will then ask the agency for its response to the complaint. However, OSC usually does not provide the agency's response to the complainant, instead only providing an oral summary of the response, perhaps accompanied by follow-up questions to the complainant. Given that the complainant is not provided with the agency's actual submission, it can be needlessly difficult to respond to the OSC's interpretation of the agency's position.

OSC is required to provide notice within 90 days after filing the complaint of the status of the investigation, and to provide follow-up notices every 60 days after the first notice. 5 U.S.C. § 1214(a)(1)(C). However, these are boilerplate statements that the investigation is continuing.

OSC has a mediation program which has sometimes resulted in favorable settlements. However, this is a voluntary mediation program, and agencies do not always agree to participate.

If OSC decides to terminate an investigation, it must provide at least 10 days' written notice to the complainant, who "may submit written comments about the report to the Special Counsel." 5 U.S.C. § 1214(a)(1)(D). The final closure letter must include "a summary of relevant facts ascertained by the Special counsel, including the facts that support, and the facts that do not support, the allegations;" "the reasons for terminating the investigation;" and "a response to any comments submitted" to the preliminary closure report. 5 U.S.C. § 1214(a)(2)(A).

Filing an OSC complaint is an administrative exhaustion requirement prior to going to the MSPB on an Individual Right of Action (IRA) appeal. There are two ways to exhaust: (1) the complainant must wait at least 120 days before filing an IRA appeal, if OSC does not complete its investigation and the complainant requests a closure letter; or (2) if OSC closes out the investigation, then the complainant has the right to go to the MSPB. In either circumstance, the complainant has 65 days from the notice of the closure or 60 days from receipt of the notice to file the IRA appeal (*i.e.*, a five-day "mailbox" rule). 5 U.S.C. § 1214(a)(3)(A), (B); 5 C.F.R. § 1209.5(a)(1), (2).

OSC Stays of Agency Actions

OSC has the authority to request that any MSPB Board member issue a stay of a personnel action for 45 days, "if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice." 5 U.S.C. § 1214(b)(1)(A)(i); *see also* 5 C.F.R. §§ 1209.8 – 1209.11. OSC has provided general (non-binding) guidance of the criteria it considers in requesting a stay:

1. There are reasonable grounds to believe that the personnel action that was taken or is about to be taken constitutes a PPP; and
2. Absent a stay the employee will be subjected to a removal, a suspension for more than 14 days, a reduction in grade, a significant reduction in pay, a geographic reassignment, the non-renewal of an appointment, or any other personnel action which the complainant demonstrates by compelling evidence will result in serious immediate hardship;
3. In any other case where, based on available information, there exists a substantial likelihood that the personnel action that was taken, or is about to be taken, was the result of a PPP; or
4. Where the Special Counsel, in his or her sole discretion, determines that a stay would be appropriate and consistent with OSC's statutory mission to request a stay from the Board.

Carolyn N. Lerner & Jason M. Zuckerman, *The U.S. Office of Special Counsel's Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing*, at 39 (Office of Special Counsel 2015). The stay may be extended by the Board if deemed appropriate. *Id.*

The MSPB Litigation Process

After the complainant files an IRA appeal with the MSPB, there typically is a waiting period for the MSPB to assign an Administrative Judge (AJ) to the case, as the Chief Administrative Judge or her designee will review the IRA appeal to check for the preliminary filing requirements.

The MSPB has set forth a summary of the procedures in the *Judges' Handbook* (2019), and the relevant regulations include a number of helpful "examples" that provide guidance on navigating the MSPB process. *See* 5 C.F.R. Parts 1201 and 1209.

The AJ may seek briefing on jurisdictional issues, requiring the complainant to provide an itemized statement setting forth (1) the protected disclosures or activities; (2) the dates of the disclosures or activities; (3) the individuals to whom the disclosures were made; (4) why the complainant's belief in the truth of the disclosures was reasonable; (5) what actions the agency took; (6) why the complainant believes the disclosure was a contributing factor in the agency's actions; and (7) information on the OSC complaint, including what allegations were raised, any amendments, and how the OSC closed the investigation. To the extent that the OSC complaint or the MSPB appeal has the first six components, and the MSPB appeal has included the OSC closure letter, then the MSPB AJ may not need further briefing on these jurisdictional issues.

The MSPB AJ will also typically require the agency to submit the "Agency File" prior to conducting discovery. The Agency File may consist of, *e.g.*, a narrative response to the appeal, including an explanation of the personnel actions; a statement of whether the complainant is covered by a collective bargaining agreement (CBA) that may cover the alleged personnel actions; a statement of whether the complainant has already filed a discrimination complaint and the status; and any documents relevant to documenting the adverse action.

The MSPB has the authority to consolidate or join multiple appeals, such as one complainant filing several appeals, or to group appeals from multiple complainants, such as in an agency RIF. *See* 5 C.F.R. § 1201.36; *Judges' Handbook*, Chapter 3, Section 3.

The MSPB also has the authority to adjudicate class actions, typically in the contexts of RIFs and other actions affecting large numbers of employees. *See* 5 C.F.R. § 1201.27; *Judges' Handbook*, Chapter 3, Section 4.

If the appellant requests a hearing, the MSPB AJ must hold a hearing, assuming the appeal was timely and there is no jurisdictional barrier. However, if the appellant waives a hearing, the AJ cannot require a hearing be held. *See Judges' Handbook*, Chapter 4, section 1.

Discovery in the MSPB

Discovery in the MSPB is similar to that under the Federal Rules of Civil Procedure. The general discovery procedures are in 5 C.F.R. § 1201.71 to § 1201.85. The parties may "use one or more of the methods provided under the Federal Rules of Civil Procedure," including "written interrogatories to parties, depositions,, requests for production of documents or things for inspection or copying and requests for admission." 5 C.F.R. § 1201.72(c). The regulations limit interrogatories to "25 in number including all discrete subparts," and allow up to ten depositions, absent prior approval by the AJ. 5 C.F.R. § 1201.74(e).

Typically, the AJ will set a relatively short overall schedule for discovery; if additional time is needed, such as to deal with discovery from witnesses who are no longer employed by the federal government, or the need to obtain documents from other federal agencies or third parties, then the parties should be prepared to justify the need for additional time.

The AJ can stay discovery, particularly if the case is referred to a Settlement Judge, or if the case is referred to the Mediation Appeals Program. *See* 5 C.F.R. 1201.28(d); *Judges' Handbook*, Chapter 3, Section 12 & Chapter 11, Section 9.

The first set of discovery requests must be served within 30 days after the AJ issues the order to the agency to produce the agency file and response. 5 C.F.R. § 1201.73(d)(1). Discovery

responses are due within twenty days. 5 C.F.R. § 1201.73(d)(2). Any follow-up discovery requests must be served within ten days of the response to the first set of requests. *Id.*

If a party is unsatisfied with the discovery responses, that party may initiate the motion to compel process, but only after attempting to resolve the issue with the opposing party; "all those involved shall make a good faith effort to resolve the discovery dispute and narrow the areas of disagreement." 5 C.F.R. § 1201.74(c)(1). However, a motion to compel must be filed "within 10 days of the date of service of objections," with any opposition due 10 days thereafter. 5 C.F.R. § 1201.74(d)(3); *see also Judges' Handbook*, Chapter 8, Sections 8-9. This tight timetable leaves little time to review the document production in order to identify deficiencies and to confer with opposing counsel prior to filing a motion to compel.

One key difference in the MSPB compared to federal court procedure is the subpoena power with respect to third party discovery. When it comes to witnesses who are currently employed by the respondent agency, the agency is required to make those witnesses available if the AJ so orders. 5 C.F.R. § 1201.33(a). If there are witnesses who work at other government agencies, the AJ has the authority to order the appearance of those witnesses. *Id.* However, for those witnesses who are not currently employed by the federal government, such as retired employees or outside contractors, then while the party seeking their testimony can request that the Board issue a subpoena, the enforcement process is slow at best. Upon refusal or failure of a witness to comply with a subpoena, the party who obtained the subpoena must ask the Board for enforcement in the appropriate U.S. District Court. The AJ must consult with both the Chief Administrative Judge and the MSPB Office of General Counsel about the motion for enforcement. *See* 5 C.F.R. § 1201.85(a); *Judges' Handbook*, Chapter 7, Section 6. This potential difficulty in conducting third party discovery is an issue with the MSPB process that should be considered in evaluating a case.

Conclusion

Litigating a WPA retaliation case through both the OSC and the MSPB presents some significant differences from litigating other types of employment discrimination and retaliation claims. Practitioners need to familiarize themselves with the procedures and strategies that are unique to the OSC and MSPB process, particularly the tight time limits for discovery, and the specialized evidentiary and burden-shifting framework used by the agencies in analyzing WPA claims.

Damages under the Whistleblower Protection Enhancement Act

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This paper discusses some of the issues involving emotional distress damages under the Whistleblower Protection Enhancement Act (WPEA), giving a few examples and arguing that other sources can be used to argue for larger awards.

The *Whistleblower Protection Enhancement Act* (WPEA), 5 U.S.C. §1221(g)(1)(A)(ii), provides that in an appeal of an adverse action, if the Board finds that an agency has engaged in a prohibited personnel practice as defined in 5 U.S.C. § 2302(b)(8) or (b)(9)(A)(i), (B), (C) or (D), it may award damages, including "back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages including interest, reasonable expert witness fees, and costs. 5 U.S.C. §§ 1221(g)(1)(A)(ii), 1221(i). See also 38 U.S.C. §714(d); 5 U.S.C. §§ 7701(c)(2), 7513; 5 C.F.R. § 1201.202(b)-(c).

Consequential damages under 5 U.S.C. § 1221(g) are limited to out-of-pocket costs and do not include non-pecuniary damages such as emotional or mental distress or other intangible losses. *See, Bohac v. Department of Agriculture*, 239 F.3d 1334, 1340-43 (Fed. Cir.2001). Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. *Id*., 5 C.F.R. §§1201.201(d), 202(c).

The appellant must establish, by preponderant evidence, the amount of his damages and that they were reasonable and foreseeable, i.e., causally related to the agency's reprisal. *See King*

v. Department of the Air Force, 122 M.S.P.R. 531 10 (2015); *Johnston v. Department of the Treasury,* 100 M.S.P.R. 78, 13 (2005). Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

When it comes to damages for emotional distress, however, there has been a dearth of good opinions from the Board (in part due to the 5 years absence of a Board) and there have also been a history of low awards for emotional distress. Because there have been few MSPB cases awarding compensatory damages in whistleblower reprisal cases, the Board has looked to the case law pertaining to compensatory damages awarded by the Equal Employment Opportunity Commission where prohibited discrimination has been found. *See, e.g., Sloan v. U.S. Postal Service*, 77 M.S.P.R. 58, 70 (1997). In turn, the Commission has looked to private sector case law. That law has long provided for remedies designed to ensure that the employee is fully compensated for the harm and losses resulting from the discriminatory treatment. When discrimination is found, the employer must provide the successful plaintiff with full, make-whole relief to restore him as nearly as possible to the position he would have occupied absent the discrimination. *See, e.g., Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975); *Wan v. U.S. Postal Serv*., EEOC Appeal No. 01995204 (July 11, 2001). Although not all harm done are amenable to precise quantification; the burden of limiting the remedy, rests with the employer. *Smallwood v. United Airlines, Inc.*, 728 F.2d 614, 616 n.5 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984).

This Author however submits that EEOC awards are fundamentally flawed in that there is an artificial cap on emotional distress damages for illegal discrimination under Title VII that is not on for damages under the WPEA, and these caps have not kept up with over 30 years of inflation.

Damages for wrongful termination, no matter whether they involve violations of Title VII or other prohibited personnel practice can and do exceed the Title VII caps. There are several alternative sources for emotional distress awards: 1) actual jury awards in similar Title VII cases for reprisal, preferably within the same jurisdiction as the incident in question, 2) awards for reprisal from the Department of Labor's Office of Federal Worker's Compensation Panel (OWCP), 3) other whistleblower statutes such as *Sarbanes Oxley,* 18 U.S.C. § 1514A(c); and 4) other tort awards or state employment awards in the same jurisdiction. In Federal District Court, jurors are not informed of the $300,000 caps and they are free to award damages for emotional distress as they see fit. It is the District Judge who imposes the caps once jurors issue their decision. Furthermore, the caps were imposed in 1991 and have yet to be adjusted for inflation in over 30 years. An inflation adjusted cap would be in excess of $644,000 as of the end of 2022.

While EEOC damage awards are artificially capped. There are some useful principles explained in various decisions and the Board in the past has looked to guidance from the EEOC on this issue. *See, e.g., Laney v. VA* , 2017 MSPB LEXIS 721, *21-22 (M.S.P.B. February 14, 2017). Non-pecuniary damages must be limited, however, to the sums necessary to compensate the injured party for actual harm, even where the harm is intangible. The existence, nature, and severity of emotional harm must be proved. A proper award should take into account the severity of the harm and the length of time that the injured party suffered the harm. *See Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652 (July 17, 1995). Finally, the amount of the award should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. *See Jackson v. United States Postal Service*, EEOC Appeal No. 01972555 (April 15, 1999), *citing Cygnar v. City of Chicago*, 865 F. 2d 827, 848 (7th Cir. 1989).

Factors in the Commission's decisions are fairly well known in our community, but they include both objective and subjective reasonings. These include for example the length of time that an individual suffered the harassment, *Looney v. Dep't of Homeland Security*, EEOC Appeal No. 07A40124, 01A53252 (May 19, 2005), the nature and severity of the adverse action or harassment, *Taber v. Postmaster General*, 01983780 (2001), and the actual impact on the individual, i.e. whether medical treatment was required, *Rivera v. Secretary of Navy*, 01934157, 4156/E12 (1994). Obviously, these make awards very fact dependent – an Appellant's specific condition, pre-existing issues and other factors will determine the best arguments to make.

But as noted, Commission decisions are of limited use due to the artificial caps of $300,000. Jury awards in the same community may have bearing and applicability. This practitioner recently cited an $800,000 jury award against a state agency for termination in reprisal for raising Title VII claims. This award was reduced by the Title VII caps by the District Court Judge, but it is illustrative of the community standard for compensatory damages for wrongful termination in reprisal for engaging in protected activity.

In general, however, Administrative Judges, and indeed in the past the Board itself, has been in this practitioner's opinion way to "stingy" when it comes to awarding damages for emotional distress. However, this may be an area ripe for change in the future with the new Board, but it may take a while as they run through the backlog of cases.

A good summary of Whistleblower damages was outlined in an initial decision, of *Hayes v. Dept. of Agriculture* 2022 MSPB LEXIS 998, where the Administrative Judge awarded $25,000 in compensatory damages for being removed from a task force. The judge went through a litany of cases:

Hayes v. Department of Veterans Affairs, SF-0714-19-0128-P-1, 2019 MSPB LEXIS 2203, 2019 WL 2745941 (June 24, 2019). The employee was awarded $ 4,000 in nonpecuniary compensatory damages. The administrative judge found there was limited evidence from the appellant's own statements and a one-page medical record that reflected treatment starting before the appellant was removed. The administrative judge acknowledged that this award was lower than other cases, but "in those cases, the employee was typically out of work for a longer period of time and provided more evidence to prove the nature and causation of their emotional distress than the appellant submitted here."

Murphy-Martin v. Department of Veterans Affairs, DC-1221-16-0259-P-1, 2017 MSPB LEXIS 4595, 2017 WL 4883525 (Oct. 27, 2017). The employee was awarded $ 5,000 in nonpecuniary compensatory damages. The administrative judge rejected awarding damages for "all of the unfortunate circumstances" in the employee's life because her declaration lacked "detailed information as to the manifestations and duration of her distress."

Ingram v. Department of the Navy, SF-0752-18-0391-P-1, 2020 MSPB LEXIS 1618, 2020 WL 1983413 (Apr. 22, 2020). The employee was awarded $ 10,000 in nonpecuniary compensatory damages. The administrative judge found that the employee failed to distinguish his successful whistleblower claims from his unsuccessful discrimination claims. "Unfortunately, the appellant did not give much information that would aid in assessing the amount of harm attributable to the removal alone [the only successful claim], such as a comparison of his mental state before the removal and after, a change in the frequency of visits, new prescriptions, or similar quantifiable indicators of increased mental distress."

Gilewicz v. Department of Homeland Security, DE-1221-20-0091-P-2, 2021 MSPB LEXIS 2168, 2021 WL 2654507 (June 23, 2021). The employee was awarded $ 100,000 in nonpecuniary compensatory damages. The employee submitted evidence that she was angry, anxious, depressed, fearful, unable to participate in activities she used to enjoy. The employee "describe[d] at length the insomnia and depression she suffered," reported currently experiencing anxiety, depression, insomnia, other symptoms of chronic stress, and had contemplated suicide. She submitted medical records from a licensed clinical social worker and therapist, both of whom wrote that the employee experienced significant depression that impacted her daily functioning. The administrative judge concluded that the limited Federal Circuit damages awards were too low compared with decisions by the EEOC.

Medlin v. Department of Homeland Security, AT-1221-20-0604-P-1, 2021 MSPB LEXIS 741, 2021 WL 779697 (Feb. 25, 2021). The employee was awarded $ 125,000 in nonpecuniary compensatory damages, based on findings that the stress caused by the agency's actions exacerbated preexisting medical conditions, which were supported by medical records. The agency's actions included posting his photograph at entrances to the facility, and making his spouse, who worked in the same unit, pack up his office after he was removed. Former colleagues avoided him, and he likened his "banishment" from the agency facility to be like a dishonorable discharge from the military. He experienced

physical symptoms, including insomnia, inability to stay awake during daytime, loss of balance, increased migraine headaches, irritable bowel symptoms that were so severe he carried extra clothing in case he soiled him, and worsened erectile dysfunction. He also experienced memory and concentration problems, such as not knowing why he had moved between rooms.

…

Hickey, 766 Fed.Appx. 970, which affirmed an award of $ 10,000 in nonpecuniary compensatory damages.

Hollingsworth, 117 M.S.P.R. 327, which awarded $ 15,000 in nonpecuniary compensatory damages for removal reversed for disability discrimination after 13 months, action exacerbated various physical ailments, damaged the appellant's mental health and career).

Heffernan v. Department of Health & Human Services, 2007 M.S.P.B. 246, 107 M.S.P.R. 97 (2007). The Board awarded the appellant $ 25,000 in nonpecuniary compensatory damages based on written statements from the appellant and his sister describing the mental pain and anguish he suffered over the 2.5 years he had been wrongfully removed from his position as a priest, and that his professional standing as a priest had been severely damaged by the agency's discriminatory actions, which was based on detailed descriptions about how his supervisors felt he had embarrassed the organization.

Guzman v. Department of Homeland Security, SF-0752-15-0170-P-3, 2020 WL 5879686 (Sep. 30, 2020). The employee was awarded $ 250,000 in nonpecuniary compensatory damages. The appellant "described fear, anxiety, depression, trembling hands, humiliation, and embarrassment" that affected "every significant relationship in his life," including that friends and former colleagues would not communicate with him, and indeed, and been directed against doing so by agency managers. The agency published false information about him (as determined by the merits decision), which will "remain there so long as the Internet is in existence." Even after he had been restored by a Board order following an improper removal, he was not given any work assignments of consequence, was not included in meetings, and despite being formally in a management role, had no managerial functions for over 20 months until he reached mandatory retirement age. Because he was in a law enforcement position subject to mandatory retirement, the employee could not "simply extend his time in the Federal workforce to make up" for lost time, opportunity, and reputation. The employee's wife submitted information about how his children feared him. The administrative judge found that the record was "replete with statements, accounts, recollections from the appellant's children, friends, and colleagues that make it crystal clear that the appellant was harmed as a direct result of the agency's retaliatory action."

Hayes v. Dep't of Agric., 2022 MSPB LEXIS 998, 15-19 (M.S.P.B. March 22, 2022).

Some other examples of WPEA damage awards are as follows:

1. *Smith v. Dep't of the Army*, 2023 MSPB LEXIS 4724, (M.S.P.B. November 3, 2023) $65,000 for a termination with no medical documentation to support a higher award.

2. *Laney v. VA* , 2017 MSPB LEXIS 721, *21-22 (M.S.P.B. February 14, 2017) $50,000 for a detail away from Appellant's office.

3. *Burns v. Dep't of Homeland Sec.*, 2023 MSPB LEXIS 4728, (M.S.P.B. November 3, 2023) $30,000 for proposed termination, but noting other contributing factors to the Appellant's emotional distress.

4. *Butler v. Department of the Army*, Docket No. DA-1221-19-0077-P-1, 2023 MSPB LEXIS 3226 (June 22, 2023). $75,000 for a NOPR and a removal decision, and the administrative judge found that the agency's actions exacerbated the appellant's previously diagnosed PTSD, depression and anxiety.

5. *Skrettas v. Department of Veterans Affairs*, Docket No. CH-1221-20-0549-P-1, 2022 MSPB LEXIS 4436 (November 14, 2022). $0. The administrative judge found that the appellant did not show that he was entitled to either consequential or compensatory damages for a retaliatory performance appraisal.

6. *Jackson v. Department of Veterans Affairs*, Docket No. SF-1221-19-0489-P-1, 2022 MSPB LEXIS 3618 (September 23, 2022). $25,000 for (1) retaliatory change in tour of duty, (2) permanent detail out of work location, (3) hostile work environment, and (4) probationary termination. When requesting damages, the appellant described feeling alienated, isolated, humiliated, and bullied at work. After her termination, the appellant "struggled severely" and experienced material and emotional costs.

7. *Perlick v. Department of Veterans Affairs*, Docket No. NY-1221-19-0052-P-2, 2022 MSPB LEXIS 2623 (July 18, 2022). $20,000, where Appellant asserted that she was suffering from "Major Depressive Episode with few signs of remission; waking up depressed and panicky, decreased appetite, difficulty motivating [her]self to get things done, lack of enjoyment, difficulty concentrating, needing the sleep aid diazepam to fall asleep, then sleeping more than normal" because she was devastated by the agency's termination of her employment.

8. *Jackson v. Department of the Army*, Docket No. AT-1221-21-0280-P-1 (June 23, 2022). $35,000 awarded for a proposed 14 day suspension and issuance of a 10-day suspension.

9. *Oliva v. Department of Veterans Affairs*, 817 Fed. App'x 980 (Fed. Cir. 2020), finding no error with the Board's decision to award $ 3,500 in non-pecuniary compensatory damages for emotional harm caused by a letter of reprimand.

10. *Stern v. Department of Veterans Affairs*, Docket No. NY-1221-19-0193-P-1, 2020 MSPB LEXIS 3306 (August 11, 2020). $10,000 for proposed removal.

11. *Rodriguez v. Department of the Navy*, Docket No. DA-1221-19-0180-P-1, 2020 MSPB LEXIS 3193 (August 4, 2020). No compensatory damages for a denial of a single opportunity for overtime.

12. *Roberts v. Department of Justice*, Docket No. DA-1221-18-0421-P-1, 2019 MSPB LEXIS 4462 (December 4, 2019). $10,000 for various employment actions, including reassignment of subordinate employees, proposed 5-day suspensions, reprimands and reassignment of duties.

In general, some recent MSPB cases have been more keen to award damages in WPEA claims at a higher rate, but there is still a ways to go. In *Medlin v. DHS*, AT-1221-20-0604-P-1 (Feb. 25, 2021), an Administrative Judge awarded $125,000 in compensatory damages for stress and resultant problems, family disruption, and reputational loss following placement of the appellant on administrative leave and a bar order resulting from whistleblower reprisal. In *Guzman v. DHS*, SF-0752-15-0170-P-3 (Sept. 30, 2020), an Administrative Judge awarded $250,000 in nonpecuniary compensatory damages for stress and resultant problems, impairment to relationships, and reputational damage, after appellant's retirement in lieu of removal in 2014.

Other sources beside the Board

As pointed out above, other sources for damages for emotional distress exist outside the scope of the WPEA and OFO Title VII that may be helpful in making arguments. In this practitioner's view, emotional distress is emotional distress. It should not matter whether the emotional distress is caused by whistleblower reprisal under the WPEA, or other forms of reprisal such as under the OWCP statute, Sarbanes Oxley, or other examples of illegal reprisal. The focus should be on the harm and that should be examined under the lens of what harm was done (e.g., a termination should result in a larger award than a letter of reprimand) and the Appellant's subjective experience (e.g. levels of stress, physical symptoms related to the reprisal, requirement for medical treatment, other stressors in an Appellant's life, etc.).

In particular, the Sarbanes Oxley act, 18 U.S.C. § 1514A(c), a private whistleblower is entitled to damages for emotional distress and similar to the WPEA, there is no cap on such damages as there are under Title VII. While such awards tend to be jury awards, and as such, there

can be a wide variety depending on jurisdictions, the particular facts of the case, and simply the ways in which jurors approach, there have been some spectacular awards. *See, e.g., Zulfer v. Playboy Enters. Inc.*, JVR No. 1405010041, 2014 WL 1891246 (C.D. Cal. Mar. 5, 2014). ($6,000,000 million awarded for a combination of emotional distress and under California whistleblower statutes). Other interesting awards are: *Van Asdale v. Int'l Game Tech.*, 549 F. App'x 611, 614 (9th Cir. 2013) ($2,200,000 for wrongful termination), and a lower example, *Rhinehimer v. Bancorp Investment, Inc.*, 2013 WL 9235343 (E.D.Ky. Dec. 27, 2013), *aff'd* 2015 WL 3404658 (6th Cir. 2014) ($250,000 for wrongful termination.)

However, such larger awards are generally considered outliers by practitioners, and a quick survey (i.e. a discussion with fellow NELA member, Jason Zuckerman), indicates that a more realistic compensatory damage award is on the order of $100,000. *See, e.g., Van Asdale v. Int'l Game Tech.,* 549 F. App'x 611, 614 (9th Cir. 2013) ($100,000 for termination upheld on appeal).

This author also researched further decisions of the Employees Compensation and Appeals Board, for worker's compensation cases, however few examples were found.

Jurisdictional Pitfalls in Whistleblower Cases

The purpose of this paper is not to give an exhaustive account of all jurisdictional issues, but to point out some common problems that arise in the jurisdictional stage of a whistleblower complaint. Jurisdiction is an area of Merit Systems Protection Board that is rife with numerous pitfalls for unsuspecting practitioners – and this practitioner still stumbles across them. Jurisdiction is, unfortunately, viewed as a way for judges to rid themselves of cases without having to make a decision on the merits. Thus, it is essential that jurisdiction be properly established before taking the matter to the Board for a decision on the merits.

There are three major aspects to Jurisdiction:

1) Proper Whistleblowing form – by that I mean, an Appellant must be truly a whistleblower, and that the complaint must fall within the ambit of either 5 U.S.C. §2302(b)(8) or (9);

2) An adverse action, or a proposed adverse action;

3) Exhaustion of Administrative Remedies – i.e. a full complaint to the Office of Special Counsel (OSC) sufficient for them to conduct an investigation into wrongdoing.

Each of these three areas create pitfalls that often cause practitioners to trip and lose a case that could otherwise have merit. Like most things, we start with the statute, 5 U.S.C. 2302(b)(8) & (9):

> **(8)** take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
>
> > **(A)** any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
> >
> > > **(i)** any violation of any law, rule, or regulation, or
> >
> > > **(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
> >
> > > if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;
>
> **(B)** any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—
>
> > **(i)** any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or

(C) any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (B) that is—

(i) not classified; or

(ii) if classified—

(I) has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and

(II) does not reveal intelligence sources and methods.

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) refusing to obey an order that would require the individual to violate a law, rule, or regulation;

I. The Form of Whistleblowing

A. Law, rule or regulation

As can be seen from the statute one of the primary things that makes someone a whistleblower is that they make a complaint of a violation of a "law, rule or regulation." These cover some rather broad areas of course. But often, especially when dealing with clients who had filed their complaints with OSC, *pro se,* issues arise as to whether they truly have raised an issue that falls under the ambit of the statute.

What this does not cover is ordinary disagreements over policy considerations by the government. As the Board has opined, to qualify for protection, an Appellant must have a "reasonable belief that the disclosed information evidences the kinds of misconduct listed in section 2302(b)(8), rather than a policy disagreement." *Webb v. Dept. of Interior,* 122 MSPR 248, 205 MSPB 6 (2015).

Examples of unprotected complaints include personal grievances over general complaints over working conditions, training office equipment work hours, lack of supervisory support. *Winfield v. VA,* 348 Fed. Appx. 577, 580 (Fed. Cir. 2009). Policy disagreements, such as to whom to award a contract, disagreement over a restructuring of the department, disagreement with an agency ruling – even if the ruling is incorrect. An erroneous Agency ruling is not a violation of the law. *Meuwissen v. Department of the Interior,* 234 F.3d 9, 13 – 14, (Fed. Cir. 2000).

Thus, it is essential in a jurisdictional brief to spell out exactly what the whistleblowing was about and identify the specific law, rule or regulation involved – or all laws, rules or regulations since often more than one is implicated. HOWEVER, it is NOT essential that the whistleblower identify the specific law, rule or regulation, when actually engaging in whistleblowing activity, or when reporting the whistleblowing activity to the Office of Special Counsel. It is only important to report what the wrongdoing is to both.

The "Board does not require an appellant to correctly label the category of wrongdoing under 5 U.S.C. § 2302(b)(8) because OSC can be expected to know which categories of wrongdoing might be implicated by a particular set of factual allegations." *Lane v. Dep't of Homeland Sec.*, 2010 M.S.P.B. 245, P13 (M.S.P.B. December 17, 2010). Thus it is not important whether Appellant named any specific law, or whether the issue was waste, or a violation of a law.

B. Gross waste, fraud, and abuse

Gross waste, fraud and abuse is often difficult to define. A loss of $2.50 is not likely to be viewed as waste or fraud. But generally speaking one should look at such within the context of the magnitude of related agency operations. *Navus v. Dept. of Army,* 57 MSPR 386 (1993). The Board in that case went on to say that Gross waste constitutes more than a debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. An allegation though of gross waste without mention of the amount of funds involved will not likely trigger jurisdiction. *Frederick v. VA,* 63 MSPR 563, 571 (1994). However, the Board has also ruled that what is protected are the disclosures that one reasonably believes evidences violations of laws, rules or regulations or gross waste fraud and abuse – even if a further investigation demonstrates that no rules or gross waste or fraud actually occurred. *Keefer v. Dept. of Agriculture,* 82 MSPR 87 (1999). Thus even a zero loss can qualify.

C. Specific danger to public health or safety

This particular issue can become somewhat complicated. The Board has ruled that any danger must be substantial and specific to qualify for protection. *Sazinski v. HUD,* 73 MSPR 682 (1997). Vague allegations are not enough. However, the Board has routinely ruled that the

allegations do not have to affect the entire public – but can simply involve the individuals served by the Agency or simply the safety of co-workers. *Braga v. Dept. of Army,* 54 MSPR 392 (1992); *Wojcicki v. Dept. of Air Force*, 72 MSPR 628 (1996). This is very important in VA cases, where the allegations of

D. Disclosures to the Inspector General
E. Failure to obey an order that is a violation of a law, rule or regulation.

II. Adverse actions

III. Exhaustion of Administrative Remedies

The issue of the exhaustion of administrative remedies also contains a few important pitfalls. In the "seven questions" that administrative judges propound, there are two that ask, when did the Appellant complaint to OSC, and when did they get their right to file letter. What is not clearly asked is *what* was disclosed to OSC. And yet what was disclosed to OSC is a key factor in determining the appropriate remedies and should always be addressed in a jurisdictional brief.

There are two key factors that need to be disclosed to OSC: 1) what was the whistleblowing, and 2) what was the adverse actions. All protected whistleblowing activity and all adverse actions should be brought to OSC's attention. This is why it is essential to respond to the typical "13 day letter" to OSC. Often whistleblowing is ongoing; perhaps Appellant is subjected to daily harassment, numerous promotional opportunities are denied, etc. All should be detailed to OSC in response to the 13 day letter. And often this creates a problem when dealing with individuals who come to counsel after they have received their right to file letter.

Federal Employee Whistleblower Case Law Update (2022-2023)

Kevin L. Owen, Esq., Gilbert Employment Law, P.C.

Chambers v. Department of Homeland Security, 2022 MSPB 8 (May 2, 2022)
An appellant is not required to respond to OSC's preliminary determination letter in order to exhaust his administrative remedies.

Edwards v. Department of Labor, 2022 MSPB 9 (May 5, 2022)
Allegations of discrimination may not be brought under the whistleblower protection statutes.
The 2017 amendment to 5 U.S.C. § 2302(b)(9)(C), which extended protection to disclosing information to "any other component responsible for internal investigation or review" did not apply retroactively.

Edenfield v. VA, 54 F.4th 1357 (Fed. Cir. Dec. 5, 2022)
The Board erred in holding the petitioner did not have a reasonable belief that he was making a protected disclosure. The provision that the appellant reasonably believed the agency violated was "ambiguous at best" An employee's belief could be reasonable even if incorrect.

Bishop v. Agriculture, 2022 MSPB 28 (Aug. 18, 2022)
Routine EEO Complaints are not a qualifying protected activity under § 2302(b)(9)(A)(i).
Protected activity under § 2302(b)(9)(A)(i) includes only complaints seeking to remedy reprisal for protected disclosures under § 2302(b)(8). Because the appellant's EEO complaint did not seek to remedy alleged whistleblower reprisal under § 2302(b)(8), it did not constitute protected activity under § 2302(b)(9)(A)(i). The appellant's disclosures, made in his administrative grievances, are not protected activity under § 2302(b)(9)(C) because to find otherwise would render (b)(9)(A) irrelevant and superfluous.

McCray v. Department of the Army, 2023 MSPB 10 (March 7, 2023)
A claim of reprisal for filing a grievance cannot provide the basis for an IRA appeal if the grievance did not involve an allegation that the agency had violated 5 U.S.C. § 2302(b)(8). Disclosures made within the grievance cannot support a finding of jurisdiction under § 2302(b)(8). Filing an administrative grievance does not constitute protected activity under 5 U.S.C. § 2302(b)(9)(C).

Kaszowski v. Air Force, 2023 MSPB 15 (April 4, 2023)
The appellant's election to challenge her removal through the negotiated grievance procedure was not binding, and thus did not preclude her Board appeal. The agency did not fully explain the consequences of choosing the appeal or grievance procedures, specifically not informing the appellant that she could raise the matter at issue with the Board or under the negotiated grievance procedures, "but not both."

Marcell v. Department of Veterans Affairs, 2022 MSPB 33 (Sept. 23, 2022)
Neither OWCP claims nor requests for leave under the FMLA constitute protected activity under 5 U.S.C. § 2302(b)(9)(A).

Abernathy v. Department of the Army, 2022 MSPB 37 (Nov. 15, 2022)
The appellant was not excluded from protection as a whistleblower simply because he was neither an employee or applicant at the time he made his disclosures. This finding is not limited to Federal contractors. It applies to any individual who makes a whistleblowing disclosure at any time before becoming a Federal employee or applicant for employment.

Covington v. Interior, 2023 MSPB 5 (Jan. 13, 2023)
A disclosure of wrongdoing committed by a non-Federal government entity is protected only when the Federal government's interests and good name are implicated in the alleged wrongdoing.
The appellant's disclosures regarding alleged wrongdoing by the Navajo Nation Forestry Department implicated the Federal Government's interests and good name.

Skarada v. Department of Veterans Affairs, 2022 MSPB 17 (June 22, 2022)
To constitute a covered personnel action, an agency action must have practical consequences for the employee. Therefore, to constitute a "significant change," an agency action, whether an individual action or multiple actions collectively, must have a significant impact on the overall nature or quality of an employee's working conditions, responsibilities or duties.

Salazar v. Department of Veterans Affairs, 2022 MSPB 42 (Dec. 13, 2022)
The higher burden of proof for disclosures made in the normal course of duties under 5 U.S.C. § 2302(f)(2) applies only if the employee's principal job function is to regularly investigate and disclose wrongdoing.
The 2018 NDAA amendment to § 2302(f)(2) clarified existing law and therefore it applied to all pending cases, regardless of when the underlying events occurred.

Mikhaylov v. Dep't of Homeland Sec., 62 F.4th 862 (4th Cir. Mar. 15, 2023)
Timing/Knowledge test alone is not sufficient to establish causation; "rather a disclosure is a contributing factor only when the confluence of the official's knowledge and the timing of the action reasonably suggests a connection between the two."
The WPEA "does not provide that a protected disclosure automatically becomes a contributing factor in every case where a personnel action is finalized shortly after protected disclosures come to light"

When disciplinary action is initiated fast on the heels of an employee making a protected disclosure, a reasonable person could easily conclude that the discipline was in retaliation for the disclosure. On those paradigmatic facts, the protected disclosure must be viewed as a contributing factor.

In this case, the discipline imposed on the employee stemmed from a preexisting and ongoing OPR investigation into the employee which predated the deciding official's learning of the protected disclosures.

NOTE This is a minority circuit opinion that is not binding on the MSPB

Rickel v. Dep't of the Navy, 31 F.4th 1358 (Fed. Cir. 2022)
The fact an Agency is unable to produce comparator evidence in support of *Carr* Factor 3 does not foreclose the Agency from meeting its burden of proof for its affirmative defense by clear and convincing evidence.

The U.S. Office of Special Counsel's Role in Protecting Whistleblowers and Serving as a Safe Channel for Government Employees to Disclose Wrongdoing

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[1] The authors acknowledge the assistance of Gregory Giaccio and Grace Williams in preparing this outline.

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The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency whose primary mission is to safeguard the merit system[2] by protecting federal employees and applicants from prohibited personnel practices (PPPs), especially reprisal for whistleblowing, and provide an independent, secure channel for disclosure and resolution of wrongdoing in federal agencies.[3] OSC investigates allegations of reprisal and is authorized to seek corrective action to make a whistleblower whole and to initiate disciplinary action against civilian government officials who commit PPPs.

I. Establishment of OSC

In the wake of the Watergate scandal, and well-publicized allegations of retaliation by agencies against employees who had blown the whistle on wasteful defense spending and revelations of partisan political coercion in the federal government, Congress enacted sweeping reform of the civil service system in a bill known as the Civil Service Reform Act (CSRA).[4] The primary purpose of the CSRA—providing review of agencies' adverse employment actions—was to ensure that "[e]mployees are . . . protected against arbitrary action, personal favoritism, and from partisan political coercion." S. Rep. No. 95-969, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2741. To achieve those goals, Congress identified merit system principles and PPPs designed to ensure, among other things, protection of whistleblowers, open competition for selections and promotions, pay comparability, efficient use of the work force, and fair treatment of government employees.[5]

[2] The "merit system" in federal employment refers to laws and regulations designed to ensure that personnel decisions, including hiring and discipline, are taken based on merit.

[3] OSC also enforces the Hatch Act provisions on permissible and impermissible political activity by government employees and protects the employment and reemployment rights of military veterans and reservists under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301 – 4335).

[4] Civil Service Reform Act of 1978 (CSRA), October 13, 1978, Pub. L. No. 95-454, 92; *see also* Fong, Bruce D., Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980's, 40 Am.U.L. Rev. 1015, 1017-18 (1991). Stat. 1111-1116.

[5] The nine merit system principles are set forth at 5 U.S.C. § 2301(b):

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be—

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

The Senate Report accompanying the CSRA reveals that Congress was especially concerned with protecting whistleblowers from retaliation:

> In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the General Services Administration employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.

S. Rep. No. 95-969, at 8 (1978). To achieve the goals of the CSRA, including whistleblower protection, Congress established the OSC and tasked it with investigating and prosecuting allegations of PPPs, obtaining corrective actions for employees subjected to PPPs, initiating disciplinary action against civilian government officials who commit PPPs, and enforcing the Hatch Act of 1939.[6] In 1989, Congress enacted the Whistleblower Protection Act (WPA), [7] which made OSC an independent agency within the executive branch and clarified that OSC's primary role is to protect employees, especially whistleblowers, from PPPs.

II. OSC's Independence and Powers

The OSC is an independent agency in the Executive Branch and the Special Counsel, the head of the OSC, is appointed by the President, with advice and consent from the Senate.[8] Unlike most agency heads, the Special Counsel does not serve at the pleasure of the President. By statute, the Special Counsel serves a 5-year term and "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1211(b).

The Special Counsel has broad powers, including the authority to compel witness testimony under oath; obtain documents; bring petitions for corrective action; file a complaint or make recommendations for disciplinary action; receive, review, and, where appropriate, forward to the Attorney General or an agency head disclosures of violations of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—
(A) a violation of any law, rule, or regulation, or
(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
The thirteen prohibited personnel practices are set forth at 5 U.S.C. § 2302(b).

[6] The CSRA also established the U.S. Merit Systems Protection Board, an independent, quasi-judicial agency that serves as the guardian of federal merit systems. The MSPB's mission is to protect federal merit systems and the rights of individuals within those systems. MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies. This paper refers to the Merit System Protection Board as the Board or the MSPB.

[7] *See* Pub. L. No. 101-12, Sec. 2 (1989).

[8] As originally established under the CSRA, the OSC was part of the MSPB. The Whistleblower Protection Act of 1989 established OSC as an independent agency. *See* Pub. L. No. 101-12, 103 Stat. 32 (1989).

and specific danger to public health or safety; take depositions, and receive evidence. Significantly, the Special Counsel is also authorized to seek a stay of a personnel action pending an OSC investigation where the OSC has reasonable grounds to believe that the action is the result of a PPP.[9]

III. Investigating and Resolving Complaints of Whistleblower Retaliation

The WPA prohibits using a personnel action to retaliate against a federal employee because of the individual's disclosure of a violation of any law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[10]

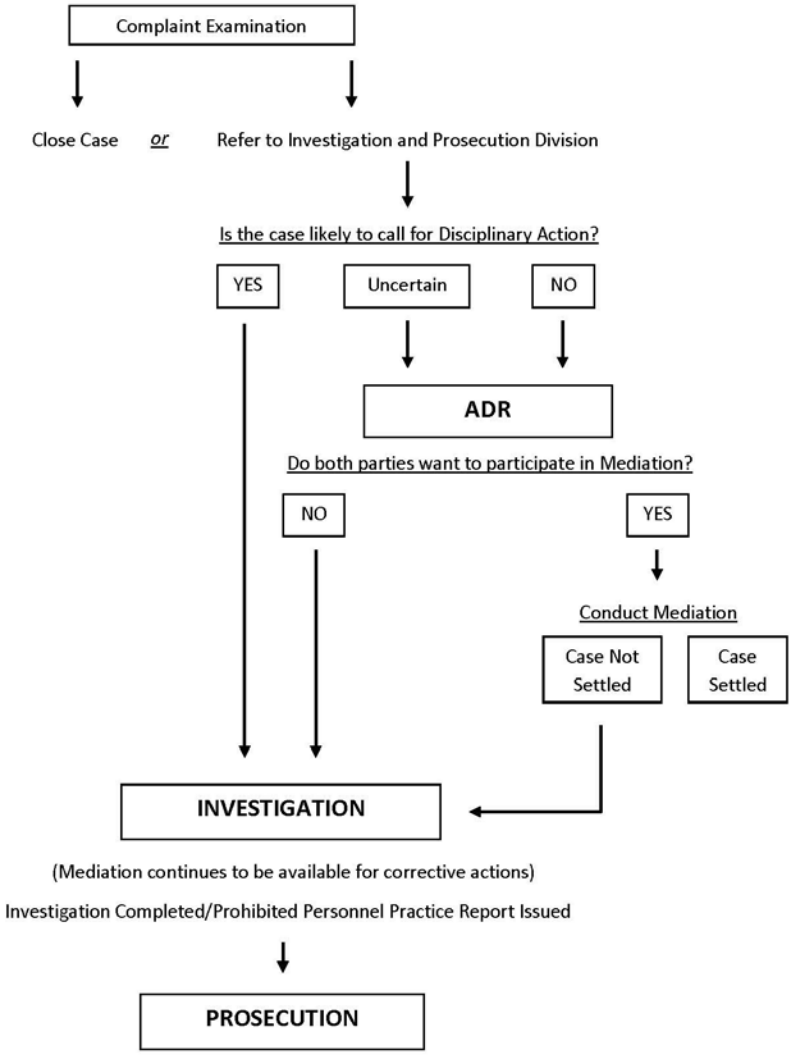
OSC's Complaints Examining Unit (CEU) screens about 3,000 PPP complaints per year, more than half of which allege whistleblower reprisal. Attorneys and personnel management specialists conduct an initial review of complaints to determine if they are within OSC's jurisdiction, and if so, whether further investigation is warranted. The unit refers qualifying matters for Alternative Dispute Resolution (ADR) or to the Investigation and Prosecution Division (IPD) for further investigation, possible settlement, or prosecution.

Once a PPP case is referred to the ADR Unit, an OSC ADR specialist will contact the affected employee and agency. If both parties agree, OSC conducts a mediation session, led by OSC-trained mediators who have experience in federal personnel law.

If ADR is unable to resolve a matter, it is referred to IPD, which is responsible for conducting investigations of PPPs. IPD attorneys determine whether the evidence is sufficient to establish that a violation has occurred. If not, the matter is closed. IPD's investigation of a reprisal complaint includes obtaining and reviewing pertinent records and interviewing witnesses under oath. Where OSC determines that there are reasonable grounds to believe that a PPP has occurred and the matter has not been resolved, OSC sends a report to the agency head setting forth OSC's findings and the key evidence supporting those findings, and recommending corrective action.[11] In most cases in which OSC issues a PPP report, the agency voluntarily agrees to implement the OSC's recommendations. If an agency declines to take corrective action, OSC can file a petition for corrective action at the MSPB, and the parties then take discovery and try the case on the merits before an MSPB Administrative Law Judge. The MSPB can order corrective action for the complainant as well as impose disciplinary action against responsible agency personnel.[12]

[9] *See* 5 U.S.C. § 1214(b)(1)(A)(i).
[10] *See* 5 U.S.C. § 2302(b)(8). Most civil servants can bring a whistleblower reprisal complaint at OSC, but employees of agencies that conduct foreign intelligence or counterintelligence, including the Central Intelligence Agency, are excluded from coverage. *See* 5 U.S.C. § 2302(a)(2)(C).
[11] *See* 5 U.S.C. § 1214(b)(2)(B).
[12] *See* 5 U.S.C. § 1214(b)(2)(D).

The following schematic illustrates the typical route for a PPP complaint:



IV. Obtaining Corrective Action for Whistleblowers

In the WPA, Congress clarified that that while disciplining those who commit PPPs may be used as a means by which to help accomplish the goal of protecting employees from PPPs, "the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration."[13] Corrective action for a PPP violation consists of "make whole" remedies, including reinstatement, back pay (lost wages), medical costs, compensatory damages, any other reasonable and foreseeable consequential charges, and attorneys' fees and costs.[14]

[13] *See* Pub. L. No. 101-12, Sec. 2 (1989).
[14] Prior to the enactment of the Whistleblower Protection Enhancement Act of 2012 (WPEA), the Board was not authorized to award compensatory damages for PPP violations. In *King v. Dep't of Air Force*, the Board determined the compensatory damages provision in the WPEA does not apply retroactively. 119 M.S.P.R. 663, §§ 15-18 (2013).

In addition, Section 104(c) of the Whistleblower Protection Enhancement Act (WPEA) clarifies that the remedy for a whistleblower subjected to a retaliatory investigation can include "fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for" protected whistleblowing. The WPEA does not define what constitutes a retaliatory investigation, leaving in place the MSPB's decision in *Russell v. Dep't of Justice,* 76 M.S.P.R. 317, 323-25 (1997), holding that "[w]hen . . . an investigation is so closely related to the personnel action that it could have been a pretext for gathering evidence to retaliate, and the agency does not show by clear and convincing evidence that the evidence would have been gathered absent the protected disclosure, then the appellant [whistleblower] will prevail on his affirmative defense of retaliation for whistleblowing." Id. at 324. Retaliatory investigations can take many forms, such as unwarranted referrals for criminal or civil investigations or overly scrutinized reviews of time and attendance records.

The following are recent examples of OSC investigations of whistleblower claims that resulted in corrective action:

Wasteful use of funds. A supervisory auditor employed a private attorney to assist in blowing the whistle on his agency's gross waste of funds under a million dollar service contract. In the course of his privileged communications with his attorney, the auditor disclosed confidential information concerning an important government audit. Thereafter, the employee made his disclosure to the Inspector General prompting the agency to investigate the employee for having disclosed confidential information to his private attorney. When the investigation confirmed the employee's conduct, the agency proposed his removal, later mitigating the removal to a suspension. OSC investigated the complaint to determine whether the agency's disciplinary action was in retaliation for protected whistleblowing. In a case of first impression, OSC issued a PPP report sustaining the complaint and finding that the agency's retaliation violated the First Amendment and the WPA. In response, the agency agreed to provide full corrective action to the employee including attorneys' fees reimbursement, and the employee withdrew his OSC complaint in a settlement.

Inaccurate payment. A supervisor encouraged her subordinate to report a decision that granted payments to a claimant that they believed would result in the erroneous payment of hundreds of thousands of dollars, if not corrected. In retaliation for disclosing, the manager received a reprimand, was stripped of her supervisory title, and was reassigned to a different duty station. The subordinate whistleblower received a 14-day suspension. OSC obtained full corrective action for the manager. OSC also negotiated a full offer of relief for the subordinate, but the subordinate declined the offer in order to pursue his administrative claims independently.

Repeated violations of air passenger safety. A supervisory employee made several disclosures regarding employee misconduct and violations of workplace rules governing a highly sensitive mission that protects air passenger safety. In retaliation for his disclosures, the employee was fired. In a settlement, OSC obtained full corrective action for the employee, including reinstatement, back pay, and attorneys' fees.

Fraudulent and wasteful contracting. An employee suffered retaliation in a series of adverse actions after he alleged waste, fraud, and abuse in a government contract valued at a very high amount. He was removed as contracting officer, lost his supervisory duties, received notice of a proposed suspension, suffered a reduction in pay, had his overseas tour shortened, lost overseas

leave privileges, and failed to be selected for positions for which he applied. OSC's investigation substantiated many of the complainant's allegations, and the agency granted full corrective action and agreed to reassign the employee to a different position in the agency.

Improper program qualifications. An employee disclosed that a private sector customer of the agency with close ties to the agency's local manager provided inaccurate financial information to qualify for the agency's program. In retaliation for her disclosure, the employee reported that her working conditions became intolerable; she suffered harassment, a significant change in working conditions, a reprimand, a lowered performance appraisal, denial of a cash award, and denial of overtime. In a settlement, the agency agreed to reassign the employee to a different office, rescind her letter of reprimand, and pay her attorneys' fees. In return, the complainant withdrew her OSC complaint.

Accounting errors. An employee suffered a series of harassing retaliatory actions because he revealed accounting discrepancies to his managers and to the Inspector General. The retaliatory personnel actions included changing his work schedule, placing him in an incorrect grade after being converted from the National Security Personnel System, charging him as absent without leave, lowering his performance appraisal, reassigning him to a new duty location, and cancelling a promotion. The OSC investigation substantiated the employee's complaint and the agency agreed to retroactively promote him and reassign him geographically with relocation benefits to a position outside of his management chain.

Potential fire hazard. A long-time seasonal employee reported the improper installation of a stove in a remote location as a potential fire hazard. Shortly after her report, the agency terminated the employee's appointment and declined to rehire her in successive seasons for a position she had held for over 10 years. OSC's investigation verified the employee's whistleblowing disclosure and retaliation complaint. In a settlement, the agency agreed to provide the employee with back pay for four seasons of missed work and the employee withdrew her OSC complaint.

V. Pursuing Disciplinary Action

In addition to obtaining corrective action for a whistleblower, OSC is authorized to seek disciplinary action against an employee who has retaliated against a whistleblower.[15] Disciplinary action includes "removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000."[16] Disciplinary action is important to deter retaliation and can send a strong signal to managers or agency officials that they can be held accountable for retaliating against a whistleblower.

Prior to the enactment of the WPEA, OSC was hampered in its ability to pursue disciplinary actions because of the U.S. Court of Appeals for the Federal Circuit's *Santella*[17] decision requiring OSC to meet an onerous "but for" causation standard in disciplinary action cases. *Santella* further dissuaded OSC from bringing disciplinary action cases at the

[15] OSC lacks jurisdiction to seek discipline for military officials, i.e. members of the uniformed services, since they are not "employees" as defined by 5 U.S.C. § 2105, i.e., "appointed in the civil service." However, under the WPA, OSC may transmit recommendations for disciplinary or other appropriate action (including the evidence on which the recommendations are based) to the head of the agency concerned. 5 U.S.C. § 1215(c)(1).
[16] *See* 5 U.S.C. § 1215(a)(3).
[17] *Special Counsel v. Santella*, 65 M.S.P.R. 452 (1994), aff'd , 185 F.3d 1318 (Fed. Cir. 1999).

MSPB by requiring OSC to pay the attorneys' fees of a manager in a disciplinary action case in which OSC does not prevail. Section 106 of the WPEA overturned *Santella*[18] by clarifying that OSC can prevail in a disciplinary action case by demonstrating to the MSPB that the whistleblower's protected disclosure was a "significant motivating factor" in an agency's decision to take the adverse action, even if other factors also motivated the decision. Section 107(a) also provides that the employing agency, not OSC, will be liable for attorneys' fees in disciplinary action cases.

Evidence showing a pattern or "convincing mosaic" of retaliation can be used to prove the significant factor element in a retaliation case. Such mosaic includes pieces of evidence that "[w]hen taken as a whole, provide strong support if all [pieces] point in the same direction…." *Crump v. Dep't of Veterans Affairs*, 114 M.S.P.R. 224, 229-30 (2010) (quoting *Sylvester v. SOS Children's Vills. Illinois, Inc*., 453 F.3d 900, 903 (7th Cir. 2006)). As a general rule, this mosaic has been defined to include three general types of evidence: (1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that employees similarly situated to the appellant have been better treated; and (3) evidence that the employer's stated reason for its actions is pretextual. *Marshall v. Dep't of Veterans Affairs*, 111 M.S.P.R. 5, 13 (2008) (quoting *FitzGerald v. Dep't of Homeland Sec.*, 107 M.S.P.R. 666, 675-76 (2008).

The following are recent examples of OSC obtaining disciplinary action as a result of findings in an investigation of a whistleblower claim:

Mishandling of veterans' remains. Three OSC whistleblowers at the Department of the Air Force Port Mortuary, Dover Air Force Base, alleged that a series of adverse personnel actions were taken against them in retaliation for having disclosed to OSC and to the Air Force's Inspector General numerous incidents of misconduct, mishandling, and regulatory violations in the mortuary's care of the remains of fallen service members. In an extensive PPP report, OSC concluded that Air Force officials retaliated against the whistleblowers because of their disclosures through various harmful actions that included a proposed removal, placement on extended administrative leave, suspensions, significant changes in duties and working conditions, and lowered performance appraisals. The Air Force responded positively to OSC's report by providing full corrective action to the whistleblowers and disciplining the responsible officials. In addition, the Air Force instituted OSC's recommended reforms to improve mortuary operations and train its employees on whistleblower protection.

Improper solicitation of personal benefits. The MSPB referred this case for disciplinary action to OSC. The MSPB concluded that an official had retaliated against an employee for disclosing to the agency's ethics officer that the official had wanted the employee to solicit a personal benefit from an agency contractor. The Board found that the official solicited the employee's resignation under threat of a misconduct investigation in retaliation for the whistleblowing. OSC settled the matter wherein the official agreed to accept a suspension with certain probationary conditions.

[18] *Santella v. Special Counsel*, 86 M.S.P.R. 48, ¶ 10 (2000), *aff'd on recons*., 90 M.S.P.R. 172 (2001), *aff'd*, 328 F.3d 1374 (Fed. Cir. 2003).

VI. Serving as a Secure Channel to Disclose Wrongdoing

In addition to protecting whistleblowers from retaliation, OSC serves as a secure channel for most federal workers to disclose information about violations of laws, gross mismanagement or waste of funds, abuse of authority, and specific dangers to the public health and safety. OSC does not, however, have jurisdiction over employees of the U.S. Postal Service and Postal Regulatory Commission, members of the Armed Forces, state employees operating under federal grants, employees of federal contractors, Legislative or Judicial Branch employees, and other federal employees that are exempt from federal law. For instance, certain disclosures involving foreign intelligence or counterintelligence must be transmitted immediately to the National Security Advisor.

Upon receipt of a disclosure, OSC attorneys review the information to evaluate whether there is a substantial likelihood that the information discloses one or more of those five categories of wrongdoing.[19] If OSC determines that the disclosure meets the "substantial likelihood" standard, OSC refers information to an agency head for an investigation, and the agency must investigate the allegations and submit a written report to OSC on the agency's findings. Absent the whistleblower's consent, OSC does not disclose the identity of the whistleblower.[20] If the Special Counsel does not refer the disclosure to the agency head, OSC sends a letter to the whistleblower explaining why the Special Counsel did not refer the information. This letter lets the whistleblower know what other disclosure channels may be available. Either way, an OSC staff member will contact the whistleblower within two weeks of filing to explain the process and timing.

The agency report must be signed by an agency head and must include the basis for the investigation, the manner in which the investigation was conducted and a summary of the evidence gathered. The report also must list any apparent violations found and include a description of any action to be taken as a result of the investigation. Agency heads frequently task their Offices of Inspector General with the responsibility for investigating disclosures referred by OSC.

Upon receipt, the agency's report is reviewed to determine whether it contains the information required by the statute and whether the report's findings appear to be reasonable. In addition, the whistleblower is afforded an opportunity to review and comment on the agency report. If the report meets the statutory requirements, the Special Counsel then transmits the report to the President and the congressional committees with oversight responsibility for the agency involved. OSC also posts the report on its website, along with the whistleblower's comments.

By providing a safe channel for whistleblower disclosures**,** OSC regularly reins in waste, fraud, abuse, illegality, and threats to public health and safety that pose the very real risk of catastrophic harm to the public, and huge remedial and liability costs for the government. In recent years, OSC has shepherded numerous, harrowing disclosures from courageous Federal Aviation Administration (FAA) employees who have blown the whistle on systemic failures in air traffic control and the oversight of airline safety. For example, aviation safety inspectors

[19] *See* 5 U.S.C. § 1213.

[20] OSC can disclose the identity of a whistleblower where it "determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law." 5 U.S.C. § 1213(h).

disclosed that FAA failed to timely issue Airworthiness Directives requiring the inspection of aircraft, resulting in unresolved and potentially cataclysmic safety issues. Similarly, an air traffic controller at Detroit Metropolitan Airport disclosed that FAA failed to complete required environmental, noise and safety risk assessments when establishing a procedure for landing aircraft on airport runways, creating a clear and present safety hazard. This disclosure resulted in FAA cancelling the runway procedure. In another case, whistleblower disclosures to OSC resulted in a Department of Transportation finding that staff at a major metropolitan airport did not know which aircraft separation requirements to follow, a recipe for causing mid-air collisions.

A recent significant disclosure stemmed from three whistleblowers at the Department of the Air Force Port Mortuary, alleging 1) the improper preparation of remains of a deceased Marine; 2) the improper handling and transport of possibly contagious remains; 3) the improper transport and cremation of fetal remains of military dependents; and 4) the failure to resolve cases of missing portions of remains. The investigation substantiated the allegations that Port Mortuary leadership failed to properly resolve two cases in which portions of remains of deceased service members were lost. The report concluded that managers engaged in gross mismanagement, and that the lack of accountability for the portions resulted in "a negligent failure" to meet the requisite standard of care for handling remains and violated several agency rules and regulations. The report also substantiated the allegations of improper cremations without the required authorization. The Air Force did not substantiate the allegations of wrongdoing regarding the preparation of remains, the improper transport of fetal remains of military dependents, or the improper handling and transport of possibly contagious remains. However, the evidence presented in the reports did not support several of the findings and conclusions drawn by the Air Force regarding these allegations; therefore, OSC determined that the agency's findings did not appear reasonable.[21]

In response to the findings, the Air Force took substantial corrective action, even where they did not acknowledge wrongdoing. These corrective actions included enhancing training and implementing policies and procedures to improve the processes and accountability at the Port Mortuary. However, OSC raised concerns regarding the insufficiency of the disciplinary action taken against the managers who were found to be responsible for violating rules and regulations, gross mismanagement, dishonest conduct, and a failure of leadership.

VII. Scope of OSC Jurisdiction in Whistleblower Retaliation Cases

The WPA covers most federal employees, but there are statutory exemptions that exclude certain components of the government, or limit the scope of protection. As explained below, certain law enforcement and intelligence agencies have separate statutory coverage, and are excluded from coverage by the WPA.

[21] As discussed above on pages 8-9, OSC also performed an investigation of retaliation against employees who disclosed mismanagement at the Port Mortuary. While the protected disclosure that is alleged in a whistleblower retaliation complaint filed at OSC may overlap with a whistleblower disclosure filed at OSC, it is important to remember to file the PPP complaint using Form 11 and the disclosure using Form 12. Those complaint forms are posted on OSC's website, which also contains an efiling system that offers the option of filing a PPP complaint or a disclosure electronically.

Type of employer	**2302(b)(8) Coverage**	**Source**
Private employers	No	5 U.S.C. § 2302(a)(2) 5 U.S.C. § 2105 Some states have adopted whistleblower protection laws protecting private sector employees and most states recognize a tort action for wrongful termination in violation of public policy.
Contract employees	No	5 U.S.C. § 2302(a)(2); 5 U.S.C. § 2105 Employees of DoD and NASA contractors protected under 10 U.S.C. § 2409, and employees of contractors of other government agencies protected under 41 U.S.C. § 4712.
State and Local	No	5 U.S.C. § 2302(a)(2); 5 U.S.C. § 2105 Most states have adopted whistleblower protection statutes protecting public sector employees.
Non-appropriated Fund (NAF)	No	5 U.S.C. § 2105(c). *See Clark v. Merit Sys. Prot. Bd.*, 361 F.3d 647, 651 (Fed. Cir. 2004) (citing with approval *Clark v. Army & Air Force Exch. Serv.*, 57 M.S.P.R. 43 (1993)). Under 10 U.S.C. § 1587, NAF employees are protected from reprisal for whistleblowing pursuant to procedures adopted by the Secretary of Defense.
National Guard	No	OSC has jurisdiction, but no enforcement authority: The Board and Federal Circuit have held that the Board lacks the authority to enforce an order against the National Guard. *Singleton v. Merit Sys. Prot. Bd.*, 244 F.3d 1331 (Fed. Cir. 2001); *see also, McVay v. Arkansas Nat'l Guard*, 80 M.S.P.R. 120, 124-25 (1998).
GAO	No	5 U.S.C. § 2302(a)(2)(C)(iii)
Uniformed Military /commissioned corps of HHS or NOAA:	No	excluded by 5 U.S.C. §§ 1221(a); 2105(a); 2101(3); *see also Special Counsel ex rel. Hardy v. Dep't of Health & Human Servs.*, 117 M.S.P.R. 174, 177 (2011). Members of the Armed Forces are covered under the Military Whistleblower Protection Act, 10 U.S.C. § 1034
Veterans Canteen Service	No	*See Chavez v. Dept. of Veterans Affairs*, 65 M.S.P.R. 590, 593-94 (1994) (finding that the Board lacked jurisdiction over a removal appeal where the appellant's position has been excluded from the appointment provisions of Title 5).
Postal Regulatory Commission:	No	excluded by 5 U.S.C. § 2105(e)

Intelligence agencies & Federal Bureau of Investigation	No	explicitly exempted under 5 U.S.C. § 2302(a)(2)(C)(ii)[22] On October 10, 2012, President Obama issued a Presidential Policy Directive (PPD) that prohibits retaliation against whistleblowers in the intelligence community and requires intelligence agencies to establish a review process for claims of retaliation consistent with the procedures in the WPA.[23] The review procedures must be adopted within 270 days of issuance of the PPD.
U.S. Postal Service	Partial	5 U.S.C. § 2302(b)(7). Pursuant to 39 U.S.C. § 410, the provisions of Title 5 of the United States Code do not apply to U.S. Postal Service employees, exceptfor certain sections, including 5 U.S.C. § 3110, which restricts the employment of relatives, and 5 U.S.C. § 552, which deals with the public's access to agency information. Under a Memorandum of Understanding between OSC and the U.S. Postal Service, OSC refers alleged violations of the anti-nepotism statute to USPS for investigation. Additionally, we have jurisdiction for arbitrary and capricious withholding of information under the Freedom of Information Act (FOIA).
All Government Corporations under 31 U.S.C. § 9101	Partial	Covered for 5 U.S.C. § 2302(b)(8) and (9)(A)(i), (B), (C), or (D) in 5 U.S.C. § 2302(a)(2)(C)(i)
Federal Aviation Administration (FAA)	Partial	49 U.S.C. § 40122(g)(2) excludes FAA employees from all prohibited personnel practices **except** for "section 2302(b), relating to whistleblower protection, including the provisions for investigation and enforcement as provided in chapter 12 of title 5."[24]
Transportation Security Administration	Partial	*Post WPEA:* 5 U.S.C. § 2302(b)(1), (8), and (9) covered

VIII. Prohibitions Against Whistleblower Retaliation

[22] The Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office are all exempted.
[23] *See* "Protecting Whistleblowers with Access to Classified Information," Presidential Policy Directive/PPD-19 (Oct. 10, 2012) (posted at http://www.whitehouse.gov/sites/default/files/image/ppd-19.pdf).
[24] *See Edwards v. Dep't of Homeland Security*, 110 M.S.P.R. 243, 248 (2008) (dismissing a 5 U.S.C. § 2302(b)(12) claim for a TSA employee to which 49 U.S.C. § 40122(g)(2) applied, but never addressing whether "relating to whistleblower protection" included (b)(9) claims.)

OSC enforces two prohibitions against retaliation. Section 2302(b)(8) prohibits retaliation for disclosures that evidence (1) any violation of any law, rule or regulation; (2) gross mismanagement; (3) gross waste of funds; (4) abuse of authority; or (5) a substantial or specific danger to public health or safety. Section 2302(b)(9) prohibits reprisal for (1) exercising an appeal, complaint, or grievance right; (2) testifying for or otherwise lawfully assisting any individual in filing an appeal, complaint, or grievance right granted by law, rule, or regulation; (3) cooperating with or disclosing information to the Inspector General of an agency or the Special Counsel; or (4) refusing to obey an order that would require the individual to violate a law.

A. Whistleblower Retaliation, § 2302(b)(8)

The elements of 2302(b)(8) are: (1) a protected disclosure; (2) a personnel action taken, threatened or not taken subsequent to the protected disclosure; (3) the accused officials knew of the protected disclosure; and (4) a causal connection between the disclosure and the personnel action.

To defeat a claim under the WPA, an agency must show by "clear and convincing" evidence that it would have taken the challenged actions even in the absence of protected disclosures.[25] This standard imposes a heavy evidentiary burden on an agency. Showing a mere preponderance of the evidence is not enough. The agency must introduce sufficient evidence to "produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established."[26]

1. Categories of Protected Disclosures (Element 1)

i. Violation of Law, Rule or Regulation

There is no statutory definition or legislative history for the term "rule" as used in 5 U.S.C. § 2302(b)(8) but the MSPB has taken a fairly expansive view of what constitutes a rule. In *Rusin v. Dep't of the Treasury*[27], the Board held that "the determination of whether something is a 'rule' for purposes of the WPA cannot be based merely on its title" and a "more substantive examination" is required. The Board ultimately concluded that disclosing a violation of instructions pertaining to using government credit cards was a non frivolous allegation that was possibly protected.[28]

The whistleblower need not identify the specific law, rule or regulation being violated if the statements obviously implicate misconduct under a particular provision.[29] Even disclosures that are mistaken may be protected if they are reasonably believed, and the reasonableness of the

[25] 5 U.S.C. § 1214(b)(4)(B)(ii).
[26] *Rychen v. Dept. of Army*, 51 M.S.P.R. 179, 184 (1991).
[27] *Rusin*, 92 M.S.P.R. 298, 305 (2002)
[28] *Id*. at 306-07. The Board elaborated, "an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation; or a prescribed guide for action or conduct, regulation or principle." *Id*., at 305-307 (citing Black's Law Dictionary 1330 (7th ed. 1999) and Barron's Law Dictionary 427 (3rd ed. 1991)).
[29] *See Langer v. Dep't of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001) ("[W]hen the employee's statements and the circumstances surrounding the making of those statements clearly implicate an identifiable violation of law, rule or regulation," he does not have to identify a statutory or regulatory provision by title or number).

subjective opinion that a violation happened may be examined in light of the applicable training of the whistleblower.[30]

ii. Gross Mismanagement: Substantial Risk of Significant Impact on the Mission

Gross mismanagement is defined as "management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission."[31] Gross mismanagement is more than *de minimis* wrongdoing or negligence and not all mismanagement qualifies.[32] A disclosure of gross mismanagement must be so serious that it rises above a mere difference of opinion and is not debatable among reasonable people.[33] Where a policy decision does not rise to the level of gross mismanagement, but the policy change could impact the public's health and safety, it may be a disclosure protected under the latter category.[34]

iii. Gross Waste of Funds

A gross waste of funds is a "more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government."[35]

iv. Abuse of Authority

An abuse of authority is an "arbitrary or capricious exercise of power by a Federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons."[36] Unlike the phrases "gross mismanagement" and "gross waste of funds," the phrase "abuse of authority" does not contain an expressed *de minimis* standard.[37] The Board has stated that disclosures of abuses of authority are substantively different from disclosures of the other wrongdoing in 5 U.S.C. § 2302(b)(8)(A)(ii) that contain some sort of qualifying language that specifies a degree to which the wrongdoing must meet and has declined to infer a *de minimis* exception.[38] The Board has indicated that where the alleged abuse of authority has no appearance of personal gain for the person exercising the authority, or other preferred persons, there is no disclosure. *Downing v. Dep't of Labor*, 98 M.S.P.R. 64, 70 (2004) (holding that there was no allegation that a particular individual's rights were affected or that the office closure was for personal gain); *Chambers v. Dep't. of Interior*, 103 M.S.P.R. 375, 389 (2006), *partially aff'd, vacated, and remanded on other grounds in Chambers v. Dep't. of Interior*, 515 F.3d 1362 (Fed. Cir. 2008) (appellant failed to show that

[30] *See Herman v. Dep't of Justice*, 115 M.S.P.R. 386, 391 (2011) (finding the appellant reasonably believed Privacy Act was violated given his lack of training in law).
[31] *Lopez v. Dep't of Housing and Urban Development*, 98 F.3d 1358 (Fed. Cir. 1996) (Table) (quoting *Nafus v. Dep't of the Army*, 57 M.S.P.R. 386, 395 (1993)).
[32] *Id*.
[33] *White*, 392 F.3d at 1382. *White* is a particularly difficult case to summarize, and was litigated before the full Board and the Federal Circuit multiple times over the course of a decade.
[34] *See Chambers v. Dep't of the Interior*, 515 F.3d 1362, 1368-69 (Fed. Cir. 2008) (Board erred in analyzing disclosure regarding reduction of law enforcement budget as gross mismanagement instead of danger to public safety); *Chambers v. Dep't of the Interior*, 116 M.S.P.R. 17, 29 (2011) (finding the appellant's disclosure of reallocation of law enforcement resources protected as danger to public health and safety).
[35] *Nafus v. Dep't of the Army*, 57 M.S.P.R. 386, 393 (1993), *overruled on other grounds*, *Frederick v. Department of Justice*, 65 M.S.P.R. 517, 531 (1994).
[36] *D'Elia v. Dep't. of Treasury*, 60 M.S.P.R. 226, 232 (1994), citing 5 C.F.R. § 1250.3(f) (1988).
[37] *D'Elia*, 60 M.S.P.R. at 232; *see also Wheeler v. Dep't of Veterans Affairs*, 88 M.S.P.R. 236, 241 (2001).
[38] *Wheeler*, 88 M.S.P.R. at 240.

officials abused authority because she did not show if they engaged in self-dealing or deprived others of rights).

a. Examples of Abuse of Authority

Harassment or intimidation of employees: *See, e.g.*, *Costello v. Merit Sys. Prot. Bd.*, 182 F.3d 1372, 1373 (Fed. Cir. 1999) (profanity in violation of code of conduct and harassment and intimidation of employees); *Murphy v. Dep't of the Treasury*, 86 M.S.P.R. 131, 136 (2000) (supervisor engaged in "threats, swearing, [and] physical acts of aggression" to intimidate employee and other staff members into following the supervisor's requests without question); *Reeves v. Dep't of Navy*, 99 M.S.P.R. 153, 160 (2005) (supervisor threatened subordinate with physical violence).

Preferential treatment to an employee with whom the supervisor is perceived to be intimate: *Pasley v. Dep't. of the Treasury*, 109 M.S.P.R. 105, 114 (2008) (disclosing that first-level supervisor delegated supervisory duties to female subordinate with whom he appeared to have romantic relationship, and threatened career of person drawing attention to this relationship); *Sirgo v. Dep't of Justice*, 66 M.S.P.R. 261, 267 (1995); *but see Special Counsel v. Spears*, 75 M.S.P.R. 639, 655 (1997) (sending flowers with performance award and presenting preferred employee an award in private were too trivial to constitute reasonable belief in intimate relationship).

Improper personnel selections: *Wheeler v. Dep't of Veterans Affairs*, 88 M.S.P.R. 236, 241 (2001); *see also Berkowitz v. Dep't of the Treasury*, 94 M.S.P.R. 658, 661 (2003) (agency manipulated promotion process to allow selection of certain individuals, but exclude others); *Schaeffer v. Dep't of the Navy*, 86 M.S.P.R. 606, 614 (2000) (use of non-merit factors to reward friends and punish perceived enemies in personnel selections is both an abuse of authority and a violation of 5 U.S.C. § 2302(b)(6)).

Mishandling a grievance: *Schaeffer v. Dep't of the Navy*, 86 M.S.P.R. 606, 613 (2000) (failed to resolve grievance in eleven-month period); *Loyd v. Dep't of the Treasury*, 69 M.S.P.R. 684, 688 (1996) (assigning grievance to management official named as subject in the grievance).

v. Substantial and Specific Danger to Public Health and Safety

In determining whether a disclosure exhibits a reasonable belief that there is a substantial and specific danger to public health and safety, the Federal Circuit analyzes several factors, including: (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm, i.e., the potential consequences.[39]

Although the statute addresses dangers to "public" health and safety, the Board has adopted an expansive approach in evaluating reasonable belief in cases where the alleged danger is limited to a specific class of individuals and not to the public at large.[40] The Board has not specifically analyzed the "public" requirement of this condition and appears to be treating disclosures under this condition on a case-by-case basis.

[39] *Chambers v. Dep't of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008).
[40] *See Woodworth v. Dep't of the Navy*, 105 M.S.P.R. 456, 463-64 (2007) (perceived danger to a limited number of government personnel and not to the public at large); *Acting Special Counsel ex rel. Finkel v. Dep't of Labor*, 93 M.S.P.R. 409, 413-14 (2003) (protected disclosure that agency failed to test its inspectors for possible exposure to beryllium where test was inexpensive and exposure could lead to fatal lung ailment).

vi. Censorship Related to Scientific Integrity under the WPEA

Section 110 of the WPEA extends whistleblower protections to government scientists who challenge censorship or make disclosures related to the integrity of the scientific process. In particular, it protects disclosures of information that an employee reasonably believes are evidence of censorship related to research, analysis, or technical information that cause, or will cause, gross government waste or mismanagement, an abuse of authority, a substantial and specific danger to public health or safety, or any violation of law. "Censorship" is broadly defined to include "any effort to distort, misrepresent, or suppress research, analysis, or technical information." This expansion of protected conduct is consistent with efforts by this Administration to promote scientific integrity, including the March 9, 2009 Presidential Memorandum on Scientific Integrity, which requires agencies to adopt policies ensuring scientific integrity.

2. Reasonable Belief

The Congressional intent behind the WPA was to expand protection for those with an honest belief they were reporting waste, fraud, abuse or gross mismanagement. Personal bias or self-interest may affect credibility, but does not affect whether the disclosure is protected.[41] In assessing the reasonableness of the discloser's belief, the following objective test is used: whether, given the information available to the whistleblower, a person standing in his shoes could reasonably believe that the disclosed information evidences one of the identified conditions in the statute.[42]

i. Disclosure Need Not be True to be Reasonable.

The Board has held "[t]he [whistleblower] need not prove that the condition reported established any of the situations detailed under 5 U.S.C. § 2302(b)(8)(A)(i) or (ii), but he must come forth with such proof, either in the form of testimony or documentary evidence, as will establish that the matter reported was one that a reasonable person in the employee's position would believe to evidence one of the situations specified at 5 U.S.C. § 2302(b)(8)."[43]

ii. Focus is on the Reasonableness of the Perception of the Whistleblower, Not the Listener.

Generally when assessing the reasonableness of the whistleblower's belief, the Board will ask whether (1) a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant (2) could reasonably conclude that the actions of the government evidence a violation of law, rule, regulation, gross mismanagement, a gross

[41] *See, e.g., Kinan v. Dep't of Defense*, 87 M.S.P.R. 56, 566-67 (2001) (employee's bias not dispositive on issue of reasonable belief)*; Fickie v. Dep't of the Army*, 86 M.S.P.R. 525, 530-31 (2000); *Parikh v. Dep't of Veterans Affairs*, 116 M.S.P.R. 197, 206 (2011) ("vindictive motive" of whistleblower immaterial to whether disclosure is protected). However, a witness's bias and self-interest will always be a part of the credibility-determination process. Whether one's bias or self-interest actually results in an unreasonable belief, however, depends on the circumstances.
[42] *Fitches v. Dep't of the Air Force*, 82 M.S.P.R. 68 (1999); *Gores v. Dep't of Veterans Affairs*, 68 M.S.P.R. 100 (1995); *see also Ward v. Dep't of the Army*, 67 M.S.P.R. 482, 485-86 (1995) (using interchangeably "would believe" and "would not be unreasonable to conclude").
[43] *Russell v. Dep't of Justice*, 68 M.S.P.R. 337, 342 (1995); *Ward v. Dep't of the Army*, 67 M.S.P.R. 482, 485-86 (1995).

waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[44]

3. Specificity Requirement

The Board has rejected disclosures that lack specificity or are vague. For example, in *Special Counsel v. Costello*, the Board declined to protect a letter which requested help for what the employees believed to be threats, retaliation and micro-management.[45] The Board held that bare allegations, without some examples to support it, could not be protected.[46] More significantly, the Board declined to consider *post hoc* evidence that established the validity of these conditions.[47] An appellant must explain what violations of law, regulation, gross mismanagement, abuse of authority, or substantial and specific dangers to public health or safety were involved.[48]

On the other hand, the Board has held that a disclosure need not be so specific that it would permit a law enforcement agency to conduct a reasonably well-focused investigation.[49] Additionally, the Federal Circuit has ruled that when disclosing a violation of law, rule, or regulation, an employee need not identify a statutory or regulatory provision by title or number, when the employee's statements and the circumstances surrounding the making of those statements clearly implicate an identifiable violation of law, rule, or regulation.[50]

4. No Proscribed Channel for Whistleblowing

i. Generally: Any Person Rule

A whistleblower may disclose information to "any" person. The statute does not require that the whistleblowing occur through a specific channel (e.g., Office of Inspector General or OSC) unless the information concerns matters required by law or Presidential order to be kept confidential.[51] Congress intended that "disclosures be encouraged [and cautioned that] OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing."[52] Section 101 of the WPEA clarified that a disclosure does not lose protection because it was made to a

[44] *LaChance v. White*, 174 F.3d. 1378, 1381 (Fed. Cir. 1999).
[45] 75 M.S.P.R. 562, 585 (1997), *rev'd on other grounds sub nom. Costello v. Merit Sys. Prot. Bd.*, 182 F.3d 1372 (Fed. Cir. 1999).
[46] *Id.*
[47] *Id*. *See also Huffman v. Office of Pers. Mgmt*., 84 M.S.P.R. 569 (1999) (Slavet, concurring) (where employee only thinks something has occurred, has no personal knowledge of the wrongdoing, lacks clear understanding of what has occurred, and is reporting incomplete information and rumors, reasonable belief is not present).
[48] *Boechler v. Dep't of the Interior*, 109 M.S.P.R. 638, 642 (2008).
[49] *Keefer v. Dep't of Agric*., 82 M.S.P.R. 687, 693 (1999).
[50] *Langer v. Dep't of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001); *DeSantis v. Napolitano*, 716 F. Supp. 2d 1100, 1107 (D.N.M. 2010); *Kalil v. Dep't of Agric*., 96 M.S.P.R. 77, 85 (2004); *Ivey v. Dep't of the Treasury*, 94 M.S.P.R. 224 (2003).
[51] 5 U.S.C. § 2302(b)(8)(A).
[52] S. Rep. No. 358, 103rd Cong., 2d Sess. 10, *quoting* S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988). "[I]t is inappropriate for disclosures to be protected only if they are made . . . to certain employees or only if the employee is the first to raise the issue." S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988).

supervisor or other person who participated in the wrongdoing. There are certain circumstances when a disclosure might not be protected if it was made as a private citizen.[53]

ii. No Chain of Command Requirement

The statute does not require that the discloser proceed incrementally through his chain of command.[54] This is a corollary to the "any person" rule. Any disclosure is protected to any person if it reasonably evidences a statutory condition – with the limited exceptions created by case law.

iii. "Any Disclosure" Rule

When the WPA reformers substituted "any disclosure" for "a disclosure" in the statute, they intended the small change to signify their intent to protect *all* disclosures. Congress stated explicitly it was reacting to its perception that OSC, the Board and the courts had been erecting technical barriers to exclude certain disclosures from protection.[55] So, the drafters added the word "any" to modify "disclosure" to, in their words, "stress that any disclosure is protected (if it meets the requisite reasonable belief test and is not required to be kept confidential)."[56]

Subsequent to the enactment of the WPA, some Federal Circuit decisions established limitations on the scope of protected conduct. Those decisions include: (1) *Horton v. Dep't of the Navy*,[57] holding that disclosures to the alleged wrongdoer are not protected; (2) *Willis v. Dep't of Agriculture*,[58] excluding from WPA protection a disclosure made as part of an employee's normal job duties; and (3) *Meuwissen v. Dep't of Interior*,[59] holding that disclosures of information already known are not protected. Sections 101 and 102 of the WPEA restore the original intent of the WPA to adequately protect whistleblowers by clarifying that a disclosure does not lose protection because: (1) the disclosure was made to a person, including a supervisor, who participated in the wrongdoing disclosed; (2) the disclosure revealed information that previously had been disclosed; (3) of the employee or applicant's motive for making the disclosure; (4) the disclosure was made while the employee was off duty; or (5) of the amount of time which had passed since the occurrence of the events described in the disclosure. Section 101(b)(2) also clarifies that a disclosure is not excluded from protection because it was made during the employee's normal course of duties, providing the employee is able to show that the personnel action was taken in reprisal for the disclosure.[60]

[53] *Van Ee v. Environmental Protection Agency*, 64 M.S.P.R. 693, 697 (1994) (opinions expressed as a private citizen in the course of settlement discussions may be protected); *Garrett v. Dep't of Defense*, 62 M.S.P.R. 666, 671 (1994) (protecting disclosures to supervisor); *Braga v. Dep't of the Army*, 54 M.S.P.R. 392, 397-98 (1992), *aff'd*, 6 F.3d 787 (Fed. Cir. 1993) (Table) (protecting memo to supervisor, oral statements made in meeting with agency officials, and memo to Chairman, Joint Chiefs of Staff, assuming disclosure to be reasonably based).
[54] *Detrich v. Dep't of Navy*, 251 F. App'x. 679, 681 (Fed. Cir. 2007) ("An Agency cannot require that protected disclosures be made only to supervisory personnel").
[55] S. Rep. No. 100-143, 100th Cong., 2d Sess. 13 (1988).
[56] *Id.*
[57] 66 F.3d 279, 282 (Fed. Cir. 1995).
[58] 141 F.3d 1139, 1144 (Fed. Cir. 1998).
[59] 234 F.3d 9, 12–13 (Fed. Cir. 2000).
[60] In *Day v. Dep't of Homeland Security*, 119 M.S.P.R. 589 (2013), the Board held that the WPEA definition of "disclosure" applies to cases pending at the time of enactment because the WPEA clarifies existing law.

iv. Disclosures Made under Grievance or Appeal Procedures

The Board may deny whistleblower protection for disclosures of information which might otherwise qualify as a protected disclosure under section 2302(b)(8) if the disclosure is protected by another subsection of section 2302(b) (e.g. (b)(9)). The two most frequent categories of disclosures for which the Board has excluded protection are disclosures made in the equal employment opportunity (EEO) complaint process or the grievance process.

An allegation made during the exercise of an appeal, complaint or grievance right granted by law, rule or regulation that an employer has violated some law or regulation does not necessarily qualify as whistleblowing under 5 U.S.C. § 2302(b)(8) but may be protected by (b)(1) or (b)(9).

1. Exceptions to Exclusion Rule (the following may still be protected by (b)(8)):

a. Certain EEO-Related Matters

Not all EEO matters that can be raised under (b)(9) lose their (b)(8) protection when raised outside of a formalized adjudication proceeding. *Ellison v. Merit Sys. Prot. Bd.*, 7 F.3d 1031, 1035 (Fed. Cir. 1993). In several instances, the Board has protected EEO-related disclosures, often where the discrimination is pervasive or blatant. *See, e.g., Kinan v. Dep't of Defense*, 87 M.S.P.R. 561, 566 n. 2 (2001) (disclosures by equal opportunity specialist raised outside EEO process that management failed to remedy under-representation in EEO office, failed to enforce sexual harassment policy, and tolerated nepotism).[61]

b. OWCP Claims

An OWCP claim is not an exercise of an appeal right under 5 U.S.C. § 2302(b)(9) and normal whistleblower analysis applies. *Von Kelsch v. Dep't of Labor*, 59 M.S.P.R. 503, 509 (1993); *Owen v. Dep't of the Air Force*, 63 M.S.P.R. 621, 626 (1994). However, the MSPB analyzed an employee's allegations of reprisal for an OWCP claim solely as an assertion of 5 U.S.C. § 2302(b)(9). *Crump v. Dep't of Veterans Affairs*, 114 M.S.P.R. 224, 229 (2010). In *Crump*, the MSPB did not cite to *Von Kelsch* or *Owen* but instead analyzed the claim under section 2302(b)(9), and found no retaliation. Because the MSPB did not specifically overrule *Von Kelsch* or *Owen*, it is probably best to continue to analyze these cases for disclosures rather than assuming that they are protected only under 5 U.S.C. § 2302(b)(9). Disclosures in an OWCP claim may be protected under 5 U.S.C. § 2302(b)(8).[62]

[61] *Gonzales v. Dep't of Housing and Urban Development*, 64 M.S.P.R. 314, 318-19 (1994) (disclosures alleging agency denigrated rights of Spanish-speaking persons denied equal opportunity to file housing discrimination claims were protected, as was disclosure that official was insensitive towards disabled); *Oliver v. Dep't of Health and Human Servs.*, 34 M.S.P.R. 465, 470 (1987), *aff'd*, 847 F.2d 842 (Fed. Cir. 1988) (Table) (disclosures of discrimination in awarding grants, as well as racist hiring practices).

[62] *Special Counsel v. Costello*, 75 M.S.P.R. 562, 586 (1997), *rev'd on other grounds sub nom. Costello v. Merit Sys. Prot. Bd.*, 182 F.3d 1372 (Fed. Cir. 1999).

c. OSHA Complaints

OSHA Complaints. A disclosure to the Occupational Safety and Health Administration may be protected if the employee reasonably believes that the matters disclosed evidence a violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety. *Smith v. Dep't of Agric*., 64 M.S.P.R. 46, 53 (1994); *Owen v. Dep't of the Air Force*, 63 M.S.P.R. 621, 628-30 (1994).

d. Intertwined Disclosure

Disclosures that are intertwined with a grievance or EEO complaint which have independent bases for (b)(8) protection may be protected if made outside the grievance or EEO process.[63] However, in this context the employee may have to provide evidence to prove the disclosure was a contributing factor in the personnel action.

e. Disclosure of Failure of Process

A disclosure that an agency failed to process a grievance over an 11-month period was found to be a disclosure of an abuse of authority.[64]

f. Disclosure of Discrimination

The Board has excluded from whistleblower protection disclosures of illegal discrimination prohibited by Title VII of the 1964 Civil Rights Act or other EEO-related activity[65] even when those disclosures were not made within the EEO complaint process on the grounds that they are protected by sections 2302(b)(1)(A) or (9).[66] Although not specifically overruled, this authority has competing authority as illustrated by *Kinan v. Dep't of Defense*, 87 M.S.P.R. 561, 566 n.2 (2001), where the Board found an EEO-type disclosure not made within the EEO complaint process to be protected, citing *Ellison v. Merit Sys. Prot. Bd.*, 7 F.3d 1031, 1035 (Fed. Cir. 1993) as support.[67]

g. Disclosures to the Inspector General

Disclosures made to an Inspector General (IG) which qualify as whistleblowing under 5 U.S.C. § 2302(b)(8) are protected under sections (b)(8) and (b)(9).[68] Even where the employee does not initiate the disclosure to the IG, but makes a disclosure in response to the IG's inquiries,

[63] *Loyd v. Dep't of the Treasury*, 69 M.S.P.R. 684, 688-89 (1996). *See also Luecht v. Dep't of the Navy*, 87 M.S.P.R. 297, 302 (2000) (although filing EEO complaint alleging discriminatory treatment does not constitute whistleblowing disclosure under (b)(8), coverage under (b)(9) does not necessarily exclude it from (b)(8), if the appellant also made a disclosure based on the same operative facts outside of his (b)(9) activity).
[64] *Schaeffer v. Dep't of the Navy*, 86 M.S.P.R. 606, 613 (2000).
[65] The regulations prohibiting discrimination in the federal sector incorporate (i) Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*; (ii) the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*; (iii) the Equal Pay Act, 29 U.S.C. § 206(d); (iv) the Rehabilitation Act, 29 U.S.C. § 791 *et seq.*; and the Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff *et seq.* *See* 29 C.F.R. § 1614.101.
[66] *Applewhite v. Equal Employment Opportunity Commission*, 94 M.S.P.R. 300 (2003); *Nogales v. Dep't of the Treasury*, 63 M.S.P.R. 460, 464 (1994); *Von Kelsch v. Dep't of Labor*, 59 M.S.P.R. 503, 509-10 (1993); *Marable v. Dep't of the Army*, 52 M.S.P.R. 622, 630 (1992).
[67] *See also Sutton v. Dep't of Justice*, 94 M.S.P.R. 4 (2003); *Leucht v. Dep't of the Navy*, 87 M.S.P.R. 297 (2000).
[68] *See* 5 U.S.C. § 2302(b)(8)(B); *Schlosser v. Dep't of Interior*, 75 M.S.P.R. 15, 21 (1997); *Paul v. Dep't of Agric.*, 66 M.S.P.R. 643, 648 (1995); *Williams v. Nat'l Labor Relations Bd*., 59 M.S.P.R. 640, 646 (1993).

the disclosure is still protected.[69] If the disclosure fails to qualify as whistleblowing under 5 U.S.C. § 2302(b)(8), then the discloser may rely on 5 U.S.C. § 2302(b)(9)(C) for protection.[70]

h. Disclosures to the Office of Special Counsel

The Board has held that "[a]gency reprisal for bringing a matter to the attention of OSC is prohibited by 5 U.S.C. § 2302(b)(8)."[71] The Board has further held that the disclosure of a PPP made in an OSC complaint qualifies as protected whistleblowing; as such, retaliation for the disclosures made in an OSC complaint constitutes retaliation for whistleblowing.[72]

5. Perceived whistleblowing

In perceived whistleblower cases, "the Board will focus its analysis on the agency's perceptions, i.e., whether the agency officials involved in the personnel actions at issue believed that the appellant made or intended to make disclosures that evidenced the type of wrongdoing listed under 5 U.S.C. § 2302 (b)(8). In those cases, the issue of whether the appellant actually made protected disclosures is immaterial. Instead, the issue of whether the agency perceived the appellant as a whistleblower will essentially stand in for that portion of the Board's analysis in both the jurisdictional and merits stages of the appeal."[73]

In *King*, the Board confirmed that it will focus its analysis on the agency's perceptions, *i.e.*, whether the agency officials involved in the personnel actions at issue believed that the appellant made or intended to make disclosures that evidenced one or more of the five categories of a protected disclosure.

6. Exception to Protected Conduct: Disclosures Prohibited by Law

A disclosure is not protected under § 2302(b)(8) where it is "specifically prohibited by law" or where the information being disclosed is "required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs."[74] However, such disclosures to OSC or to an Inspector General are protected. In some cases, the specific law prohibiting disclosure allows the employee the additional option of making a disclosure of restricted information to a congressional member or committee with the necessary clearance to receive the information.

[69] *Tullis v. Dep't of the Navy*, 117 M.S.P.R. 236, 241 (2012).
[70] *Ellison v. Merit Sys. Prot. Bd.*, 7 F.3d 1031 (Fed. Cir. 1993) (prior disclosure in grievance does not vitiate protection of similar subsequent disclosure to IG); *Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991), *aff'd sub nom. Hathaway v. Merit Sys. Prot. Bd.*, 981 F.2d 1237 (Fed. Cir. 1992); *see also Schlosser v. Dep't of the Interior*, 75 M.S.P.R. 15 (1997).
[71] *Johns v. Dep't of Veterans Affairs*, 95 M.S.P.R. 106, 110 (2003) (the appellant filed PPP complaint with OSC alleging, among other things, that agency officials made false statements to federal agencies regarding firearms qualification scores); *see Thomas v. Dep't of the Treasury*, 77 M.S.P.R. 224, 230-31 (1998), *overruled on other grounds by Ganski v. Dep't of the Interior*, 86 M.S.P.R. 32 (2000).
[72] *McDonnell v. Dep't of Agric.*, 108 M.S.P.R. 443, 449 (2008); *Wheeler v. Dep't of Veterans Affairs*, 88 M.S.P.R. 236, 240-44 (2001); *but see Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589 (2001) (declining to consider whether an employee's previous complaint to OSC constituted a protected disclosure for purposes of (b)(8) because the activity was protected by (b)(9)); *Dean v. Dep't of the Army*, 57 M.S.P.R. 296, 302 (1993) (upholding AJ's finding that retaliation for complaints to OSC are covered by (b)(9), not (b)(8), without discussing substance of allegations).
[73] *King v. Dep't of the Army*, 116 M.S.P.R. 689, 696-97 (2011). (*King v. Dept. of the Army*, slip op. Docket No. AT1221110037W1 (M.S.P.B. September 14, 2011).)
[74] 5 U.S.C. § 2302(b)(8)(A) and (B).

There are two important limitations to this narrow exception to § 2302(b)(8) protected conduct. First, the "specifically prohibited by law" exception to protected conduct does not encompass agency rules or regulations. *MacLean v. Dep't of Homeland Security*, 714 F.3d 1301 (Fed. Cir. 2013). Second, the law barring disclosure must be specific. In particular, only "a statute which requires that matters be withheld from the public as to leave no discretion on the issue, or which establishes particular criteria for withholding or refers to particular types of matters to be withheld "could qualify as a sufficiently specific prohibition." *Id.* (citing S. Rep. No. 969, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 2723, 2743). Two statutes that fall within this narrow exception to protected conduct are the Trade Secrets Act, 18 U.S.C. § 1905, and § 6013 of the Internal Revenue Code, which prohibits federal employees from disclosing tax returns.

7. Covered Personnel Actions (Element 2)

The MSPB construes broadly what can constitute a personnel action, and does not view the list of personal actions at 5 U.S.C. § 2302(a)(2)(A) to be exhaustive.

i. Failures and Threats

Failure to extend or renew a temporary appointment is a failure to appoint.[75] An employer's failure to reinstate an employee after he/she resigns may be a failure to appoint,[76] and nonselection is a failure to appoint.[77] Nonselection for promotion is a failure to promote.[78] Similar to appointments, where an employee's promotion is denied due to the cancellation of the vacancy announcement, and ultimately no one is promoted or appointed to the position, the cancellation can still be a covered personnel action.[79] Additionally, failure to noncompetitively promote an individual, such as through reclassification of the position, can constitute a failure to promote or a "decision concerning pay."[80]

The MSPB has interpreted the term "threaten" very broadly, and ruled that a memorandum of warning and threatening to take chapter 75 or other disciplinary or corrective actions, are threats to take a personnel action. A performance improvement plan (PIP) is a threat to reduce in grade or pay or to remove based on performance, and thus is a threat of disciplinary or corrective action. A record of the agency's investigation into an employee's purported questionable conduct, for which he faced possible disciplinary action, was deemed a threat to take a disciplinary action.[81]

[75] *See generally, O'Brien v. Office of the Indep. Counsel*, 79 M.S.P.R. 406, 410-11 (1998); *Special Counsel v. Dep't of the Interior*, 68 M.S.P.R. 19, 23 (1995); *Kern v. Dep't of Agric*., 48 M.S.P.R. 137, 140 (1991); *Special Counsel v. Dep't of the Army*, 48 M.S.P.R. 13, 16 (1991).
[76] *Holloway v. Dep't of the Interior*, 82 M.S.P.R. 435, 440 n.4 (1999).
[77] *Wojcicki v. Dep't of the Air Force*, 72 M.S.P.R. 628, 635 (1996); *DiPompo v. Dep't of Veterans Affairs*, 62 M.S.P.R. 44, 48 (1994).
[78] *Monasteri v. Merit Sys. Prot. Bd*., 232 F.3d 1376, 1380 (Fed. Cir. 2000); *Askew v. Dep't of the Army*, 88 M.S.P.R. 674, 683 (2001); *Ward v. Dep't of the Army*, 67 M.S.P.R. 482, 485 (1997); *Zimmerman v. Dep't of Hous. and Urban Dev*., 61 M.S.P.R. 75, 79 (1994); *Niswonger v. Dep't of the Air Force*, 60 M.S.P.R. 655, 658 (1994).
[79] *Ruggieri v. Merit Sys. Prot. Bd*., 454 F.3d 1323, 1325 (Fed. Cir. 2006).
[80] *Briley v. Nat'l Archives & Records Admin*., 71 M.S.P.R. 211, 222 (1996)*; but see Tackett v. Dep't of Agric*., 89 M.S.P.R. 348 (2001) (failure to upgrade an employee's prior position after he was reassigned out of it was not a constructive demotion).
[81] *Gergick v. General Servs. Admin*., 49 M.S.P.R. 384, 387, 392 (1991).

ii. Personnel Action – Significant Change in Job Duties or Working Conditions

Personnel actions are generally anything that requires a Standard Form 50 (SF-50) to document, but an SF-50 is not definitive proof of a personnel action.[82] Thus an SF-50 may be sufficient to prove a personnel action, but is not necessary to prove that a significant change in working conditions has taken place. The most obvious examples of personnel actions are appointments, demotions, promotions, or significant changes in duties or assignments.

An appointment, whether intermittent, permanent, seasonal, or temporary, is still an appointment to a position, and refusal to renew or reappoint due to whistleblowing is not permitted.[83] Two essential prerequisites of an appointment are (1) an authorized appointing officer who takes an action that reveals his awareness that he is making an appointment in the United States civil service; and (2) action by the appointee denoting acceptance.[84] The best evidence of an appointment is a formal document, typically the SF-50 or -52, the execution of which is the "the *sine qua non* to plaintiff's appointment."[85]

A demotion, reduction in pay, reduction in grade, furlough of 30 days or less, removal, suspension, administrative leave, letter of warning, reduction in force (RIF),[86] reprimand,[87] and an oral reprimand are considered to be disciplinary actions by the MSPB. However, in the case of an oral reprimand, though the MSPB considers it a personnel action, no meaningful corrective action is available for such an action, and the MSPB may dismiss the case for that reason.[88] A constructive demotion, where an employee is effectively – if not formally – demoted to performing duties associated with a lower position, is also a personnel action.

[82] "An SF-50 is not a personnel action in itself, but is merely an after-the-fact record of a personnel action previously taken." *Nasuti v. Merit Sys. Prot. Bd*., 376 F. App'x. 29, 33 (Fed. Cir. 2010) (non-precedential). This decision affirmed a part of the MSPB decision which held that "The approval of an SF-50 by an agency is a clerical documentation task which customarily occurs after the effective date of a personnel action." *Nasuti v. Dep't of State*, 112 M.S.P.R. 587, 595 (2009) (citing *Vandewall v. Dep't of Trans.*, 52 M.S.P.R. 150, 155 (1991)*; Scott v. Dep't of the Navy*, 7 MSPB 741, 8 M.S.P.R. 282, 287 (1981); *see Grigsby v. Dep't of Commerce*, 729 F.2d 772, 775 (Fed. Cir.1984) ("the SF-50 is not a legally operative document controlling on its face an employee's status and rights").

[83] *See* 5 U.S.C. § 2302(a)(2)(A)(i).

[84] *Watts v. Office of Pers. Mgmt*., 814 F.2d 1576, 1580 (Fed. Cir. 1987); *Brock v. Dep't of the Navy*, 49 M.S.P.R. 564, 566 (1991); *Robinson v. U.S. Postal Serv.*, 92 M.S.P.R. 37 (2002).

[85] *Goutos v. United States*, 552 F.2d 922, 924 (Ct. Cl. 1976); *Costner v. United States*, 665 F.2d 1016, 1022 (Ct. Cl. 1981); *Horner*, 803 F.2d at 693.

[86] The MSPB has held that a RIF is "other disciplinary or corrective action" if it affects the employee for reasons personal to the employee. *Rutberg v. Occupational Safety and Health Admin*., 78 M.S.P.R. 130, 136 (1998); *O'Shea v. Dep't of Transp*., 65 M.S.P.R. 512, 514 n. (1994); *Sanders v. Dep't of the Army*, 64 M.S.P.R. 136, 141 (1994), *aff'd*, 50 F.3d 22 (Fed. Cir. 1995) (Table); *Moran v. Dep't of the Air Force*, 64 M.S.P.R. 77, 87 (1994); *Carter v. Dep't of the Army*, 62 M.S.P.R. 393, 399 (1994).

[87] *See generally Van Ee v. Environmental Protection Agency*, 64 M.S.P.R. 693, 699 (1994*); Gonzales v. Dep't of Hous. and Urban Dev*., 64 M.S.P.R. 314, 319 (1994); *Onasch v. Dep't of Transp*., 63 M.S.P.R. 158, 163 (1994); *Charest v. Federal Emerg. Mgt. Agency*, 54 M.S.P.R. 436, 442 (1992).

[88] *McGowen v. Dep't of the Air Force*, 72 M.S.P.R. 601, 606-07 (1996) (case dismissed for failure to state a claim for which the MSPB could award effective relief), *aff'd*, 135 F.3d 777 (Fed. Cir. 1998) (Table); *but see Special Counsel v. Spears*, 75 M.S.P.R. 639, 664-65 (1997) (where MSPB held that *oral counseling*, even when documented by a memorandum from the supervisor, was not a personnel action, raising question of whether there is a difference between "oral reprimands" and "oral counseling").

The Board has held that harassment can be an actionable personnel action. *See Covarrubias v. Soc. Sec. Admin*., 113 M.S.P.R. 583, 589 n. 4 (2010).

iii. Employment Actions That Are Not "Personnel Actions" under 2302(b)

The Board has found that certain actions do not qualify as personnel actions for the purposes of whistleblower protection. For example, arrest by an agency police officer, or comments directing the employee to "find another job," are not personnel actions.[89] Revocation of a security clearance, without something more, is also not a personnel action under 5 U.S.C. § 2302(a).[90] Thus, although removal can be a personnel action under the statute, when the basis for removal is due to the revocation of a security clearance, OSC has no authority to review the underlying merits of the revocation or the subsequent removal.[91]

Opening an investigation into the employee's conduct is not necessarily a personnel action, but the WPA now permits the whistleblower to seek compensation for defending against a retaliatory investigation. Specifically, under the WPEA, an employee may recover "fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action."[92]

8. Actual or Constructive Knowledge of the Disclosure (Element 3)

Knowledge of the deciding official can be among the most difficult elements to prove, as there may be no direct proof of actual knowledge of the protected disclosure.

i. Actual Knowledge

Actual knowledge may be demonstrated directly or through circumstantial evidence.[93] However, there are no reported cases where the Board has found actual knowledge based solely on circumstantial evidence. The Board has credited unequivocal testimony of actual knowledge over equivocal denial of actual knowledge to establish this element.[94]

[89] *Shivaee v. Dep't of the Navy*, 74 M.S.P.R. 383, 387 (1997) (holding that supervisor's statement to "find another job" was not a threat to remove the employee*). Weber v. Gen. Serv. Admin*., 54 M.S.P.R. 444, 446 (1992) (agency did not take a personnel action against an employee when an agency police officer arrested him.) While it has not been overruled, *Weber* preceded the 1994 amendments to the WPA, which amended the CSRA definition of personnel action from "any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level," to "any other significant change in duties, responsibilities, or working conditions."

[90] *Dep't of the Navy v. Egan*, 484 U.S. 518, 526-32 (1988); *Hesse v. Dep't of State*, 217 F.3d 1372, 1380 (Fed. Cir. 2000) (holding that because 5 U.S.C. § 2302(a)(2) lacks specific language authorizing the Board to review security clearance determinations, the Board is without the authority to do so).

[91] Presidential Policy Directive 19 (Oct. 10, 2012) prohibits executive agencies from taking any action affecting an employee's eligibility for access to classified information in reprisal for whistleblowing. The Directive requires establishment of an internal review procedure for employees who assert that an agency denied or revoked their security clearance or access to classified information in retaliation for protected whistleblowing. Namely, such employees will be entitled to an internal appeal followed by an External Inspector General review. If they prevail, they are entitled to similar status quo ante relief that a prevailing whistleblower would be entitled to under 5 U.S.C. §§ 1214 and 1221.

[92] 5 U.S.C. § 1214(h).

[93] *Bonggat v. Dep't of the Navy*, 56 M.S.P.R. 402, 407 (1993); *McClelland v. Dep't of Defense*, 53 M.S.P.R. 139, 147 (1992).

[94] *See Jones v. Dep't of the Interior*, 74 M.S.P.R. 666, 674 (1997).

ii. Constructive Knowledge is Sufficient

Constructive knowledge is present where an official with actual knowledge influenced the deciding official.[95]

9. Protected Disclosure was a Contributing Factor in the Personnel Action (Element 4)

The MSPB will construe this factor broadly, and will consider any factor alone or in connection with others that tends to affect in any way the outcome of the personnel action at issue. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that (1) the official taking the personnel action knew of the disclosure, and (2) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.[96]

i. Prima Facie Case can be Proven by Knowledge-Timing Test, and Test is Retroactive.

The Board has held that knowledge and timing are, by themselves, enough to establish a *prima facie* case of retaliation.[97] The Board has further held that if knowledge-timing are present, a *prima facie* case has been established, and it is improper for the AJ to consider other evidence to determine that the contributing-factor standard has not been met.[98] The Board applies the knowledge-timing test retroactively to all actions covered by the WPA.[99]

ii. The Knowledge/Timing Test is Only One of Many Possible Ways to Satisfy the Contributing Factor Standard.

Where knowledge-timing is not met to infer contributing factor, the Board will consider any other circumstantial evidence to determine whether the contributing factor test has been met.[100] The Federal Circuit has elaborated:

> So long as a protected disclosure is a contributing factor to the contested personnel action, and the agency cannot prove its affirmative defense, no harm can come to the whistleblower. We thus view the WPA as a good-government statute. As long as employees fear being subjected to adverse actions for having disclosed improper governmental practices, an obvious disincentive exists to discourage such disclosures. A principal office of the WPA is to eliminate that disincentive and freely encourage employees to disclose that which is wrong with our government. How a protected disclosure is made, or by whom, matters not to

[95] *See McClellan v. Dep't of Defense*, 53 M.S.P.R. 139 (1994).
[96] Pub. L. 103-424, § 4(b), *codified at* 5 U.S.C. § 1221(e)(1).
[97] *See Shriver v. Dep't of Veterans Affairs*, 89 M.S.P.R. 239, 245-46 (2001) (appellant made nonfrivolous allegation that nonselection for promotion was retaliatory where selecting official knew of disclosure and denied promotion within eight months).
[98] *Carey v. Dep't of Veterans Affairs*, 93 M.S.P.R. 676, 681-82 (2003).
[99] *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 323 (1997); *Special Counsel v. Costello*, 75 M.S.P.R. 562, 587-88 (1977), *rev'd on other grounds sub nom. Costello v. Merit Sys. Prot. Bd..*, 182 F.3d 1372 (Fed. Cir. 1999); *Jones v. Dep't of Interior*, 74 M.S.P.R. 666, 671 (1997); *Scott v. Dep't of Justice*, 69 M.S.P.R. 211, 238-40 (1995), *aff'd*, 99 F.3d 1160 (Fed. Cir. 1996).
[100] *See Jones v. Dep't of Interior*, 74 M.S.P.R. 666, 678 (1997) (failing to find contributing factor)*; Powers v. Dep't of the Navy*, 69 M.S.P.R. 150, 156 (1995).

> the achievement of the WPA's goal. The elements of misgovernment must be disclosed before they can be cured in satisfaction of the WPA's *raison d'être*.[101]

a. Reasonable Time Period for Inferring Nexus

What constitutes a reasonable time period varies, but the MSPB has considered actions taken within several months of the protected disclosure to be close enough in time under the knowledge-timing test.[102] When a personnel action occurs more than two years after the protected disclosure, it will probably be difficult to prove there was a nexus.

10. Agency Burden

Once OSC proves by a preponderance of the evidence that a protected disclosure was a contributing factor, the agency can avoid liability only if it demonstrates by clear and convincing evidence that it would have taken the same action in the absence of the whistleblowing. In determining whether the agency can meet that burden, the Board considers the following three factors: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of agency officials involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

As the Federal Circuit pointed out in *Whitmore v. Dep't of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012), the clear and convincing standard is an exacting burden for agencies:

> 'Clear and convincing evidence' is a high burden of proof for the Government to bear. It is intended as such for two reasons. First, this burden of proof comes into play only if the employee has established by a preponderance of the evidence that the whistleblowing was a contributing factor in the action – in other words, that the agency action was 'tainted.' Second, this heightened burden of proof required of the agency also recognizes that when it comes to proving the basis for an agency's decision, the agency controls most of the cards – the drafting of the documents supporting the decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases. In these circumstances, it is entirely appropriate that the agency bear a heavy burden to justify its actions.

Id. And in *Whitmore,* the Federal Circuit explained the policy reasons for holding agencies to such a high burden:

> The laws protecting whistleblowers from retaliatory personnel actions provide important benefits to the public, yet whistleblowers are at a severe evidentiary

[101] *Marano v. Dep't of Justice*, 2 F.2d 1137, 1142 (Fed.Cir. 1993).

[102] *See generally, Inman v. Dep't of Veterans Affairs*, 112 M.S.P.R. 280, 283-84 (2009) (reassignment 15 months after disclosure). *Kalil v. Dep't of Agric*., 96 M.S.P.R. 77, 85 (2004) (suspension proposed six months after disclosure). *Ivey v. Dep't of the Treasury*, 94 M.S.P.R. 224 (2003) (recommendation for removal occurred four months after whistleblowing). *Carey v. Dep't of Veterans Affairs*, 93 M.S.P.R. 676 (2003) (interval of a few months). *Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589 (2001) (suspension was 18 months after disclosure to one party, and slightly more than a year after another; removal was three and a half months after most recent disclosure); *Agoranos v. Dep't of Justice*, 119 M.S.P.R. 498 (2013) (personnel actions taken more than 2 years after a protected disclosure can meet the knowledge–timing test where they are part of a continuum of related performance-based actions stemming from the protected disclosure).

> disadvantage to succeed in their defenses. Thus, the tribunals hearing those defenses must remain vigilant to ensure that an agency taking adverse employment actions against a whistleblower carries its statutory burden to prove – by clear and convincing evidence – that the same adverse action would have been taken absent the whistleblowing. . . . Congress decided that we as a people are better off knowing than not knowing about [the matters disclosed by whistleblowers], even if it means that an insubordinate employee . . . becomes, via such disclosures, more difficult to discipline or terminate. Indeed, it is in the presence of such non-sympathetic employees that commitment to the clear and convincing evidence standard is most tested and is most in need of preservation.

Id. at 1377. In sum, the causation standard and burden-shifting framework in § 2302(b)(8) claims is favorable to employees.

B. Retaliation for Exercising Whistleblowing, Complaint, Appeal or Grievance Rights, § 2302 (b)(9)

5 U.S.C. § 2302(b)(9) makes it a prohibited personnel practice for an agency to take a personnel action against an employee in retaliation for exercising certain appeal or grievance rights, for assisting another individual in exercising such rights, for cooperating with an IG, or the OSC, or for refusing to violate a law. To establish a *prima facie* violation of section 2302(b)(9), the proponent must show the following by preponderant evidence:

1. The employee (or someone identified with the employee) engaged in a protected activity;
2. The employee was subject to the taking, failing to take, or threatening to take a personnel action;
3. The official(s) responsible for the personnel action had knowledge of the employee's protected activity; and
4. There is a causal connection (i.e., nexus) between the employee's protected activity and the personnel action.

1. Protected Activity (Element 1)

i. Exercise of Any Appeal, Complaint, or Grievance Right

Subsection (b)(9)(A) prohibits personnel actions taken, not taken, or threatened on the basis of an employee's exercise of "any appeal, complaint, or grievance right granted by law, rule, or regulation." The Board has held that the types of activities protected by this section involve "formalized adjudicative proceedings." *Owen v. Dep't of the Air Force*, 63 M.S.P.R. 621, 627 (1994) (discussing that Congress intended for (b)(9) to apply to complaints lodged in a formal adjudicative process not informal complaints, gripes or objections). The WPEA split (b)(9)(A) claims into two subcategories: (i) those which deal with remedying a violation of 2302(b)(8); and (ii) all others that do not deal with remedying a violation of 2302(b)(8). The WPEA makes significant distinctions between these two subcategories in the areas of causation standards and appeal rights.

a. Activity Protected as the Exercise of Any Appeal, Complaint, or Grievance Right

(a) *Filing EEO Complaints and Appeals*[103] – *See, e.g., Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679 (Fed.Cir. 1992) (finding that MSPB subject matter jurisdiction over whistleblowing activities pursuant to (b)(8) does not extend to allegations of retaliation for filing a complaint of discrimination with the EEOC; allegations involving retaliation for filing EEOC complaints of discrimination may be heard pursuant to (b)(9)(A)); *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, 623-24 (2001) (finding no retaliation based on gravity of misconduct); *Wright v. Dep't of Transp.*, 89 M.S.P.R. 571, 574 (2001) (finding filing of agency grievance not election of remedies under 7121(g)); *Luecht v. Dep't of the Navy*, 87 M.S.P.R. 297, 302 (2000) (finding EEO complaints, Board appeals and grievances were (b)(9) activity, not (b)(8)); *New v. Dep't of Veterans Affairs*, 82 M.S.P.R. 609, 617-18 (1999)(finding no causal connection between appellant's disability discrimination and retaliation claims and the agency denial of appellant's request for priority consideration for reemployment); *Jaramillo v. Dep't of the Army*, 81 M.S.P.R. 469, 480 (1999)(appellant failed to prove that manager's actions constituted retaliation for filing an EEO complaint and manager had significant nonretaliatory reason for his actions in that he was acting to ensure the safety of his subordinates); *Dorsey v. Dep't of the Air Force*, 78 M.S.P.R. 439, 450 (1998) (finding that AJ incorrectly applied wrong elements of proof to appellant's retaliation claim and matter was remanded for a determination as to whether there was a genuine nexus between the alleged motive to retaliate and the appellant's removal); *Shelly v. Dep't of Treasury*, 75 M.S.P.R. 677, 680 (1997) (appellant failed to show that there was a general nexus between her EEO complaint and her removal); *Jones v. Dep't of the Army*, 75 M.S.P.R. 115, 122 (1997) (appellant failed to show that motive to retaliate outweighed gravity of appellant criminal misconduct); *Duffrin v. Dep't of Transp.*, 70 M.S.P.R. 557, 562 (1996)((b)(9) prohibits taking or failing to take a personnel action such as reinstatement or reassignment because of the filing of an EEO complaint); *Richard v. Dep't of Defense*, 66 M.S.P.R. 146, 154 (1995) (although relevant agency officials knew the appellant had been appointed to her position as a result of a successful EEO complaint, the appellant did not establish that these officials had any involvement in the discriminatory acts and therefore she failed to show that her removal for failing to comply with a management-directed reassignment could have been retaliation).

(b) *Filing Grievances*[104] – *See, e.g., Serrao v. Merit Sys. Prot. Bd.*, 95 F.3d 1569, 1574-75 (Fed. Cir. 1996) (claim that employee suffered reprisal for filing a grievance is an alleged PPP under (b)(9)(A); *Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, 623-24 (2001) (the appellant failed to show any causal connection or nexus between her protected activity and her removal action); *Gustave-Schmitt v. Dep't of Labor*, 87 M.S.P.R. 667, 675 (2001) (noting that "union activity" is protected); *Luecht v. Dep't of the Navy*, 87 M.S.P.R. 297, 302 (2000) (finding EEO complaints, Board appeals and grievances (b)(9) are activity, not (b)(8)); *McMillan v. Dep't of the Army*, 84 M.S.P.R. 476, 483 (1999)(the exercise of a grievance right

[103] The Board interpreted "any appeal right" to include EEO complaints. *In re Frazier*, 1 M.S.P.R. 163, 190-92 (1979) (noting that the EEO process is "granted by," "required by," and "enacted pursuant" to law, rule, or regulation).

[104] Under the CSRA, the Board interpreted "any appeal right" to include grievances. *Dunning v. National Aeronautics and Space Admin.*, 10 M.S.P.R. 183, 185 (1982); *Gerlach v. Federal Trade Comm'n*, 9 M.S.P.R. 268, 272 (1981).

is an activity protected by (b)(9)); *Special Counsel v. Dep't of Veterans Affairs*, 84 M.S.P.R. 314, 316 (1999)(MSPB granted OSC request for a 45-day stay, finding reasonable grounds to believe that the agency failed to extend employee's employment in retaliation for filing grievances); *Lednar v. Social Security Admin*., 82 M.S.P.R. 364, 369 (1999) (Board found that agency would have removed the appellant based on misconduct even absent his protected activity which included filing a grievance and therefore no nexus between the alleged retaliation and adverse action)).

(c) *MSPB Appeals*[105] *– See, e.g., Luecht v. Dep't of the Navy*, 87 M.S.P.R. 297, 302 (2000) (discussing that EEO complaints, Board appeals and grievances are (b)(9) activity, not (b)(8)); *Noble v. Dep't of Justice*, 68 M.S.P.R. 524, 528 (1995) (Board remanded case for determination if personnel action was retaliation for prior appeal to the Board); *Owen v. Dep't of the Air Force*, 63 M.S.P.R. 621, 630 (1994)(filing an appeal with the Board is protected activity under (b)(9)); *Metzenbaum v. Dep't of Justice*, 54 M.S.P.R. 32, 36 (1992) (Board appeals are (b)(9) activity not (b)(8)); *Ruffin v. Dep't of the Army*, 48 M.S.P.R. 74, 78 (1991) (agency is prohibited from retaliating against an employee for filing a Board appeal by (b)(9) and not (b)(8)).

(d) *Unfair Labor Practice Charges*[106] *– See, e.g., Grant v. Dep't of the Air Force*, 61 M.S.P.R. 370, 377 (1994) (the appellant's claim that her removal was retaliation for filing an unfair labor practice (ULP) charge is reviewable under (b)(9) not (b)(8)); *Coffer v. Dep't of the Navy*, 50 M.S.P.R. 54, 57 (1991) (filing a ULP is not whistleblowing under (b)(8), it is activity protected by (b)(9).

(e) *Requests Under the Privacy Act to Correct Allegedly False Information in Personnel Records – Santillan v. Dep't of the Air Force*, 53 M.S.P.R. 487, 491 (1992).

(f) *PPP Complaints to OSC*[107] *– Booker v. U.S. Postal Serv*., 53 M.S.P.R. 507, 509, *aff'd*, 982 F.2d 517 (Fed. Cir. 1992) (Table).

(g) *Civil Lawsuits*[108] *– Creer v. U.S. Postal Serv*., 62 M.S.P.R. 656, 660 (1994).

(h) *Preparatory Activity*[109] – The Board has protected union-related duties, such as helping members to file grievances, EEO complaints, and ULPs. *See Page v. Dep't of the Navy*, 101

[105] The Board interpreted "any appeal right" to include MSPB appeals. *Cofield v. Gov't Printing Office*, 22 M.S.P.R. 392, 395 (1984); *Ritchey v. U.S. Postal Serv*., 19 M.S.P.R. 170 (1984); *Mitchell v. U.S. Postal Serv*., 19 M.S.P.R. 120, 123 (1984).

[106] The Board interpreted "any appeal right" to include filing an unfair labor practice charge. *Ireland v. Dep't of Health and Human Serv*., 34 M.S.P.R. 614, 620 (1987).

[107] The Board interpreted "any appeal right" to include filing a complaint with OSC. *See Hawes v. Dep't of the Navy*, 14 M.S.P.R. 591, 595-96 (1983).

[108] The Board interpreted "any appeal right" to include filing civil lawsuits. *Neff v. Dep't of Treasury*, 39 M.S.P.R. 142, 146 (1988); *Parker v. Dep't of the Interior*, 4 M.S.P.R. 97, 99 (1980); *Crawford v. Dep't of the Army*, 1 M.S.P.R. 428, 429 (1980).

[109] The Board interpreted "any appeal right" to include conduct that precedes the formal filing of an appeal. This included: (1) the announced intention to file an EEO complaint, *Special Counsel v. Zimmerman*, 36 M.S.P.R. 274, 291 (1988); (2) contacting an EEO counselor for advice, *Johnson v. Dep't of the Army*, 37 M.S.P.R. 95, 97 (1988) and *Bartel v. Federal Aviation Admin*., 14 M.S.P.R. 24, 33 (1982); (3) efforts to organize and establish a union, *Ireland v. Dep't of Health and Human Serv*., 34 M.S.P.R. 614, 620 (1987); (4) writing, but not necessarily sending, a letter to OSC, *Special Counsel v. Harvey*, 28 M.S.P.R. 595, 603-04 (1984) (holding subject official's awareness of complainant's intent to file a complaint with OSC was protected), *rev'd on other grounds*, 802 F.2d 537, 547 (D.C. Cir. 1986).

M.S.P.R. 513, 516 (2006) (preparation for a grievance is (b)(9) not (b)(8) activity); *Wooten v. Dep't of Health and Human Serv.*, 54 M.S.P.R. 143, 146 (1992) (union-related duties on behalf of union members is protected by (b)(9)). The Board has also protected the announced intention by an employee to grieve the handling of his performance rating. *Special Counsel v. Nielson*, 71 M.S.P.R. 161, 169-72 (1996).

(i) *Classification Appeal* – Retaliation for the complainant's classification appeal would be a violation of (b)(9) and not (b)(8). *Cook v. Dep't of the Army*, MSPB Docket No. CH-0752-05-0830-S-1, slip op. at 5 (denying stay request because insufficient showing that employee made protected disclosures which were contributing factors in his removal).

(j) *VEOA* – Retaliation for filing a claim under the Veterans Employment Opportunities Act may be considered under b(9). *Shaver v. Dep't of the Air Force*, 106 M.S.P.R. 601, 605 n. 3 (2007).

b. Activity Not Protected as the Exercise of Any Appeal, Complaint, or Grievance Right[110]

(a) *Filing a Workers' Compensation Claim* – Filing a Form CA-1, Federal Employee's Notice of Traumatic Injury, is not an initial step toward taking legal actions against an employer for perceived violation of an employee's rights, and thus, is not a protected activity under section 2302(b)(9)(A). *Von Kelsch v. Dep't of Labor*, 59 M.S.P.R. 503, 508-09 (1993).[111]

(b) *Informal Complaints* – i.e., complaints of dissatisfaction with management's handling of grievances and EEO complaints, and the settlement of those matters. *Garst v. Dep't of the Army*, 56 M.S.P.R. 371, 386-87 (1993).

(c) *Informal Advocacy* – i.e., advocacy on behalf of someone who fails to exercise any kind of appeal, complaint, or grievance right. *Stover v. Dep't of Interior*, 63 M.S.P.R. 46 (1994).

(d) *OSHA Disclosures* – i.e., disclosures to an agency safety office and to OSHA. *Owen v. Dep't of the Air Force*, 63 M.S.P.R. 621, 628 (1994). Note, such disclosures were held to fall under (b)(8).

(e) *Disclosing Information Obtained While Acting as an EEO Counselor – Gonzalez v. Dep't of Housing and Urban Dev.*, 64 M.S.P.R. 314, 318 (1994) (such disclosures were protected under (b)(8)).

(f) *Requesting Accommodation – Fitzsimmons v. United States Postal Serv.*, 102 M.S.P.R. 485 (2006).

[110] The Board did not protect activity that was not clearly preparatory to the invocation of a protected remedial process or was significantly disassociated from such processes. *See, e.g., Lewis v. Bureau of Engraving & Printing*, 29 M.S.P.R. 447, 451 (1985) (inquiries about position classifications prior to EEO complaint); *Ledeaux v. Veterans Admin.*, 29 M.S.P.R. 440, 444 (1985) (employee's criminal charges against his supervisor for assault and battery); *Barnes v. Dep't of the Army*, 22 M.S.P.R. 243, 247 (1984) (false and malicious statements made off-duty); *Leveritt v. Dep't of the Air Force*, 5 M.S.P.R. 168, 172 (1981) (distribution of an allegedly libelous EEO complaint to employees outside the EEO complaint process).

[111] *But see Crump v. Dep't of Veterans Affairs*, 114 M.S.P.R. 224, 229 (2010). In *Crump*, the MSPB did not cite to *Von Kelsch*, but analyzed the claim under section 2302(b)(9).

ii. Testifying For or Lawfully Assisting the Exercise of Any Appeal, Complaint or Grievance Right[112]

The WPA codified protection for "testifying for or otherwise lawfully assisting any individual in the exercise of any [appeal, complaint, or grievance right granted by any law, rule, or regulation]." 5 U.S.C. § 2302(b)(9)(B). Under this subsection, the Board has protected:

(a) Executing an Affidavit During an EEO Investigation – *Adair v. U.S. Postal Serv*., 66 M.S.P.R. 159, 165 (1995).

(b) Providing Information During an EEO Investigation – *Peterson v. Dep't of Transp*., 54 M.S.P.R. 178, 183 (1992) (AJ erred by analyzing the appellant's claim under (b)(8) instead of (b)(9)); *Thornhill v. Dep't of the Army*, 50 M.S.P.R. 480, 489-90 (1991) (employee's testimony in discrimination complaint is protected activity under (b)(9)).

(c) Allegedly Refusing to Cover-Up an EEO Violation – *Marable v. Dep't of the Army*, 52 M.S.P.R. 622, 630 (1992).

(d) Testifying at an EEO Hearing – *Adair v. U.S. Postal Serv*., 66 M.S.P.R. 159, 165 (1995) (AJ erred in determining that the appellant's supervisor had no knowledge of the appellant's EEO testimony); *Cloonan v. U.S. Postal Serv*., 65 M.S.P.R. 1, 4 (1994) (Board affirmed AJ decision that agency changed appellant's schedule because of the appellant's testimony in an EEO matter); *Shively v. Dep't of the Army*, 59 M.S.P.R. 531, 533, 536 (1993) (employee's allegations of reprisal for involvement in EEO activities implicates behavior protected under (b)(9)); *Viens-Koretko v. Dep't of Veterans Affairs*, 53 M.S.P.R. 160, 163 (1992) (the appellant's act of testifying at an EEO hearing is protected under (b)(9)(B)).

(e) Union Officials Acting on Behalf of Members in Connection with ULPs and EEO Complaints – *Wooten v. Dep't of Health and Human Serv*., 54 M.S.P.R. 143, 146 (1992).

[112] The Board construed the exercise of an appeal right under (b)(9) to include protection for individuals who invoked the aid of established remedial processes. *Bodinus v. Dep't of Treasury*, 7 M.S.P.R. 536, 540 (1981). Thus it protected those who testified for or assisted others in the exercise of an appeal right. *Special Counsel v. Brown*, 28 M.S.P.R. 133 (1985); *Acting Special Counsel v. Dep't of Defense*, 13 M.S.P.R. 380, 383 (1982); *Bodinus*, 7 M.S.P.R. at 540; *see also Watson v. Department of Treasury*, 49 M.S.P.R. 237, 243 (1991); *Boomer v. Dep't of the Navy*, 34 M.S.P.R. 636, 640 (1987); *Ketchum v. Dep't of Transp*., 28 M.S.P.R. 268, 273 (1985); *Monczewski v. Dep't of the Air Force*, 12 M.S.P.R. 362, 365 (1982).

The purpose for extending protection beyond the exercise of an appeal right was to preserve the integrity of the appeal process. *Bodinus*, 7 M.S.P.R. at 540; *In re Frazier*, 1 M.S.P.R. 163, 192-93 (1979). The Board protected false, but nonmalicious, statements made during the course of a grievance proceeding. *Kennedy v. Dep't of the Army*, 22 M.S.P.R. 190, 192-94 (1984). Where protection was unnecessary to preserve the integrity of the process, the Board demonstrated unwillingness to protect. Thus, where an employee made false and malicious statements in the EEO process, the Board declined to protect those statements. *Johnson v. Dep't of the Army*, 48 M.S.P.R. 54, 60-62 (1991); *Oliver v. Dep't of Health and Human Serv*., 34 M.S.P.R. 465, 474-75 (1987), *aff'd*, 847 F.2d 842 (Fed. Cir. 1988) (Table).

2. Cooperating With or Disclosing Information to Inspector General or OSC[113]

The WPA codified protection for "cooperating with or disclosing information to the Inspector General of any agency or to [OSC], in accordance with applicable provisions of law." 5 U.S.C. § 2302(b)(9)(C). This section will cover those disclosures made to an IG or OSC that do not meet the precise terms of a protected disclosure under 5 U.S.C. § 2302(b)(8). *Special Counsel v. Nielson*, 71 M.S.P.R. 161, 169-70 (1996) (OSC did not prove that employee was terminated because of his cooperation with the IG, an alleged violation of (b)(9)(C)); *Booker v. U.S. Postal Serv*., 53 M.S.P.R. 507, 509-10 (1992) (claim of reprisal for cooperating with IG investigation is (b)(9) and not an independent source of Board jurisdiction); *Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991). ((b)(9)(C) covers employee disclosures to an IG or OSC which do not meet the precise terms of actions described in (b)(8)), *reconsideration denied*, 52 M.S.P.R. 375 (1992), *aff'd sub nom. Hathaway v. Merit Sys. Prot. Bd*., 981 F.2d 1237 (Fed.Cir. 1992).

3. Refusing to Obey Order Requiring a Violation of Law

The WPA added new protections for individuals who refuse "to obey an order that would require the individual to violate a law." 5 U.S.C. § 2302(b)(9)(D). There is no case law directly addressing the application of (b)(9)(D). However, the Board mentioned (b)(9)(D)'s application in passing in a case where the Board held that it lacked jurisdiction over the claims of an employee who filed an individual right of action (IRA) appeal. The allegation underlying the IRA appeal was that agency officials retaliated against the employee by lowering his performance rating and denying him a promotion because he failed to perform a task that would have required violating the law and regulations applicable to the certification of travel vouchers. The court noted that this particular allegation by the employee might be properly evaluated under 5 U.S.C. § 2302(b)(9)(D), but was not cognizable as a (b)(8) allegation. *Davis v. Dep't of Defense*, 103 M.S.P.R. 516, 519 (2006).

i. The Traditional "Obey and Grieve" Rule

For years, the Board uniformly applied the traditional "obey and grieve" rule which obligated an employee to obey an agency's order while taking appropriate action to challenge the validity of the order. *See*, *e.g*., *Ingram v. Dep't of Justice*, 44 M.S.P.R. 578, 582 (1990) (employee does not have unfettered right to disregard an order merely because it is improper), *aff'd*, 925 F.2d 1479 (Fed. Cir. 1991); *Cooney v. Dep't of the Air Force*, 34 M.S.P.R. 183, 186 n.1 (1987) (Board mitigated removal to a 30-day suspension finding that the appellant's refusal to obey order was understandable, but the appellant still had duty to follow order), *aff'd on remand*, 37 M.S.P.R. 240 (1988), *aff'd*, 883 F.2d 1027 (Fed. Cir. 1989) (Table); *Blevins v. Dep't of the Army*, 26 M.S.P.R. 101 (1985) (the appellant was obligated to obey the agency's order while taking appropriate action to challenge validity of order).

The Board has carved out limited exceptions to the traditional "obey and grieve" rule. Thus, for example, in *Fleckenstein v. Dep't of the Army*, 63 M.S.P.R. 470, 475-76 (1994), *overruling Gragg v. Dep't of the Air Force*, 13 M.S.P.R. 296 (1982), the Board held that a charge

[113] The Board construed (b)(9) to protect individuals who cooperated with or disclosed information to an agency IG or to OSC. *See*, *e.g*., *Special Counsel v. Harvey*, 28 M.S.P.R. 595, 604 (1984), *rev'd on other grounds*, 802 F.2d 537, 547 (D.C. Cir. 1986).

of insubordination could not be sustained in the absence of a showing that the agency was entitled to have its order obeyed. In *Fleckenstein*, the agency could not make such a showing because some of the documents demanded by the supervisor were privileged under the attorney-work product doctrine. 63 M.S.P.R. at 475-76. In *Cooke v. U.S. Postal Serv*., 67 M.S.P.R. 401, 407-08 (1995), the Board added another requirement to the *Fleckenstein* exception – namely, that obeying the order must also cause the employee irreparable harm. *See also* Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 61 Admin. L. Rev. 531, 9-10 (1999) (discussing that (b)(9)(D) provides a more limited basis for relief than (b)(8) to employees who refuse to obey an order which would require them to violate a law or their ethical responsibilities).

4. Personnel Action and Knowledge (Elements 2 and 3)

See Sections VII.A7 and A8 for discussion of the elements of personnel action and knowledge.

5. Causal Connection (Element 4)

The fourth and final element of a (b)(9) case concerns the causal connection between the protected activity and the personnel action at issue. The method by which the causal connection will be evaluated by the Board depends on the type of case. Specifically, the causal connection will be evaluated using different legal standards based on whether the matter at issue is:

1. a corrective action case brought by OSC pursuant to (b)(9);
2. a disciplinary action case brought by OSC pursuant to (b)(9), where OSC is seeking disciplinary action against the agency official responsible for taking a personnel action against an individual because of that individual's protected activity; or a
3. a matter appealed by an individual facing disciplinary action under 5 U.S.C. § 7701 who alleges (b)(9) as an affirmative defense.

i. Contributing Factor Causation in OSC Corrective Action Cases

Prior to the WPEA , based on dicta from the Board in *Santella*, the causation standard in (b)(9) corrective action cases required: 1) OSC to show by a preponderance of evidence that the protected activity was a "substantial," or "motivating" factor in the personnel action; 2) then the burden shifted to the agency to rebut by preponderant evidence that it would have taken the same action in the absence of the protected activity. *65 M.S.P.R.* at 456. While this test should still apply for cases brought under (b)(9)(A)(ii), the WPEA changed the causation standard for cases brought under (b)(9)(A)(i), (B), (C), and (D), adopting the "contributing factor" test that already applied to corrective action cases brought under (b)(8). 5 U.S.C. § 1214(b)(4)(B)(i).

ii. Significant Factor Causation in Disciplinary Action Cases

For disciplinary actions in (b)(9) cases, OSC must establish causation by showing that the protected activity was a significant factor in the adverse personnel action. *Special Counsel v. Nielson*, 71 M.S.P.R. 161, 171 (1996). In *Nielson*, the Board relied on *Eidman* and *Santella* and clarified that a significant factor in a disciplinary action case is one that "played an important role in the allegedly retaliatory action," not a factor that was "tangentially related" to the protected activity. *Nielson* at 171.

(a) *Special Counsel v. Costello*. 75 M.S.P.R. 562 (1997). In a (b)(9) disciplinary action, *Costello*, the Board applied the significant factor test and held that although the agency official considered the details contained within the employee's grievance in making his reassignment decision, it was one of four or five other factors under consideration, and therefore the Board was unable to conclude that the filing of the grievance was a significant factor in the agency official's decision to take the personnel action. *Costello* at 611.

(b) *Mt. Healthy*[114] *Subsumed by Disciplinary Action Significant Factor Test*. The Board has held that the "significant factor" test subsumes the *Mt. Healthy* defense and therefore in (b)(9) disciplinary cases separate or burden shifting analysis of evidence is not necessary. The Board reasoned that if OSC was able to establish that an employee's protected conduct played a significant role in the adverse personnel action taken by the respondent, the respondent would necessarily be unable to present a successful *Mt. Healthy* defense. *Special Counsel v. Nielson*, 71 M.S.P.R. 161, 171 (1996), quoting *Special Counsel v. Santella*, 65 M.S.P.R. 452, 458-59 (1994), *aff'd*, 77 M.S.P.R. 672 (1998).

(c) *WPEA Codified Significant Factor Test and Restores Mt. Healthy Defense in Most (b)(9) Cases*. The WPEA codified the significant motivating factor test for disciplinary action claims brought under 2302 (b)(8) and (b)(9)(A)(i), (B), (C), and (D). Specifically, "the Board may impose disciplinary action if the Board finds that the activity protected under section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) was a significant motivating factor, even if other factors also motivated the decision, for [the agency official's] decision to take, fail to take, or threaten to take or fail to take a personnel action unless that [agency official] demonstrates by a preponderance of the evidence, that the [agency official] would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity." 5 U.S.C. § 1215(a)(3)(B).

The legislative history behind the WPEA states that the change was done specifically to adopt the *Mt. Healthy* test.[115] As such, the *Mt. Healthy* defense is no longer subsumed by the significant factor test for many disciplinary action cases brought under (b)(9). An interesting question would be what standard would apply to a disciplinary action case brought under 2302(b)(9)(A)(ii). On the one hand, Congress specifically excluded section (b)(9)(A)(ii) in its amendment of the disciplinary action standard in section 1215(a)(3)(B), which suggests that *Nielsen* still applies. On the other hand, the legislative change adopting the *Mt. Healthy* defense could be read as a rejection of *Nielsen's* holding that the *Mt. Healthy* defense should be subsumed by the significant factor test.

iii. Employee Appeals (b)(9) Affirmative Defense Causation Standard

In order to show causation using (b)(9) as an affirmative defense to an adverse personnel action, the employee must show that there was a genuine nexus between the protected activity and the adverse action. *Warren v. Dep't of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986).

[114] *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977). Under the *Mt. Healthy* test, OSC would have to show that protected whistleblowing was a '"significant motivating factor" in the official's decision to take or threaten to take a personnel action, even if other factors were considered in the decision. If the OSC makes such a showing, the official would then have the opportunity to show, by a preponderance of the evidence, that he or she would have taken or threatened to take the same personnel action even if there had been no protected activity.

[115] S. Rep. No. 112-155, April 19, 2012, available at http://www.gpo.gov/fdsys/pkg/CRPT-112srpt155/html/CRPT-112srpt155.htm.

A. *Nexus Causation Standard When the Evidentiary Record Is Not Complete.* When the evidentiary record is not complete, the Board will employ a burden-shifting analysis. First, the appellant may make a *prima facie* case by establishing a genuine nexus between the protected activity and the adverse action. The Board must weigh the intensity of the motive to retaliate against the gravity of the misconduct. *Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, 624-26 (2001).

The intensity of the motive to retaliate must outweigh the gravity or seriousness of the misconduct. *Jefferson v. U.S. Postal Serv*., 81 M.S.P.R. 607, 612 (1999). If the appellant successfully establishes this, then the agency may defend against a *prima facie* case under (b)(9) by introducing evidence that it would have taken the same personnel action, even in the absence of protected activity. *Thornhill v. Dep't of the Army*, 50 M.S.P.R. 480, 490 (1991); *Westmoreland v. Dep't of Transp*., 49 M.S.P.R. 574, 577 (1991).

B. *Nexus Causation Standard When the Evidentiary Record Is Complete.* When the evidentiary record is complete, an AJ or the Board will not inquire as to whether the employee established a *prima facie* case, or whether some other threshold of proof has been met so as to shift the burden to the agency. Instead, the inquiry proceeds to the ultimate question of whether the employee met the overall burden of proving retaliation based upon weighing the evidence presented by both parties. *Simien v. U.S. Postal Serv.*, 99 M.S.P.R. 237, 249 (2005).

6. Evolving Issues in (b)(9) Cases

i. Individual Rights of Action

The WPEA expanded IRA appeals to cases falling under 2302(b)(9(A)(i), (B), (C), and (D), but not under 2302(b)(9)(A)(ii). This means that a complainant who brings a (b)(9)(A)(i), (B), (C), or (D) claim to OSC but whose case is closed will be able to independently bring a claim before the Board. Previously, such IRA appeal rights were given only to complainants who had brought a 2302(b)(8) allegation to OSC but had their cases closed. The Board has not yet decided exactly what qualifies as a (b)(9)(A)(i) allegation (an appeal, complaint, or grievance with regard to remedying a violation of 2302(b)(8)) as opposed to a (b)(9)(A)(ii) one (an appeal, complaint, or grievance that is not with regard to remedying a violation of 2302(b)(8)).

ii. Mosaic Theory of Retaliation

The Board has recognized that direct evidence of reprisal is often rare. Therefore, to establish retaliation based on circumstantial evidence, the Board has held that an employee must provide evidence showing a "convincing mosaic" of retaliation. *Rhee v. Dep't of the Treasury*, 117 M.S.P.R. 640, 651 (2012). As stated earlier, this mosaic includes three general types of evidence: 1) evidence of suspicious timing, ambiguous oral or written statements, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of retaliatory intent might be drawn; 2) evidence that employees similarly situated to the appellant have been better treated; and 3) evidence that the employer's stated reason for its action is pretextual. *Crump v. Dep't of Veterans Affairs*, 114 M.S.P.R. 224, 229-30 (2010); *Marshall v. Dep't of Veterans Affairs*, 111 M.S.P.R. 5, 11 (2008).

At present, the mosaic concept has been developed within the context of employee appeals. However, as (b)(9) law continues to evolve it may be possible to successfully argue that the evidence presented pursuant to a mosaic theory is applicable to (b)(9) corrective action and

disciplinary action cases. An implementation of the mosaic theory in OSC (b)(9) original jurisdiction cases would likely make it easier to establish causation under the respective corrective action and disciplinary action causation standards.

IX. Procedural Issues

Before exercising remedies afforded under the WPA, it is critical to assess the unique and potentially confusing procedural issues that arise in federal sector whistleblower cases.

A. Three Avenues for MSPB Adjudication of a Whistleblower Claim

There are three options available to employees to bring a whistleblower reprisal complaint before the MSPB.

1. Affirmative Defense in an Otherwise Appealable Action Case

In an appeal of an adverse action brought under 5 U.S.C. § 7513[116] or an appeal of a performance-based action brought under 5 U.S.C. § 4303, the appellant can assert a PPP as an affirmative defense. *See* 5 U.S.C. § 7701(c)(2) ("the agency's decision may not be sustained . . . if the employee . . . shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title."). The appellant has the burden to show by a preponderance of the evidence that the decision was based on a PPP.

2. Individual Right of Action Appeals

There are two ways in which an employee can bring an IRA appeal at the MSPB: 1) if OSC does not seek corrective action within 120 days of the filing of the complaint; or 2) if OSC closes its investigation of the complaint, the complainant has 65 days from the date of the written notice, or 60 days from the date of receipt of the notice, to file an IRA appeal. 5 U.S.C. § 1214(a)(3). The regulation incorporates the presumption of 5 C.F.R. § 1201.4(l) that a letter is received 5 days after mailing as applicable to the 60-day deadline for filing specified in the statute.

Prior to the enactment of the WPEA, the IRA appeal option was available only for § 2302(b)(8) claims.[117] The WPEA expanded IRA appeals to cases brought under the following provisions of § 2302(b)(9):

- 2302(b)(9)(A)(i) – exercising any appeal, complaint, or grievance right granted by any law, rule, or regulation with regard to remedying a violation of paragraph (8);
- 2302(b)(9)(B) – testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;
- 2302(b)(9)(C) – cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel; and

[116] Actions directly appealable to the MSPB include (1) a removal; (2) a suspension for more than 14 days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less. *See* 5 U.S.C. § 7512.
[117] Congress created the IRA appeal remedy to "assure whistleblowers . . . an opportunity to argue their case in a hearing – with or without the OSC's involvement." S. Rep. No. 100-413 at 17 (1988).

- 2302(b)(9)(D) – refusing to obey an order that would require the individual to violate a law.

The IRA appeal option is not available for claims brought under § 2302(b)(9)(A)(ii), *i.e.*, exercising any appeal, complaint, or grievance right granted by any law, rule, or regulation other than with regard to remedying a violation of paragraph (8).

In an IRA appeal, the Board may consider only the charges of whistleblowing that the appellant raised before OSC, *i.e.*, the appellant must prove exhaustion of administrative remedies. *Ellison v. Merit Sys. Prot. Bd.*, 7 F.3d 1031, 1036 (Fed. Cir. 1993); *Coufal v. Dep't of Justice*, 98 M.S.P.R. 31, 37 (2004). Therefore, if the complainant is subjected to additional retaliation after filing an initial complaint with OSC, it is critical to document efforts to supplement the initial complaint. An AJ's inquiry into exhaustion of administrative remedies is limited to identifying (1) the whistleblowing disclosures and (2) the personnel actions that the appellant raised before OSC. The appellant must "give the [OSC] sufficient basis to pursue an investigation which might have led to corrective action." *Ward v. Merit Sys. Prot. Bd.*, 981 F.2d 521, 526 (Fed. Cir. 1992) (citing *Knollenberg v. Merit Sys. Prot. Bd.*, 953 F.2d 623, 626 (Fed. Cir. 1992)).

IRA appeals are reviewed *de novo*, *i.e.*, the IRA appeal must be viewed independently from OSC's decision to close the complaint. Section 1221(f) of title 5, United States Code, expressly states: "[A] decision to terminate an investigation under subchapter II may *not* be considered in any action or other proceeding under this section." 5 U.S.C. § 1221(f) (emphasis added). Section 1214 contains a similar prohibition:

> A determination by the Special Counsel under this paragraph *shall not be cited or referred to* in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.

5 U.S.C. § 1214(a)(3) (emphasis added). Under this statutory scheme, OSC's internal decisions regarding an appellant's complaint have no legal relevance to whether he or she may proceed with an IRA appeal. Congress took pains to protect OSC's internal deliberations regarding the disposition of a complaint from Board review "to ensure that a whistleblower is not 'penalized' or 'prejudiced' in any way by OSC's decision not to pursue a case." *Costin v. Dep't of Health and Human Servs.*, 64 M.S.P.R. 517, 531 (1994). The MSPB can only order an appellant to produce OSC's determination letter if the AJ explains why the letter is necessary and provides the opportunity to consent. *See* 5 U.S.C. § 1214(a)(2)(B); *Bloom v. Dep't of Army*, 101 M.S.P.R. 79, 84 (2006).

3. OSC Original Jurisdiction Cases

OSC can file a complaint at the Board seeking corrective or disciplinary action. If the case proceeds to a hearing, the judge will issue an initial decision and can order corrective or disciplinary action. If neither party files a petition for review by the Board within 35 days after the date of issuance of the initial decision, then the initial decision becomes the final decision of the Board. If the Board grants a petition for review, the Board may affirm, reverse, modify, or vacate the initial decision of the judge. The Board may issue a final decision and, when appropriate, order a date for compliance with that decision.

B. Election of Remedies

An employee subjected to a covered personnel action in retaliation for protected whistleblowing that is also appealable to the Board may elect to pursue a remedy through one of three remedial processes: (1) an appeal to the Board under 5 U.S.C. § 7701; (2) a grievance under a collective bargaining agreement; or (3) a complaint filed with OSC, which can be followed by an IRA appeal filed with the Board."[118] Whichever remedy is sought first by an aggrieved employee is deemed an election of that procedure and precludes pursuing the matter in either of the other two forums. *Agoranos v. Dep't of Justice*, 119 M.S.P.R. 498 (2013). This election of remedies does not affect the right to pursue an EEO complaint, *i.e.*, an employee can pursue both an EEO complaint and an OSC complaint simultaneously.

When an agency takes an action against an employee that is directly appealable to the Board, it must provide notice of the avenues of relief available to the employee and of the preclusive effect of electing a remedy. *See* 5 C.F.R. § 1201.21(d). An election of remedies under 5 U.S.C. § 7121(g) "must be knowing and informed, and, if it is not, it will not be binding upon the employee." *Agoranos*, ¶ 16.

The Board recently summarized the election of remedies rules that apply to members of collective bargaining units:

> [W]here an employee is affected by an action that is otherwise exclusively committed to the negotiated grievance procedure under § 7121(a)(1), but that may also be a prohibited personnel practice under section 2302(b)(1), *i.e.*, unlawful discrimination, the employee may 'raise the matter under a statutory procedure or the negotiated procedure, but not both.' 5 U.S.C. § 7121(d)(1). Similarly, with regard to matters covered under sections 4303 and 7512, which are also covered by a negotiated grievance procedure, the employee may elect to pursue the contractual remedy or relief through the Board's appellate procedures, but not both. 5 U.S.C. § 7121(e)(1). In both instances, whichever remedy is sought first by an aggrieved employee is deemed an election of that procedure and precludes pursuing the matter in either of the other two forums.

Agoranos, ¶ 13.

In deciding whether to appeal an adverse action to the MSPB or instead to file a PPP complaint arising from the adverse action, it is important to consider that in an IRA appeal, the only issues before the Board are those listed in 5 U.S.C. § 1221(e), *i.e.*, whether the appellant has demonstrated that whistleblowing or other protected activity was a contributing factor in one or more covered personnel actions. 5 C.F.R. § 1209.2(c). In an IRA appeal, the appellant may not raise affirmative defenses, such as claims of discrimination or harmful procedural error, as he or she would be able to do in an otherwise appealable action case. Note also that in an IRA appeal arising from an adverse action, the agency need not prove its charges, nexus, or the reasonableness of the penalty. *Id.*

[118] *See* 5 C.F.R. § 1209.2(d).

C. OSC Deferral to EEO Process

Discrimination based on race, color, religion, sex, disabling condition, gender, nationality, or age is a prohibited personnel practice. 5 U.S.C. § 2302(b)(1). Nevertheless, it was not intended that OSC duplicate or bypass the procedures established in the agencies and the EEOC for redressing discrimination complaints. 5 C.F.R. § 1810.1. Therefore, when a complaint alleging discrimination is filed at OSC, the agency generally defers to the EEO process to adjudicate that complaint. If the EEOC makes a finding of unlawful discrimination, OSC may pursue disciplinary action against the supervisory official who engaged in unlawful discrimination. And if OSC is investigating a PPP other than § 2302(b)(1) and the complainant also alleges a strong § 2302(b)(1) claim, OSC may at its discretion investigate the § 2302(b)(1) and seek corrective action to remedy a § 2302(b)(1) violation.

D. Stays

OSC may request any member of the Board to stay any personnel action for a period of 45 days if OSC determines that there are reasonable grounds to believe that a personnel action was taken, or is to be taken, as a result of a PPP. 5 U.S.C. § 1214(b)(1)(A)(i). OSC also may file a stay request after the effective date of a personnel action. *Special Counsel ex rel. Perfetto v. Dep't of Navy*, 83 M.S.P.R. 169, 173 (1999).

OSC applies the following criteria in determining whether a stay is warranted:

1. There are reasonable grounds to believe that the personnel action that was taken or is about to be taken constitutes a PPP; and
2. Absent a stay the employee will be subjected to a removal, a suspension for more than 14 days, a reduction in grade, a significant reduction in pay, a geographic reassignment, the non-renewal of an appointment, or any other personnel action which the complainant demonstrates by compelling evidence will result in serious immediate hardship;
3. In any other case where, based on available information, there exists a substantial likelihood that the personnel action that was taken, or is about to be taken, was the result of a PPP; or
4. Where the Special Counsel, in his or her sole discretion, determines that a stay would be appropriate and consistent with OSC's statutory mission to request a stay from the Board.

An informal stay is granted voluntarily by the agency. Generally it is a verbal commitment not to take the action for a specified period of time while OSC investigates and determines the merits of the claim. Depending on the case, an informal stay may be negotiated with the agency's human resources office or personnel office, the general counsel's office or the program office. OSC generally attempts to negotiate an informal stay before petitioning the Board.

Formal stays are those granted by the MSPB pursuant to the filing of a formal petition by OSC. In evaluating the sufficiency of a stay request, the Board views the facts in the record in the light most favorable to a finding that there are reasonable grounds to believe that the personnel action is the result of a PPP. *Special Counsel v. Dep't of Treasury*, 70 M.S.P.R. 578, 580 (1996).

The Board may extend the period of a stay for any further period that the Board considers appropriate. 5 U.S.C. § 1214(b)(1)(B); *Special Counsel, ex rel. Tines v. Dep't of Veterans*

Affairs, 98 M.S.P.R. 510, 511 (2005). In evaluating a request for an extension, the Board views the record in the light most favorable to OSC, and typically grants a stay extension request if OSC's PPP claim is not clearly unreasonable. *Special Counsel, ex rel. Waddell v. Dep't of Justice*, 105 M.S.P.R. 208, 210 (2007). OSC's stay request need merely fall within the range of rationality to be granted. *Office of Special Counsel, ex rel. Hopkins v. Dep't of Transportation*, 90 M.S.P.R. 154, ¶ 157 (2001).

An appellant who files an IRA appeal can also request a stay from the Board. *See* 5 C.F.R. § 1209.9. The appellant must show that "[t]here is a substantial likelihood that the appellant will prevail on the merits of the appeal." 5 C.F.R. § 1209.9(a)(6)(iii). That standard is higher than the "reasonable grounds" standard that OSC must meet to obtain a stay. *See* 5 U.S.C. § 1214(b)(1)(A)(i).

E. Legal Representation in OSC Investigations

OSC permits witnesses[119] and subjects[120] to have personal legal counsel present at an investigative interview to provide advice and counsel. An attorney representing a subject or fact witness in an OSC investigation must enter an appearance by signing and submitting OSC's Designation of Representation form (Designation Form), which is posted on OSC's website. That form contains a certification signed by both the witness and the legal representative stating that the designated individual is serving as the "personal legal representative" of the witness.

F. OSC Deferral to MSPB Proceedings

When a complainant elects to pursue an IRA appeal or an adverse action appeal at the Board, OSC will generally close its investigation of the case. Because the MSPB is authorized to make determinations concerning the personnel actions under investigation and OSC would be bound by OSC's adjudication of the issues, there is usually no basis for OSC to further investigate a matter while it is being litigated at the MSPB. OSC may choose to intervene in a matter being litigated at the MSPB if OSC deems the matter highly significant to the proper functioning of the merit system, such as a case presenting a critical issue defining the scope of protected conduct under the WPA. In IRA appeals and adverse action appeals, OSC must obtain the consent of the appellant prior to intervening.

[119] Fact witnesses in OSC PPP investigations are employees who have information about the matter under investigation, but who do not have personal responsibility for the alleged violation under investigation. Witnesses generally do not retain counsel to represent them in an OSC interview.

[120] Subject officials in OSC PPP investigations are agency officials who recommended, initiated, approved and/or threatened to take the personnel action(s) at issue in the investigation or who are alleged to have violated a law, rule or regulation under OSC's enforcement jurisdiction.

NELA April 2024

Litigating Whistleblower Protection Act Cases at the OSC and MSPB

Lynne Bernabei
Sterling Deramus
Kevin Owen

Introduction to the Whistleblower Protection Act

- Who Is Covered?

  5 U.S.C. § 2302(a)(2)(B), (C)

- What Conduct Is Protected?

  5 U.S.C. § 2302(b)(8)

- What Adverse Employment Actions are Prohibited Personnel Practices?

  5 U.S.C. § 2302(a)(2)(A)

Introduction to the Whistleblower Protection Act

- Burden of Proof:

- Complainant – disclosures are a "contributing factor in the personnel action." 5 U.S.C. § 1221(e)(1)
  - Direct evidence or circumstantial evidence

- Agency – demonstrate "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2)

The "Carr" factors for the Agency's Burden of Proof

- *Carr* factors are non-exclusive factors, to consider whether the agency met its burden of proof by clear and convincing evidence:

- (1) Strength of agency's evidence in support of the personnel action;
- (2) Any motivation to retaliate on part of agency decisionmakers; and
- (3) Comparators who did not make protected disclosures were treated the same way.

- OSC investigators usually will only look at Carr factor three – comparators – and will not consider other evidence of retaliation, including direct evidence.

- Federal Circuit & MSPB – if there is no evidence either way of comparators, then that is in the agency's favor.

Whistleblower claims and the Office of Special Counsel (OSC)

- Filing a WPA complaint with the OSC is an administrative exhaustion requirement.

- (1) Jurisdictional statement (complainant and agency are both covered by the WPA);
- (2) Statement of protected disclosures;
- (3) Statement of adverse actions;
- (4) Statement regarding causation.

OSC's Investigation of WPA Complaints

- Complainant usually cannot see the agency's position statement, but can respond to OSC investigator's description of the agency's position.
- OSC's mediation program.
- OSC can ask the MSPB to stay an adverse personnel action.

Appeal from OSC to the MSPB

- Can appeal to MSPB after the complaint has been pending with OSC for at least 120 days, but must request a closure letter from OSC.

- Or, if OSC finds no retaliation and issues a proposed closure letter, then Complainant can submit a rebuttal. OSC will usually then issue a formal closure letter, upon which Complainant can appeal to the MSPB.

- What if the whistleblower also has EEO claims for discrimination or retaliation based on gender, race, age, etc.?
- What if the whistleblower has a Collective Bargaining Agreement with a union grievance process that also covers the adverse personnel actions?

MSPB Appeal

- MSPB Appeal should contain the following information and documents:
- (1) List of the protected disclosures, including when and to whom made;
- (2) Basis for having a reasonable belief in the truth of the protected disclosures;
- (3) Adverse actions, and why disclosures were a contributing factor (causation); and
- (4) What was raised with OSC, and how OSC closed the investigation.

MSPB Discovery – the Rocket Docket

- Initial Discovery requests must be served within 30 days after Administrative Judge issues order for Agency file;
- Discovery responses due in 20 days;
- Motion to compel due 10 days after receiving responses;
- Follow-up discovery requests also due 10 days after receiving responses.
- Third party discovery – limitations to subpoena power.

Damages (Remedies) at the MSPB

- Economic damages (back and front pay)
- Reinstatement
- Non-economic damages – emotional distress
- Attorneys' fees and costs

- Prior to 2012, Whistleblower Protection Act decisions of the MSPB previously could only be appealed to the U.S. Court of Appeals for the Federal Circuit (best known for patent litigation).

- MSPB whistleblower cases can now appealed to a circuit court "of competent jurisdiction," *i.e.*, circuit where the employee worked.

  5 U.S.C. § 7703(b)(1)(B)

NELA 178

Tips for Successfully Navigating EEOC & State FEPA Investigations for Public Employees

MADISON FIEDLER-CARLSON
AND
IRIS HALPERN

Agenda

- POLITICAL CONSIDERATIONS
- OBJECTIVES
- EEOC PRACTICAL TIPS
- DIFFERENCES IN STATE FEPAS
- FEPA PRACTICAL TIPS
- AG/DOJ
- QUESTIONS

Political Considerations

- Which statutory provisions are most helpful for your claim? Are there additional bases in state law? Other provisions you might find helpful such as NDA provisions, better damages, etc.?
- Is it a class case?
- Are there local or national politics at issue that might make the claim particularly interesting to the EEOC or CCRD? See any published priorities?

Political Considerations

- Where are you more likely to find a receptive audience to your type of claim given the culture of the state and state agency?
- Where do you want to end up in court afterwards not withstanding dual filing?
- What procedures might be in use in each agency in your state that might assist you in meeting your particular goals for filing?
  - Seeing position statements or exhibits?
  - Amenable to early right to sue notices?
  - Other procedures?


What Are Your Objectives?

Do you even want to bring a civil rights claim? Internal processes v. civil rights claims

- Some claims must be brought in internal grievance process OR through state tort claims
  - Common law claims (i.e., wrongful termination, public policy, breach of contract)
  - Union issue (grievance) v. tort claim

- Government immunity
  - State statute mirroring federal one? No immunity
  - No state statute? Be careful

Internal processes v. civil rights claims

- Grievance or state tort process isn't necessarily bad
  - State tort claims:
    - Must sit for 6 months
    - Exhausted, file in civil court
  - Grievances:
    - Must be internal, no civil case
    - State has the burden of proof
    - Can be quicker
    - Judicial review of decision

What are your objectives?

- Caution before taking leap?
- Timing of getting to court?
  - How long are you required to stay in the Commission?
    - EEOC: 180 days
    - CCCRD: 180 days
    - Iowa ICRC: 60 days
    - Early Notices of Right to Sue?
- Cause findings?
  - Likelihood of success
  - Employer's perspective
- EEOC/DOJ to litigate your case?

What are your objectives?

- Info/evidence gathering
  - Witnesses – identity, interviews
  - Employer response/position statement (contrary statements or admissions for later litigation)
  - Screening decision
  - Rebuttal (is it worth it?)
- Mediation
  - Private mediation


You've Selected
The EEOC

Filing a charge

- Keep in mind objectives and ask following…
  - What level of detail do you want in your charge?
  - Do you want to submit exhibits?
  - Do you want your client interviewed?
  - Do you want to submit a rebuttal?

Exhaustion

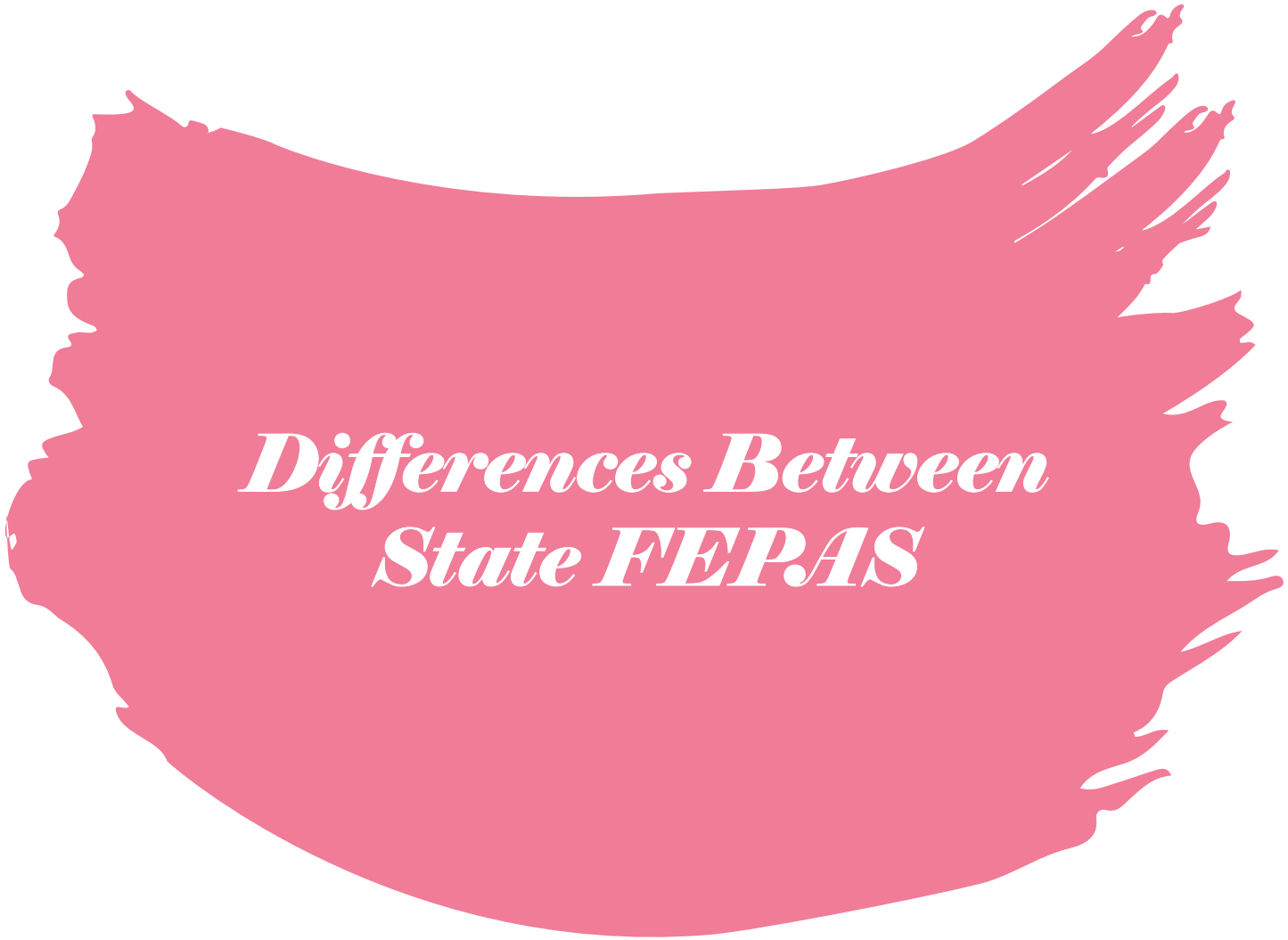
- Keep in mind goals and ask following…
  - How quickly do you want to get to litigation?
  - How much free discovery realistically obtain?
  - Honest likelihood of a cause finding? Why wait otherwise and for how long?
  - Other procedures that you may want to use and other motives?
    - Free mediation?
    - U-Visas and other assistance?

Seeing the entire process through

- Drafting an effective charge given your goals
  - Tricking defendant into lying(hidden evidence)?
  - Developing class?
  - Effective Charges, Rebuttals, RFI Responses:
    - Strong fact section with as much documentary evidence as possible.
    - Do the witness interviews and get statements yourself.
    - Ask how you and your client can further help.
    - Do the work for the investigator.
    - Investigators are not lawyers. Excess legal analysis wasted. Attach important cases and highlight.

Cause findings and conciliation

- Keep in mind goals and ask following…
  - Honest likelihood of litigation by DOJ?
  - EEOC's limited role for public employees post conciliation?
  - Work closely with EEOC to settle the case – do not waste conciliation.
  - Make sure client understands the EEOC's other demands so your client does not get frustrated.
  - Try to help EEOC secure other relief it is interested in.


Differences Between
State FEPAS

Differences in State FEPAs & EEOC

EEOC

- Filing charge – 300 days
  - Statement of Particulars
- Notice of charge to employer
- Mediation at any time requested, though usually before investigation
- Employer Response
- Rebuttal
- Investigation
- Determination
- RTS
- Request file

Iowa

- Filing charge – 300 days
  - Narrative
- Questionnaires
- Notice of charge to employer
- Screening decision
- Mediation
- Investigation
- RTS
- Request file

Colorado

- Filing charge – 300 days
- Notice of charge to employer
- Employer response
- Rebuttal
- Mediation at any time requested
- Investigation
- Determination
- RTS
- Request file



- FEPA = Fair Employment Practices Agencies
- State, municipal laws prohibiting civil rights violations
- Sometimes greater protection, sometimes less than federal laws
- Different deadlines
- Work-sharing agreements
- Dual filing



- Data sharing
  - Fundamental to enforcement of Title VII, state, municipal laws
  - EEO – Data from employers
    - Demographic data
    - No personal or confidential info
    - Also shared with FEPAs
    - Identifies priorities for investigation, enforcement
    - Identifies employment patterns
  - Efficiency

State as a Respondent

- Who/What to name?
  - Address?
  - Bureau/Department?
  - How many Defendants/Respondents is that?

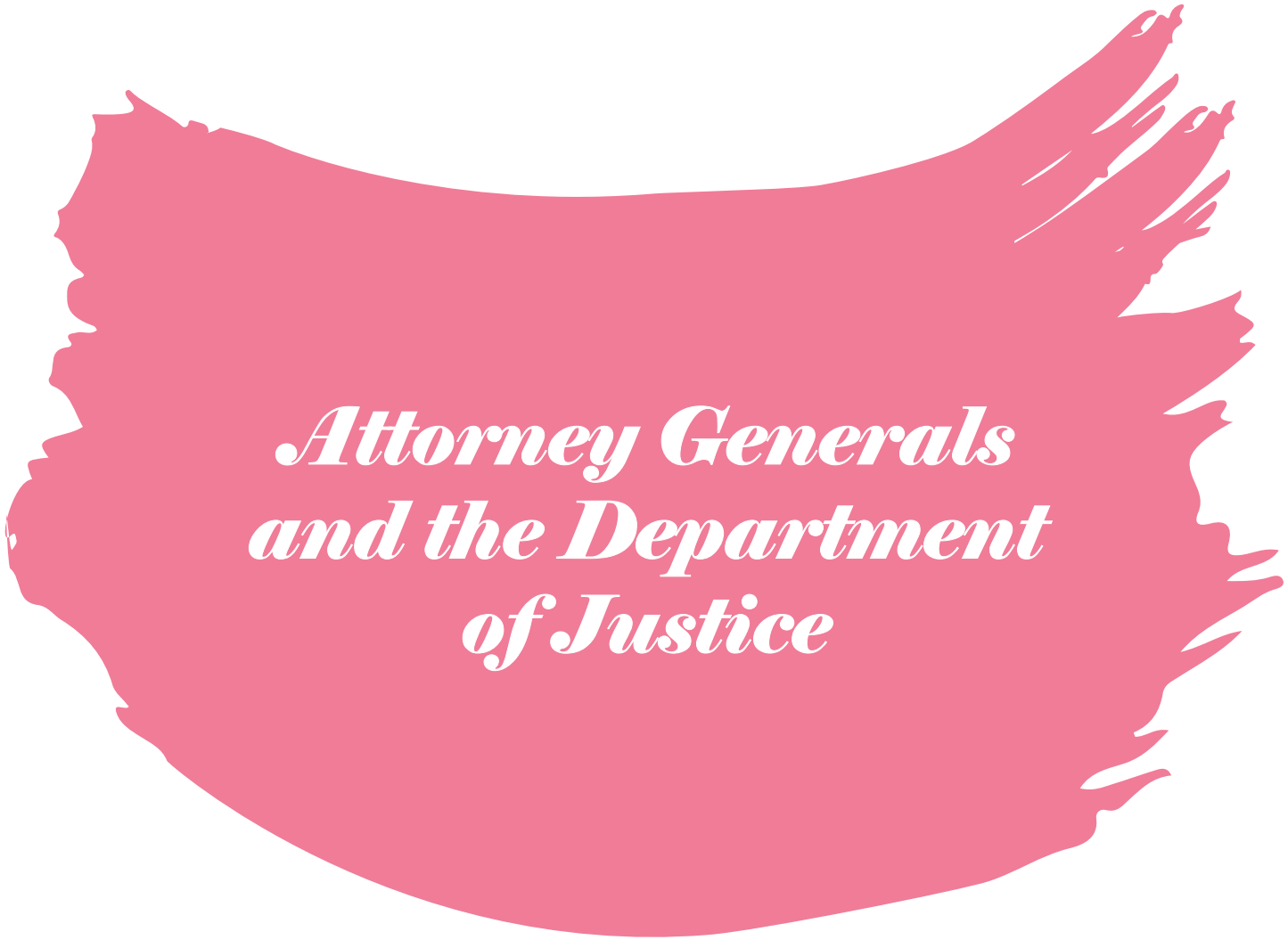
- Individual State Acts as Respondents
  - Harassers, responsible HR/DAS
  - Individual liability? Aiding and Abetting?
    - No immunity so long as the State doesn't either
    - Ex. Iowa State Tort Claims Act – Indemnity
    - But do you need them?

Charges

- Adverse employment actions
  - Specific or broad?
  - Don't forget retaliation
- Clear timeline
- Tell a story
  - Humanize your client
  - Address known issues
  - Active voice v. passive voice

Charges

- How much detail?
  - Depends on your goals…
  - How useful will it be to you?
    - Ex. We use it throughout the case, so the more detail, the better
    - Just trying to exhaust? Enough for notice
    - Settlement?
      - Why would the State know it's a good case to settle?
- Emotional distress?
  - Smaller employers
  - When it will go to people who knew and/or liked my client
  - Why does it matter?


Attorney Generals
and the Department
of Justice

EEOC → DOJ

(EXCEPT ADEA AND EPA)

- Litigation rare
- Tends to prioritize large class cases or novel legal issues current administration is prioritizing
- Ask about prior DOJ involvement during investigation and communicating with DOJ is appropriate

State FEPAs → State Attorney General's Office

- Know historic priorities and frequency of litigation.
- Find out limitations if a referral occurs:
  - Are there limitations on damages?
  - Is there estoppel/final action precluding court on certain issues?


Questions?

Thank you!



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The Federal Sector EEO Process

Gary Gilbert, Esq. - Gilbert Employment Law, P.C. & Gilbert Training Group, LLC

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Federal Sector EEO Process

- Key references:
  - 29 C.F.R. 1614
  - Management Directive 110
  - Guidance available at eeoc.gov

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Management Directive 110

- Revised on August 5, 2015
- Intended "to provide federal agencies with Commission policies, procedures, and guidance related to the processing of employment complaint governed by 29 C.F.R. Part 1614."

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Key Terms

- Complainant
- Agency
- Responsible Management Official (RMO)
- Report of Investigation (ROI)
- Alternative Dispute Resolution (ADR)
- Administrative Judge (AJ)
- Final Agency Decision (FAD)
- Initial Status Conference (ISC)

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Adverse Actions

- Anything that impacts term or condition of employment
- Not getting hired
- Not being selected/promoted for a position or detail
- Lowered performance evaluation
- Termination during probationary period (no MSPB rights)
- Claims of retaliation have broad view of coverage for what's considered an adverse action

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Informal Counseling

- Federal employee has 45 days from event thought to be discriminatory to initiate EEO counseling
- Some acts of discrimination are considered continuing:
  - Harassment/Hostile work environment
  - Failure to accommodate
- Some acts of discrimination are discrete acts

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Informal Counseling

- Counselor gathers information from employee and from RMO
- Counselor tries to resolve the matter, either informally or through ADR
- If matter cannot be resolved, Counselor issues Notice of Right to File Formal Complaint

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EEO Counselor Responsibilities

- 29 C.F.R. 1614. 105(b)(1) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including:
    - The right to request a hearing or an immediate final decision after an investigation by the agency in accordance with § 1614.108(f), election rights pursuant to §§ 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to § 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part,...

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EEO Counselor Responsibilities

- 29 C.F.R. 1614. 105(b)(1) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including:
    - The duty to mitigate damages, administrative and court time frames, and that only the claims raised in pre-complaint counseling (or issues or claims like or related to issues or claims raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency

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EEO Counselor Responsibilities

- Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency
- If the aggrieved person informs the Counselor that they wish to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent

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EEO Counselor Responsibilities

- Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency
- If the aggrieved person informs the Counselor that they wish to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent

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EEO Counselor Responsibilities

- (2) Counselors shall advise aggrieved persons that, where the agency agrees to offer ADR in the particular case, they may choose between participation in the alternative dispute resolution program and the counseling activities provided for in paragraph (c) of this section
- (c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives

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MD-110, Chapter 2, Section III

- "The EEO Counselor will also perform the roles of information gatherer, and facilitator, and possibly translator, messenger, and suggestion maker as set forth below. The EEO Counselor must perform several tasks in all cases, regardless of whether the aggrieved individual ultimately participates in EEO ADR"

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EEO Counselor Responsibilities: Educator

- Advise the aggrieved individual about the EEO complaint process under 29 C.F.R. Part 1614
- Explain the reasonable accommodations available throughout the EEO process
- Explain the ADR program, stating that the program is available to the aggrieved individual or advising whether the program will be made available

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EEO Counselor Responsibilities: Educator

- Advise the aggrieved individual of their right to file a formal discrimination complaint if attempts to resolve the dispute through EEO counseling or EEO ADR are unsuccessful
- Advise the aggrieved person that their identity will not be revealed unless the aggrieved person authorizes it to be revealed or they file a formal complaint with the agency

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EEO Counselor Responsibilities: Educator

- Determine the claim(s) and basis(es) raised by the aggrieved individual
- Conduct a limited inquiry during the initial interview with the aggrieved individual for the purpose of determining whether there may be issues relating to the timeliness of the individual's EEO Counselor contact and obtaining information relating to this issue. It also includes obtaining enough information concerning the claim(s) and basis(es) so as to enable the agency to properly identify the legal claim raised if the individual filer a complaint at the conclusion the EEO counseling process

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EEO Counselor Responsibilities: Facilitor, Translator, Messenger, Suggestion Maker

- Seek a resolution of the dispute at the lowest possible level, unless the agency offers EEO ADR and the aggrieved individual agrees to participate in the EEO ADR program. If the dispute is resolved in counseling, the EEO Counselor must document the resolution

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EEO Counselor Responsibilities: Information Gatherer

- Determine the claim(s) and basis(es) raised by the aggrieved individual.

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EEO Counselor Responsibilities: Report Writer

- Prepare a report sufficient to document that the EEO Counselor undertook the required counseling actions and to resolve any jurisdictional questions that arise

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EEO Counselor Responsibilities

- 29 C.F.R. 1614.105(g): The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter

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Formal Complaint

- Complainant has 15 days from receipt of Notice of Right to File to file a formal complaint
- Identify:
  - Basis(es) of discrimination
  - Issues
- Agency issues:
  - Acceptance letter
  - Partial acceptance letter
  - Dismissal letter/Final Agency Decision

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Amendments

- Complainant can amend their compliant with like or related issues that occur after the filing of the formal complaint
- Extends the timeframe to complete the investigation by whatever comes first:
  - 360 days from filing of the initial formal complaint
  - 180 days from the latest amendment

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EEO Investigations

- Agency has 180 days from filing of formal complaint to conduct and transmit investigation, in the form of an ROI
- Conducted by contractor or in-house at Agency
- Can be conducted in variety of ways:
  - Written questions/interrogatories
  - Telephone interview
  - In-person interview
  - Fact-finding conference

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EEO Investigations

- Investigator obtains sworn testimony from those with first-hand knowledge and gathers related documents
- Investigator drafts EEO Investigator's Summary
- Resource: MD-110, Chapter 6: Development of Impartial and Appropriate Factual Records

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Agency Can Be Sanctioned For Untimely or Incomplete Investigations

- AJ has the authority to sanction the Agency, to include:
  - Payment of attorneys' fees for discovery, or the filing of motions
  - Exclusion of evidence favorable to the Agency
  - Adverse inference in Complainant's favor
  - Default judgement in Complainant's favor

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After Receipt of ROI

- Complainant can elect to:
  - Request a hearing before an EEOC Administrative Judge

  OR

  - Request the Agency review the ROI and issue a Final Agency Decision (FAD)
  - Election must be made within 30 days of receipt of the ROI

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Final Agency Decision

- Employee from the Office of Civil Rights or other appropriate office reviews the ROI, summarizes the facts, applies the appropriate law, and determines whether or not discrimination occurred
- If Complainant is not happy with result, they can file an appeal with the EEOC's Office of Federal Operations to request a de novo review

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EEOC District, Field, and Area Offices



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Requesting a Hearing

- Complainant files a form requesting appointment of an Administrative Judge
- After AJ is assigned, case is typically scheduled for Initial Status Conference
- Format of the ISC varies depending on AJ assigned, but typically parties discuss:
  - Settlement
  - Scope of accepted issues
  - Need for discovery and timing and scope of same
  - Scheduling deadlines for filing motions for summary judgement
  - Scheduling prehearing and hearing dates

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Discovery

- Proceeds typically as outlined in Federal Rules of Civil Procedure
  - Interrogatories
  - Document Requests
  - Request for Admission
  - Depositions
- EEOC does not have subpoena power over witnesses who have left federal service

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Motions for Summary Judgement

- Typically filed by Agency
- Sometimes filed by Complainant
- Again, follows procedures set out in Federal Rules of Civil Procedure. Moving party must:
  - Present facts so that a factfinder can view them in the light most favorably to the non-moving party
  - Show there are no material facts in genuine dispute
  - Show credibility is not at issue and there's no need for a hearing
- Other party responds by disputing the above

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Prehearing and Hearing Process

- If MSJ is not filed or is denied, matter is scheduled for administrative hearing
- Like a bench trial, with no jury present
- AJ serves as factfinder
- No subpoena power
- More casual proceeding, typically held in conference room
- Federal Rules of Evidence are not strictly followed

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Complainant Must Establish

- *Prima facie* case:
  - They are a member of a protected class
  - They were subjected to an adverse action
  - There's some inference of discrimination between membership in protected class and adverse action

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Burden Then Shifts to Agency

- Agency must establish, with sufficient specificity, the legitimate, non-discrimination reason for its actions
  - i.e., what's the Agency's explanation for taking the action at issue?
  - Why wasn't the complainant the most qualified applicant?
  - Why wasn't the complainant deserving of an outstanding performance evaluation?
  - Why was the complainant fired?

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Complainant Must Show Pretext

- Complainant has the ultimate burden to show that the Agency's articulated reasons are:
  - False
  - Unworthy of belief
  - And the real reason for the Agency's actions are discriminatory animus

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After the Hearing

- AJ issues a decision on liability and remedies (if liability is established)
- AJ's decision goes to the Agency for issuance of a final action
- Final action states:
  - Agency will fully implement the AJ's decision
  - Agency partially or fully rejects the AJ's decision and at the same time, files an appeal to the EEOC's Office of Federal Operations (OFO)
- Complainant can appeal the Final Action to the EEOC's OFO
- Decisions from AJ's given more deference

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OFO Decisions

- Typically take 6 months to 2 years or more to receive
- Either side can request reconsideration of the decision
- Complainant can also file in U.S. District Court and start process over again

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Decisions in EEOC Cases

- AJ's decisions are not published and cannot be cited
- EEOC OFO's decisions are published on Lexis, Westlaw, and cyberFEDS
- EEOC no longer uses complainant's names in decisions, instead using pseudonyms
- Preferred citation format (can vary slightly)
    - *Wanda C. v. Dept. of Energy,* EEOC Appeal No. 0120170001 (January 1, 2021)

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Requests for Official Time

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MD-110: Chapter 6, Official Time

- "Reasonable" is defined as whatever is appropriate, under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information

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MD-110: Chapter 6, Official Time

- The actual number of hours to which complainant and their representative are entitled will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency's need to have its employees available to perform their normal duties on a regular basis

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MD-110: Chapter 6, Official Time

- Most of the time spent by complainants and their representatives during the processing of a typical complaint is spent in meetings and hearings with agency officials or with the Commission Administrative Judges. Whatever time is spent in such meetings and hearings is automatically deemed reasonable

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MD-110: Chapter 6, Official Time

- Since presentation of a complaint involves preparation for meetings and hearings, as well as attendance at such meetings, conferences, and hearings. Complainants and their representatives are also afforded a reasonable amount of official time, as defined on slide 41, to prepare for such

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MD-110: Chapter 6, Official Time

- They are also to be afforded a reasonable amount of official time to prepare the formal complaint and any appeals that may be filed with the Commission, even though no meetings or hearings are involved

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Remedies Available to Successful Complainants

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Guiding Principles of Remedies

- Complainant must show they would not have incurred the loss but for the discriminatory acts of the Agency
- Complainant must show a nexus between the harm and the Agency's actions
- Complainant cannot receive more than what they could have received absent the discrimination

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Remedies Available to Successful Complainants

- Back pay, if appropriate
- Difference in pay, if appropriate
- Front pay in limited circumstances
- Non-pecuniary compensatory damages
- Pecuniary compensatory damages
- Restoration of sick leave, annual leave, other benefits of employment
- Attorney's fees and costs
- No punitive damages available against federal government

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Pecuniary Damages

- Fixed costs that Complainant can demonstrate are related to the Agency's actions:
  - Co-pays for prescriptions and doctor's visits
  - Costs for looking for new job
  - Anything that the Complainant can demonstrate would not have been incurred but for the Agency's actions
- Must be proven with receipts, invoices, documentation

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Non-Pecuniary Damages

- Intangible harm caused by the Agency's actions
- Emotional distress, embarrassment, humiliation
- Damage to professional reputation
- Physical pain
- Exacerbation of prior medical conditions, or intervening causes of harm
- Medical evidence not required, but helpful to get higher awards
- Limit is $300,000 but awards are typically $5,000 - $100,000

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Attorney's Fees and Costs

- Lodestar is hourly rate x reasonable number of hours for work performed
- DC-area law firms use the *Laffey* matrix for federal sector EEO cases
- For out-of-state cases, the Agency must show it was unreasonable for complainant to retain a DC-area firm
- Not available for informal stage of the process, except under limited circumstances
- Includes legal work performed by attorneys, paralegals, and law clerks, but not clerical overhead
- Costs include printing, copying, deposition transcripts, travel costs

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Updated Guidance from EEOC on the Role of Agency Counsel during EEO Investigations

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MD-110, Chapter 1 (rev. August 2015)

- Section IV, D.: "Ensuring a clean separation between the agency's EEO complaint program and the agency's defensive function is...the essential underpinning of a fair and impartial investigation, enhancing the credibility of the EEO office and the integrity of the EEO complaints process."

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MD-110, Chapter 1 (rev. August 2015)

- Agency Representative "refers to any or all agency employees, (for example Defense Counsel, agency counsel, or legal representative), whose job duties include defending the agency's personnel policies and/or actions. The term is not limited to attorneys employed in an agency's Office of General Counsel or Office of Legal Counsel…"

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MD-110, Chapter 1 (rev. August 2015)

- Agency Representative "The term also includes attorneys in the Office of Human Capital and non-attorney employees whose job duties include defending the agency's personnel policies and/or actions, for example, labor relations specialists."
    - Emphasis added

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MD-110, Chapter 1 (rev. August 2015)

- Section IV, D.
  - "There must be a firewall between the EEO function and the agency's defensive function."
  - "At a minimum…the agency representative in EEO complaints may not conduct legal sufficiency reviews of EEO matters."

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Josefina L. v. SSA, 118 LRP 30430 (July 10, 2018)

- Agency counsel assisted a supervisor with responding to the affidavit during the investigation, by reviewing and providing feedback

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Josefina L. v. SSA, 118 LRP 30430 (July 10, 2018)

- The EEOC determined that OGC's actions "undermined the integrity of the EEO process by eroding the necessary separation of the investigative process from the Agency's defensive function."

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Josefina L. v. SSA, 118 LRP 30430 (July 10, 2018)

- 4 hours of in-person training ordered as sanction

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Annalee D. v. GSA, 118 LRP 44347 (October 10, 2018)

- Agency counsel assisted with affidavits, accompanied the supervisor to the investigative interview, and maintained this was permissible because the agency is liable for the actions of its managers

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Annalee D. v. GSA, 118 LRP 44347 (October 10, 2018)

- OFO found OGC's involvement to be "extraordinarily bold and egregious" and ordered 4 hours of in-person training

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Annalee D. v. GSA, 119 LRP 46408 (November 27, 2019)

- However, Commission subsequently granted Agency's request for reconsideration

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Annalee D. v. GSA, 119 LRP 46408 (November 27, 2019)

- "Agency defense counsels [ ] may not direct, control, interfere with, or overrule the activities of the EEO Office."

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Annalee D. v. GSA, 119 LRP 46408 (November 27, 2019)

- Prior decision "appears to set forth an absolute rule that prohibits agency defense counsel form participating in the pre-hearing stages of equal employment opportunity matters."
- No bright-line test as to what constitutes improper intrusion

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Annalee D. v. GSA, 119 LRP 46408 (November 27, 2019)

- Nothing in MD-110 explicitly:
  - Prohibits agency defense counsel from representing an agency manager during the counseling stage
  - Bans agency defense counsel during the investigative stage form assisting an agency manager in preparing their affidavit or acting as a representative under the appropriate circumstances

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Annalee D. v. GSA, 119 LRP 46408 (November 27, 2019)

- Agency counsel can also permissibly:
  - Assist agency management officials and witnesses in the preparation of their affidavits during the investigative stage
  - Assist in informal resolution talks during the counseling stage so long as agency defense counsel suggests, but does not dictate, settlement terms

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Annalee D. v. GSA, 119 LRP 46408 (November 27, 2019)

- "However, agency defense counsel may not instruct officials to make statements that are untrue or make changes to any affidavit without the affiant's approval of such changes."

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Annalee D. v. GSA, 119 LRP 46408 (November 27, 2019)

- "While the Commission has long emphasized the importance of a firewall between the investigative functions of the Agency's EEO program and the defensive functions of agency defense counsel, we find that the actions taken by the agency defense counsel in this case did not violate the firewall between the two functions."

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Recent Supreme Court Cases Impacting Federal Sector EEO Case Processing

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Babb. v. Wilkie, 140 S. Ct. 1168 (April 6, 2020)

- U.S. Supreme Court holds that the federal sector provisions of the ADEA do not require "but for" causation to establish liability
- "But for" causation does play a role in fashioning appropriate remedies

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Bostock v. Clayton County, 140 S. Ct. 1731 (June 15, 2020)

- U.S. Supreme Court holds that the prohibition against discrimination on the basis of "sex" includes sexual orientation and transgender status
- Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII

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Bostock Affirmed what the EEOC held in 2015

- "Indeed, we conclude that sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."

  Baldwin v. Secretary of Transportation, EEOC Appeal No. 0120133080 (2015)

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Groff v. DeJoy, 600 U.S. 447 (2023)

- Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.

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EEOC Guidance

- "We have no reservations in saying that a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by our clarifying decision today. After all, as a public advocate for employee rights, much of the EEOC's guidance has focused on what should be accommodated…"

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EEOC Guidance

- "Accordingly, today's clarification may prompt little, if any, change in the agency's guidance explaining why no undue hardship is imposed by temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs. See 29 CFR §1605.2(d). But it would not be prudent to ratify *in toto* a body of EEOC interpretation that has not had the benefit of the clarification we adopt today."

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Impact of *Groff*

- "Faced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary."

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Effective Advocacy Before the EEOC in Federal Sector Cases

Panelists: Gary Gilbert, Esq. - Gilbert Employment Law, P.C. &
Cheri McCracken, Esq. - Law Office of Cheri McCracken ESQ.
Moderator: Morgan L. Bigelow, Lubin & Enoch, P.C.

Outline

1. Filing an EEOC Complaint
    a. Counselor
    b. ADR Options
    c. Investigations
        i. Amended or Supplemental Complaints
        ii. Failure to timely complete investigation
    d. FAD vs. Hearing
2. Administrative Forum vs. Federal Court
    a. Controlling Case Law/Time/Fact finder preference/Formality/Appeal/Types of relief/Sanctions (Adverse inferences)
3. Discovery
    a. Report on Investigation
    b. Witnesses
        i. Subpoenas
    c. Sanctions
        i. Adverse Inference
4. Hearing
    a. Bifurcation
5. Appeal Options
    a. Motion for Reconsideration
    b. OFO
    c. District Court
6. Types of Relief
    a. 29 CFR 1614.51
    b. MD 110 Chapter 8
    c. Gary's book
    d. Attorney Fees

What are the options for ADR?

Should I stay in the administrative forum or file in federal court?

Can I subpoena witnesses?

Am I allowed discovery? Depositions?

How long does the process take? Should I request a FAD?

Are EEOC administrative hearings bifurcated?

What relief is available in the administrative forum to my client?

What can I expect to recover in legal fees and how do I maximize recovery?

Filing a Formal Complaint with the EEOC

1. Counselor: The first step is to contact an EEO Counselor at the agency where your client worked or where he/she applied for a job. Generally, this must be done within 45 days from the day the discrimination occurred.
    a. Participate in EEO counseling or ADR program, such as mediation.
2. File the Complaint: If dispute is not resolved at the counseling stage, your client must file his/her complaint within 15 days from the day the EEO Counselor provides notice on how to file.
    a. Reviewed for dismissal on procedural grounds.
3. Investigation: The Agency will investigate the charge. The investigation must be completed within 180 days.
    a. Supplemental Complaints - 180 days from last filed or 360 day from original.
    b. Failure to timely complete investigation.
4. Choose Your Forum: When the investigation is finished, the agency will issue a notice giving you two choices: either request a hearing before an EEOC Administrative Judge or ask the agency to issue a decision as to whether the discrimination occurred.

Choosing Your Forum

a. Timeline
b. Controlling Case Law
c. Fact Finder Preference - ALJ vs. Jury
d. Formality of Hearing Process
e. Appeal
f. Types of Relief
g. Sanctions (Adverse Inferences)

Requesting a Hearing

If you want to ask for a hearing, you must make your request in writing or via the EEOC Public Portal located at https://publicportal.eeoc.gov/Portal/Login.aspx where you can also upload hearing requests, and manage your personal and representative information within 30 days from the day you receive the notice from the agency about your hearing rights.

Once the agency receives the Administrative Judge's decision, the agency will issue what is called a final order which will tell you whether the agency agrees with the Administrative Judge and if it will grant any relief the judge ordered. The agency will have 40 days to issue the final order. It will also contain information about your right to appeal to EEOC, your right to file a civil action in federal district court, and the deadline for filing both an appeal and a civil action.

Agency Issues a Decision (Final Action/FAD)

If you ask the agency to issue a decision and no discrimination is found, or if you disagree with some part of the decision, you can appeal the decision to EEOC or challenge it in federal district court.

Filing an Appeal of the Agency's Final Order

You have the right to appeal an agency's final order (including a final order dismissing your complaint) to EEOC Office of Federal Operations. You must file your appeal no later than 30 days after you receive the final order. You may file your appeal using the EEOC's Public Portal located at https://publicportal.eeoc.gov/Portal/Login.aspx where you can also upload selected documents, and manage your personal and representative information.

EEOC appellate attorneys will review the entire file, including the agency's investigation, the decision of the Administrative Judge, the transcript of what was said at the hearing (if there was a hearing), and any appeal statements.

If the agency disagrees with any part of the Administrative Judge's decision, it must appeal to EEOC.

Request for Reconsideration of the Appeal Decision

If you do not agree with the EEOC's decision on your appeal, you can ask for a reconsideration of that decision. A request for reconsideration is only granted if you can show that the decision is based on a mistake about the facts of the case or the law applied to the facts. You must ask for reconsideration no later than 30 days after you receive our decision on your appeal.

Once EEOC has issued a decision on the appeal, the agency also has the right to ask EEOC to reconsider that decision.

Once we have made a decision on your request for reconsideration, the decision is final.

Filing a Lawsuit

You must go through the administrative complaint process before you can file a lawsuit. There are several different points during the process; however, when you will have the opportunity to quit the process and file a lawsuit in court, including:

- After 180 days have passed from the day you filed your complaint, if the agency has not issued a decision and no appeal has been filed
- Within 90 days from the day you receive the agency's decision on your complaint, so long as no appeal has been filed
- After the 180 days from the day you filed your appeal if the EEOC has not issued a decision, or
- Within 90 days from the day you receive the EEOC's decision on your appeal.

Resources

- EEOC Regulation 29 CFR 1614: https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1614?toc=1
- EEOC Regulation 29 CFR 1630: https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630?toc=1
- EEOC Management Directive 110: https://www.eeoc.gov/federal-sector/management-directive/management-directive-110
- *Consolidated Federal Sector EEO Update 2004-2023* By Gary Gilbert & Deryn Sumner
- *Compensatory Damages and Other Remedies* By Gary Gilbert & Deryn Sumner
- *A Guide to Federal Sector Equal Employment Law and Practice* By Ernest C. Hadley & Natania M. Davis
- "Gilbert & Broida on EEO Advocacy" Featuring Gary Gilbert & Peter Broida
- cyberFEDS: https://www.cyberfeds.com/

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Philadelphia District Office

Doering Meyer and Ryan Gibson, Class Agents,	)	EEOC No. 531-2015-00092X
	)	Agency No. DOS-F-034-07
	)	No. DOS-F-091-08
v.	)	
Antony J. Blinken, Secretary, U.S. Department of State, Agency.	)	

SETTLEMENT AGREEMENT, EXHIBIT 3

PLAN FOR THE DISTRIBUTION OF SETTLEMENT FUNDS

Pursuant to a settlement reached between the Class and the U.S. Department of State ("Agency") in this matter (the "Settlement Agreement"), a fund of $37,500,000 (thirty-seven million, five hundred thousand dollars) is available to pay all claims to members of the Class as well as all attorney's fees and costs. This Distribution Plan describes how the monetary relief will be distributed. The Settlement Administrator selected by Class Counsel will pay each Class Member under the Settlement Agreement. The Settlement Agreement provides funds for all Class Members to which they are not otherwise entitled, inasmuch as neither the Class Agents nor any of the Class Members have yet proven the Agency's liability or any individual's damages. The Settlement Agreement is by its nature a compromise, designed to obtain earlier payment for Class Members, who might otherwise have to wait many more years to recover, or never recover. As such, no Class Member is obtaining "full relief" as part of this Distribution Plan – rather, the Distribution Plan aims to provide fair, adequate, and reasonable compensation to Class Members under the circumstances.

I. CLASS DEFINITION

As described in the Settlement Agreement, Section II.A.5, the Class is defined as "All qualified applicants to the Foreign Service beginning on October 7, 2006, who were denied employment, or whose employment was delayed pending application for and receipt of a waiver, because the State Department deemed them not 'Worldwide Available' due to their disability." Class Members are those appearing on Exhibit 1 of the Settlement Agreement, with additional information in Section VII, below.

II. SUMMARY OF DISTRIBUTION PLAN

The amount of funds for compensating Class Members is $37,500,000. From that fund one-third, $12,500,000, will be paid to Class Counsel for attorneys' fees for 16+ years of litigation of this

action on a strictly contingency basis, up to $100,000 will be paid to Class Counsel for litigation expenses, up to $50,000 will be paid to a Settlement Administrator, and $400,000 will be paid to Class Agents as service payments related to their prosecution of this case. The remainder, the **total Class Member distribution,** of $24,450,000 will be paid to Class Members as follows:

- $8,150,000, one-third, in lieu of compensation for **back pay**, from which applicable payroll deductions will be made, to be reflected on an IRS Form W9;
- $8,150,000, one-third, to compensate for **lost benefits**, including but not necessarily limited to Thrift Savings Fund (TSP) Agency match, lost retirement benefits, and lost benefits associated with overseas assignments, which will be paid without deductions, to be reflected on an IRS Form 1099 MISC; and
- $8,150,000, one-third in lieu of compensation for **compensatory damages** (pecuniary and non-pecuniary), and in particular, emotional distress, which will be paid without deductions, also to be reflected on the IRS Form 1099 MISC.

Every Class Member will be sent at least a **minimum $5,000 settlement allocation**, whether or not they have provided any information regarding interim earnings to Class Counsel. For those receiving only the minimum $5,000 settlement allocation, the payment will be in lieu of compensatory damages for emotional distress. Class Members who have provided information regarding interim earnings may receive increased allocations, as detailed below.

III. BACK PAY ALLOCATIONS

Those who have provided information to Class Counsel regarding interim earnings will receive an allocation of the $8,150,000 designated as compensation in lieu of back pay.

The basic approach to computing back pay was to calculate the amount of back pay each Class Member would have earned for each year the Class Member would have been working for the Agency minus any interim earnings the Class Member actually earned while working elsewhere.

The **starting salary** used for these calculations was the starting salary in the Class Member's offer letter from the Agency, if the Class Member provided it to Class Counsel, or the average starting salary according to data provided by the Agency for the position in question during the year of the initial Class 1 medical clearance denial.

The **starting date** of the calculation period was the date of each Class Member's first medical clearance action (as shown in the Clearance History tab of each Class Member's e-Med file with the Agency), beginning with the earliest date of October 7, 2006, the start of the Class Period. While this does not correspond with the actual date any Class Member would have commenced Agency employment absent alleged discrimination, it ensures that any delays in employment based upon the medical clearance process and denial are accounted for.

The **end date** of the calculation for Class Members whose employment was delayed was their actual date of hire based upon records provided by the Agency and information supplied by Class Members, and for Class Members not hired the end date was the earlier of December 31, 2022, the date the Class Member turned 65, or, for Class Members applying for the Diplomatic

Security Agent position, the date on which the Class Member turned age 57. The period between the starting date and the end date is the **loss period.**

Back pay was computed for each calendar year using data provided by the Agency relating to each Class Member's hiring cohort. Salaries were increased based upon the average annual increases for each Class Member's hiring cohort, to cover within-grade increases and promotions.

Interest on back pay was not computed.

Wages earned during the loss period, according to tax returns, Social Security earnings statements, W2s, or other corroboration of wages provided by Class Members, were subtracted as **interim earnings** from the back pay calculated according to the foregoing methodology. The difference is the **net back pay.**

If Class Members earned less than the **reasonable minimum income threshold** in a particular year, defined as less than 2x the applicable year's poverty level for one person,[1] then they will be presumed to have failed to mitigate for that year, unless they prove they exercised reasonable diligence to seek other employment during the period. Evidence of due diligence could include: job applications, records of job interviews attended, copies of resumes sent, and names of prospective employers where they made applications and dates applications were made.

All of the net back pay amounts for Class Members who have provided interim earnings information will be summed, and each Class Member will be assigned a **percentage of the class's total net back pay**, and will receive that percentage of the back pay allocation portion of the settlement fund. For example, if Class Member A had $250,000 net back pay, and the total net back pay of the Class Members who provided information was calculated to be $25,000,000, then Class Member A would be 1% of the total class net back pay. Class Member A would receive $81,500 (0.01 x $8,150,000) for this portion of the settlement, minus appropriate payroll deductions.

Class Members who have not provided information to Class Counsel regarding interim earnings for each year in the loss period will not receive an allocation of this portion of the settlement for any year in which no interim earnings corroboration was provided. Moreover, for any year in which the reported interim earnings are below the reasonable minimum income threshold, *i.e.,* what would be earned by a Class Member exercising reasonable diligence to find comparable employment, Class Members will not receive an allocation of this portion of the settlement, unless they provide proof of an inability to mitigate despite the exercise of due diligence. It will be presumed either: that their interim earnings exceeded the back pay they might otherwise receive in any year regarding which no or minimal interim earnings corroboration was provided; and/or, that Class Members providing no information would not have cooperated fully in prosecuting an individualized damages hearing, as would be required absent this settlement under *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977) ("*Teamsters* hearings"),

[1] *Cf.* https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs-poverty-guidelines-federal-register-references

thereby making a damages claim more difficult to establish than in the case of those Class Members who cooperated fully with Class Counsel regarding proof of damages.

The back pay due a victim of discrimination is typically, in the event of fully successful litigation, only the amount that will restore the situation as nearly as possible to that which would have obtained but for the illegal discrimination. An "employee is charged with the responsibility to exercise reasonable diligence, especially in mitigation of damages." *Ford Motor Company v. EEOC*, 458 U.S. 219 (1982); *Koronkiewicz v. Rice (Dept. of Ag.)*, EEOC Appeal No. 05920574, (Sept. 24, 1992). For that reason, the amount owed as back pay is generally the difference between what would have been earned had a Class 1 medical clearance not been denied, and the actual interim earnings during the relevant time. This Distribution Plan seeks to avoid a windfall to Class Members who failed to provide information about interim earnings for any year in the loss period, and to recognize that it would be unreasonable to presume that any Class Member's interim earnings, if they were exercising reasonable diligence to obtain comparable employment, were below the reasonable minimum threshold in any year. Moreover, this formulation seeks to reward the assistance, guidance, and time provided by contributing Class Members, whose provision of information timely strengthened the legal position of the Class as a whole, and supported Class Counsel's work toward successfully resolving this matter.

IV. LOST BENEFITS ALLOCATIONS

For the same loss period described above, Class Members who provided any interim earnings documentation to Class Counsel will also receive an allocation in lieu of lost benefits. Though there are many types of possible lost benefits which could affect Class Members, the lost benefits calculated for the purposes of this allocation amount to 66.1% of each Class Member's back pay for each year, without any offsets based upon interim earnings.

This 66.1% figure is based upon the following assumptions:

1) lost TSP matches, calculated by multiplying each Class Member's back pay for each year, without any offsets based on interim earnings, by 5%;

2) lost retirement benefits, calculated by multiplying 31.1% of the estimated back pay, without any offsets. Class Counsel estimate that 31.1% is the approximate percentage that the State Department would have contributed to fund its employees' retirement system; and

3) lost benefits associated with anticipated overseas assignments, calculated by multiplying each Class Member's back pay for each year, without any offsets, by 30%. The actual value of benefits associated with overseas assignments varies according to a variety of factors including the location of the overseas assignment. This percentage is a reasonable estimate of the average overseas assignment benefits.

The same calculations for distributing settlement funds for back pay will be used here. All of the amounts (66.1% x back pay/year) will be summed and each Class Member will be assigned a

percentage of the total class lost benefits, and will receive that percentage of the benefits allocation portion of the settlement fund.

V. COMPENSATORY DAMAGES ALLOCATIONS

The compensatory damages allocation will be calculated according to a point system. Each Class Member will receive 0 to 4 points, as follows:

- 0 points: Class Member provided no information to Class Counsel regarding emotional distress or claimed no particular symptoms: $5,000 allocation, for presumed minimal emotional distress in suffering discriminatory clearance denial.
- 1 point: Class Member provided information to Class Counsel detailing mild emotional distress, including short- to moderate-term anxiety, depression, sleeplessness, and other common symptoms.
- 2 points: Class Member provided information to Class Counsel detailing moderate emotional distress, including: longer-term anxiety, depression, sleeplessness, change in appetite, negative behavioral patterns (for example, substance abuse), and other common symptoms, including physiological (in addition to psychological) symptoms; significant change in career trajectory; moderate humiliation and embarrassment; some treatment with a psychologist and/or therapist.
- 3 points: Class Member provided information to Class Counsel detailing serious emotional distress, including: long-term anxiety, depression, sleeplessness, change in appetite, negative behavioral patterns (for example, substance abuse), and other common symptoms, including physiological (in addition to psychological) symptoms; severe change in career trajectory; severe humiliation and embarrassment; changes in relationships; long-term treatment with a psychologist and/or therapist; psychotropic medication prescriptions.
- 4 points: Class Member provided information to Class Counsel detailing severe emotional distress, including: long-term anxiety, depression, sleeplessness, change in appetite, negative behavioral patterns (for example, substance abuse), and other common symptoms, including physiological (in addition to psychological) symptoms; severe change in career trajectory; severe humiliation and embarrassment; loss of relationships; long-term treatment with a psychologist and/or therapist; psychotropic medication prescriptions; loss of home or other grave personal losses; suicidal ideation and/or attempt.

The compensatory damages allocations will be based upon each person's **total compensatory damages points** as a percentage of the **total class compensatory damages points**. For example, if 100 Class Members provided no information, and the total class compensatory damages points is 300, and Class Member C had 3 total compensatory damages points, then Class Member C will receive 3/300, or 1%, of the net compensatory damages fund. The compensatory damages fund will be $8,150,000 minus the number of Class Members earning 0 compensatory damages points multiplied by $5,000. Therefore, continuing with the example, Class Member C would receive $76,500 as computed by 0.01 x $7,650,000 (*i.e.,* $8,150,000 – [$5,000 x 100 Class Members with 0 compensatory damages points]).

SENSITIVE BUT UNCLASSIFIED

VI. DISTRIBUTION PLAN EXECUTION

Class Counsel has sought repeatedly to communicate with every Class Member during the course of this litigation to obtain information regarding interim earnings and compensatory damages, as well as other information that might have affected that Class Member's individual recovery if class-wide liability had been found and the Class proceeded to individualized *Teamsters* hearings. Class Counsel will make a further attempt to communicate with Class Members prior to settlement approval to receive information, other than from those Class Members who have stated they do not wish to be contacted by Class Counsel.

Based upon the totality of the information Class Counsel has received regarding interim earnings and compensatory damages on or before January 2, 2022, Class Counsel, in consultation with a damages calculation expert, will calculate an **initial minimum damages allocation** for the entire class.

After preliminary settlement approval, the Settlement Administrator will issue the Class Notice, Exhibit 2 to the Settlement Agreement, as approved by the U.S. Equal Employment Opportunity Commission (EEOC) Administrative Judge. The Class Notice will advise Class Members of their **net initial Class Member minimum individual distribution estimates**, which will be, whichever is more: $5,000; or, 50% of the sum of their back pay, lost benefits, and compensatory damages allocations. For example, if Class Member D has allocations of $100,000 each of back pay, lost benefits, and compensatory damages, then that Class Member would receive notice of a minimum allocation of 0.50 x $300,000 = $150,000.

The Settlement Administrator will not include 50% of the total Class Member distribution in the net initial Class Member minimum individual distribution estimates, to be held back as a **reserve fund**. That is, the net initial Class Member distribution estimate will be based upon a presumed settlement fund of $12,225,000 (50% of the total Class Member distribution). The reserve fund will be distributed, as necessary, to Class Members who provide additional, specific information to Class Counsel on interim earnings and/or mitigation efforts and/or emotional distress symptoms prior to the deadline provided in the Class Notice, to the extent such information would entitle them to a greater individual allocation based upon the allocation formulas described above. The reserve fund may also be used to provide a *pro rata* allocation to any late-confirmed Class Member, as described in Section VII, below.

At the conclusion of the notice period described in the Class Notice, the **final Class Member distributions** will be based upon the allocation formula described above, using the total Class Member distribution, except that no Class Members will receive a settlement allocation less than their net initial Class Member minimum individual distribution estimates. The final Class Member distributions are expected to exceed the net initial Class Member minimum individual distribution estimates. In the extremely unlikely event that there are more claims against the reserve fund than the amount of the reserve fund, then the proportional allocations of those making claims against the reserve fund will be reduced *pro rata* to ensure that the reserve fund is exhausted but not exceeded.

SENSITIVE BUT UNCLASSIFIED

After receiving the $37.5 million settlement payment from the Agency into a Qualified Settlement Fund ("the Settlement Fund"), the Settlement Administrator will send the final Class Member distributions according to the timeline provided in the Settlement Agreement in two checks – wage (minus appropriate deductions) and non-wage, as described above – except as to those Class Members who have sought to have a recognized structured settlement vendor to receive their final distribution amount, as described in Section VIII, below.

VII. LATE-CONFIRMED CLASS MEMBERS

If there are individuals who, prior to Final Approval of the Settlement Agreement, notify Class Counsel or the Settlement Administrator that they believe they are part of the Class definition in Section I but were wrongly excluded from Exhibit 1 (the class list), and provide documentation probative of such, they may be added to the Class List by stipulation of the parties' counsel and approval of the Administrative Judge, and receive a *pro rata* share of the settlement fund from the reserve fund.

VIII. STRUCTURED SETTLEMENT OPTION

Some Class Members receiving particularly sizable settlement allocations may elect to have all, part, or none of their awards paid in periodic payments through a structured settlement arrangement, entered into prior to payment of such award. Notwithstanding any term in the Agreement to the contrary, any award to be so structured shall be paid by the Settlement Fund to reputable assignment company(ies) pursuant to assignment and release agreements reasonably acceptable to the Settlement Administrator ("Assignment Agreements"). Pursuant to such Assignment Agreements, Class Members will have no present right to payment of any structured awards that are the subject of Assignment Agreements. Prior to the payment by the Settlement Fund under any Assignment Agreement, any Class Members electing a structured settlement shall indemnify and hold harmless the Settlement Administrator administering the Settlement Fund. The EEOC in the final approval order will be asked to authorize the Settlement Administrator and Settlement Fund to execute documents and take such actions as may be necessary to effectuate the assignment and payment of awards under any Assignment Agreement.

IX. UNEXPENDED MONEY

If any unexpended balance exists in the Settlement Fund after all payments to eligible Class Members, and a second and third *pro rata* allocation, as provided in Section III.D of the Settlement Agreement, and of all tax and other obligations under the Settlement Agreement, then any unexpended balance will be donated to the National Disability Rights Network as the designated *cy pres* recipient.

[END OF DOCUMENT]

THE FIRST AMENDMENT AND PUBLIC EMPLOYEES[1]

Representing Federal and Public Employees Seminar
National Employment Lawyers Association
Denver, Colorado
April 5-6, 2024

Presented by:

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> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."*

That is the entire text of the First Amendment of the Constitution of United States of America. Despite its brevity, there are plenty of misperceptions of what protections it actually offers. To be clear, it only protects against *government* limitations on a citizen's right to freedom of speech, freedom to assemble, etc. The First Amendment does not prohibit private employers, like Twitter/X or Facebook/Meta, from doing so. But, what if your employer is the government? Can a government employer limit its employees' free speech? The short answer is—yes—in some instances.

"[T]he First Amendment bars retaliation for protected speech." Crawford-El v. Britton, 523 U.S. 574, 592 (1998). A government employer may not make forfeiture of First Amendment freedoms a condition of employment. Burns v. Bd. of Cty. Commrs., 330 F.3d 1275, 1285 (10th Cir. 2003); Lytle v. City of Haysville, 138 F.3d 857, 863 (1998) (quoting Connick v. Myers, 461 U.S. 138, 142 ((1983)). However, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (U.S. 2006).

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[1] Many have contributed to these materials. These materials were originally prepared by Don Slesnick, of Law Offices of Slesnick & Casey, LLP and William X. Candela with Miami-Dade County government. They were later updated and revised by Cynthia N. Sass of Sass Law Firm. Big thanks to them! The materials attached are distributed as a service to other interested individuals. The outlines or information herein are provided for informal use only. This material should not be considered legal advice and should not be used as such.

A. Freedom of Speech as it Relates to Public Employees

"Speech" is defined broadly to include spoken complaints, remarks made on social media, emails, etc. See e.g., Hagan v. Quinn, 867 F.3d 816, 823 (7th Cir. 2017) (conversations in the workplace, comments at a press conference, a Facebook® post, or a tweet on Twitter may all be protected speech); Fox v. Hamptons at Metrowest Cond. Ass'n, Inc., 223 So. 3d 453, 457 (Fla DCA 2017) (online speech is equally protected under the First Amendment.); Packingham v. North Carolina, 137 S.Ct. 1730 (2017) (declaring unconstitutional state statute that limited a sex offender's access to social media websites as violative of First Amendment personal liberties because it was not narrowly tailored to serve government interest in protecting children from abuse).

The First Amendment also protects the right not to speak. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 645 (1943) (in invalidating a state law requiring students to salute the American Flag, the Court held that protected speech "includes both the right to speak freely and the right to refrain from speaking at all …."); Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S.Ct. 2448 (2018) (a state statute that required non-union public employees to pay union membership fees unconstitutionally violated employees' First Amendment rights, namely the right to not speak).

Moreover, symbolic, non-verbal, non-written forms of communication may also be protected speech. See e.g., Cohen v. California, 403 U.S. 15 (1971) (holding that wearing a jacket with the words "Fuck the Draft" in public constitutes protected speech); Texas v. Johnson, 491 U.S. 397 (1989) (burning a flag at a political rally is protected speech); John Doe No. 1 v. Reed, 561 U.S. 186 (2010) (signing a petition is protected speech); Bland v. Roberts, 730 F.3d 368 (4th Cir. 2013) ("liking" something on Facebook® is protected speech; Erickson v. City of Topeka, Kan., 209 F.Supp. 2d 1131 (D. Kan. 2002) (policy that effectively prohibited Confederate battle flag vanity plate violated First Amendment); Sandul v. Larion, 119 F.3d 1250 (6th Cir. 1997) (extending a middle finger, or "flipping the bird," is constitutionally protected speech).

However, and as explained further below, there is an additional limitation on such speech in the context of public employment. Specifically, the government can limit such speech if the employee's interest in making the speech is outweighed by the disruptive effects on the employer.

The question of whether the public employee's speech is protected by the First Amendment speech claims is resolved through answering the following questions:

> (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.

Dixon v. Kirkpatrick, 553 F.3d 1294, 1302 (10th Cir. 2009). This test is known as the *Garcetti/Pickering* analysis. The first three elements of the *Garcetti/Pickering* analysis are "issues

of law to be decided by the court; the last two are factual issues to be decided by the factfinder." Id.

1. The First Amendment only protects a public employee who speaks as a "private citizen" about matters of "public concern."

a. When is a Public Employee Speaking as a Private Citizen?

The first case to address whether an employee was speaking as a "private citizen" as opposed to part of his or her "official duties" was the landmark case of Garcetti v. Ceballos, 126 S. Ct. 1951 (2006). In Garcetti, a deputy district attorney alleged that his public employer retaliated against him in violation of the First Amendment. Specifically, Garcetti alleged that his employer retaliated against him because he wrote a memorandum in support of dismissing charges against a defendant because the police affidavit used to obtain a search warrant was factually inaccurate. In rejecting Garcetti's case, the Supreme Court concluded that, because Garcetti wrote the memo as part of his official duties, he was not speaking as a citizen for First Amendment purposes. As such, the First Amendment did not insulate him from discipline.

The Court in Garcetti did not articulate a specific formula for determining when a government employee speaks pursuant to his official duties, but instead announced that the "proper inquiry is a practical one." Id. at 1961. In reaching that conclusion, the Court noted that not all speech that occurs at work is made pursuant to the employee's official duties. Id. at 1959 ("Employees in some cases may receive First Amendment protection for expressions made at work."). Moreover, not all speech about the employee's work is necessarily made pursuant to the employee's official duties. Id. at 1959 ("The First Amendment protects some expressions related to the speaker's job.").

In Lane v. Franks, 134 S.Ct. 2369 (2014), the Supreme Court made clear that a public employee only loses First Amendment protection if her speech is made in the performance of the "ordinary" tasks she was paid to perform. Garcetti, at 422; Lane, at 2379. "[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." Lane, at 2379. Thus, the critical question in determining whether an employee is speaking as a "private citizen" is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties...." Id., at 2373.[3] In light of Lane and Garcetti, courts have "taken a case-by-case approach, looking both to the content of the speech, as well as the employee's chosen audience, to determine whether the speech is made pursuant to an employee's official duties." Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 746 (10th Cir. 2010).

In interpreting Garcetti and Lane, some courts have identified specific factors to assist in the analysis of whether the employee was engaging as a public employee or a private citizen. See Gilbert v. City of Chicopee, 915 F.3d 74 (1st Cir. 2019) (citing Decotis v. Whittemore, 635 F.3d 22 (1st Cir. 2011) ("whether the employee was commissioned or paid to make the speech in question; the subject matter of the speech; whether the speech was made up the chain of command; whether the employee spoke at her place of employment; whether the speech gave objective observers the impression that the employee represented the employer when she spoke (lending it

"official significance"); whether the employee's speech derived from special knowledge obtained during the course of her employment; and whether there is a so-called citizen analogue to the speech.").

There is an academic exception to *Garcetti*. See Porter v. Bd. Of Trs. Of N.C. State Univ., 72 F.4th 573 (4th Cir. 2023), cert denied, 217 L.Ed. 2d 389 (January 22, 2024). In Porter, the Court specifically recognized that *Garcetti* does not apply to "speech by public university faculty members, acting in their official capacity, that is 'related to scholarship or teaching'". Id. Thus, in faculty First Amendment speech cases, the critical determination is whether the speech related to scholarship or teaching. Id.

b. When is a Public Employee Speaking on Matters of Public Concern?

In addition to speaking as a "private citizen," i.e., not pursuant to their official duties, a public employee also has to be speaking about matters of "public concern" in order for their speech to be protected by the First Amendment. The U.S. Supreme Court established this principle in the landmark case, Pickering v. Board of Education, 391 U.S. 563 (1968). Pickering was a public-school teacher who wrote a letter critical of the school board to the editor of a local paper. Specifically, Pickering's letter complained about the board's handling of a bond issue and its allocation of financial resources between the schools' educational and athletic programs. The Court concluded that Pickering's letter raised concerns about the "preferable manner of operating a school system" which is something "that clearly concerns an issue of general public interest." Moreover, his concerns regarding how the board allotted funds is a matter of "legitimate public concern" that is "vital to informed decision-making by the electorate." As Pickering's employment only tangentially involved the subject matter of his speech, and because he spoke to matters of great public concern, the Court determined that the First Amendment protected his speech. Id., at 571-574.

Years after Pickering, the Supreme Court provided further instruction as to what speech constitutes a "matter of public concern." In Connick v. Myers, 461 U.S. 138 (1983), the Court held that to fall within the realm of a "public concern," an employee's speech must relate to a "matter of political, social, or other concern to the community." Id., at 146; see also, Snyder v. Phelps, 562 U.S. 443, 453 (2011) (speech that "is a subject of legitimate news interest …[or] a subject of general interest and of value and concern to the public" is speech involving matter of "public concern."); see also, Marquardt v. Carlton, No. 19-4223, 2020 WL 4811388 (6th Cir. 2020) (speech involving a high profile police shooting intermixed with profane and racially insensitive language, along with regret over not being the one who did the shooting, addressed a matter of public concern, as it generated intense public debate and became a matter of public discussion). In explaining the concept of "public concern," Connick also noted that speech "upon matters only of personal interest" is generally not protected. Connick, 461 U.S. at 147.

While some courts have identified certain types of speech that are by their very nature related to matters of public concern, that inquiry must be undertaken on a case-by-case basis. See e.g. Schrier v. Univ. of Colo., 427 F.3d 1253, 1263 (10th Cir. 2005).

> Although the boundaries of the public concern test are not well defined, Connick provides some guidance. It directs courts to examine the "content, form, and context

> of a given statement, as revealed by the whole record" in assessing whether an employee's speech addresses a matter of public concern. In addition, it notes that the standard for determining whether expression is of public concern is the same standard used to determine whether a common-law action for invasion of privacy is present. That standard is established by our decisions in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975), and Time, Inc. v. Hill, 385 U.S. 374, 387-388, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967). These cases make clear that public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication. The Court has also recognized that certain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be subject to Pickering balancing.

City of San Diego v. Roe, 543 U.S. 77, 83-84 (U.S. 2004) (citations omitted).

Matters of public concern are "those of interest to the community, whether for social, political, or other reasons." Lighton v. Univ. of Utah, 209 F.3d 1213, 1224 (10th Cir. 2000). To determine whether the speech is on a matter of public concern, courts "look to whether the public or the community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a private matter between employer and employee." Lander v. Summit County Sch. Dist., 109 Fed. Appx. 215, 218 (10th Cir. 2004) (citations and quotations omitted).

> As Judge Posner forcefully stated, the protections of the First Amendment are not limited to "matters of transcendent importance, such as the origins of the universe or the merits of constitutional monarchy" but encompass all "matters in which the public might be interested." Dishnow v. Sch. Dist. of Riblake, 77 F.3d 194, 197 (7th Cir. 1996). "That the public was not large, that the issues were not of global significance, and . . . not . . . vital to the survival of Western civilization [does] not place [] speech outside the orbit of [First Amendment] protection." Id.

Lander v. Summit County Sch. Dist., 109 Fed. Appx. 215, 221 (10th Cir. Colo. 2004).

A review of the "whole record" is necessary because "an employee's speech will rarely be entirely private or entirely public," Akins v. Fulton Cty., 420 F.3d 1293, 1304 (11th Cir. 2005), and because the court has "an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1201 (10th Cir. 2007) (quotation omitted). Thus, in reviewing the whole record, courts make a determination whether the "main thrust" of the speech is on a matter of public concern or private concern. Vila v. Padron, 484 F.3d 1334, 1340 (11th Cir. 2007) (community college vice president's statements not made pursuant to official job duties, which raised concerns about the legality of the college's actions, were not protected where main thrust of statements involved matters of personal interest); Mitchell v. Hillsborough Cty., 468 F.3d 1276, 1285 n. 22 (11th Cir. 2006) (even if some portion of the employee's speech were personal in nature, "standing alone" that will not render the speech private where other portions contained matters of public interest); see also, Eisenhour v. Weber

County, 744 F.3d 1220, 1228-1229 (10th Cir. 2014) (when an employee's speech is motivated by both a personal employment dispute and to disclose matters of public concern, the "mixed motive is not fatal to her claim."); Deutsch v. Jordan, 618 F.3d 1093, 1100 (10th Cir. 2010) ("But the speaker's having a highly personal motive for a disclosure does not necessarily mean that the speech is not a matter of public concern."); Wulf v. City of Wichita, 883 F.2d 842, 860 n.26 (10th Cir. 1989) (noting that while speech was "linked to some degree to [the plaintiff's] personal dispute with [the defendant] on and to his dissatisfaction with his transfer to [another] [d]epartment, which he viewed as retaliatory, [the speech also] contain[ed] allegations of public concern").

While courts may consider whether an employee made an effort to communicate his or her concerns publicly, that issue is not dispositive. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415-416 (1979) (the Court noted that "public expression by the employee was not critical" to receive First Amendment protection, and held that First Amendment freedoms are not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."); Bass v. Richards, 308 F.3d 1081, 1089 (10th Cir. 2002) ("Speech not broadcast to the public but made in private to the government employer may still be speech about a matter of public concern."). Nor is whether the public would be interested in the topic of the speech. Rather, the relevant inquiry is "whether the purpose of the speech was to raise issues of public concern." Maggio v. Sipple, 211 F.3d 1346, 1353 (11th Cir. 2000); Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985) (noting that the relevant inquiry requires the court to "look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?").

c. Real World Examples.

The following examples may help provide some guidance:

PROTECTED:

- Kennedy v. Bremmerton Sch. Dist., 142 S.Ct. 2407 (2022): Highschool coach, Joseph Kennedy, fired by the school district for kneeling midfield after games to pray was protected. The lower courts found that it was not protected speech because it was government speech '"because his expression on the field—a location that he only had access to because of his employment – during a time when was generally tasked with communicating with students…"' In reversing the Ninth Circuit, the Supreme Court ruled that Kennedy's speech was private, not public speech and the School District violated his First Amendment free speech rights (as well as free exercise rights).

- Heffernan v. City of Paterson, 136 S.Ct. 1412 (2016): Even if a public employer is mistaken, it cannot intend to retaliate against an employee for engaging in support of a political opponent. Heffernan, a New Jersey police officer, was demoted after transporting a yard sign supporting the mayor's political opponent. At the time, the mayor thought the sign was

Heffernan's. In reversing dismissal of his First Amendment claim, the Supreme Court ruled that "the government's reasoning" for taking retaliatory action is what counts, "even if, as here, the employer makes a factual mistake about the employee's behavior." Id., at 1418.

- Lane v. Franks, 134 S.Ct. 2369 (2014): The First Amendment does protect public employees from retaliation for giving truthful sworn testimony. Lane testified in an FBI case against an elected official fired for engaging in fraudulent behavior. His public employer fired Lane following his testimony. The Supreme Court ruled that the First Amendment "protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities."

- Carollo v. Boria, 833 F.3d 1322 (11th Cir. 2016): City Manager who made reports to law enforcement about alleged violations of campaign finance laws by mayor and vice-mayor spoke as a citizen, and not to his ordinary job duties. Although the employer argued that City Manager Carollo's statements concerning finance laws was "squarely within" the scope of his duties, such duties were at best implied, and thus protected.

- Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.2d 1192, 1205 (10th Cir. 2007): Speech by charter school teachers that took place after hours and off the employer's premises and included ordinary citizens who were not employees was not speech pursuant to those employees' official duties.

- Cook v. Gwinnett Cty. Sch. Dist., 414 F.3d 1313, 1319 (11th Cir. 2005): The First Amendment protects a bus driver's concerns about "the safety of children due to bus overcrowding" and "pre-trip bus inspections" as such concerns were not merely "internal bus driver employment issues."

- Morfin v. Albuquerque Public Schools, 906 F.2d 1434, 1437-1438 (10th Cir. 1990): "[S]peech by a public school employee about a policy or practice which can substantially and detrimentally affect the welfare of the children attending the school constitutes speech on a matter of public concern."

- Wulf v. City of Wichita, 883 F.2d 842, 849-50, 857-58 (10th Cir. 1989): Finding that a police officer's letter to the Kansas Attorney General requesting an investigation of the Wichita Police Department alleging, among other things, sexual harassment of one officer by a supervisor, was found to address matters of public concern.

- Wren v. Spurlock, 798 F.2d 1313, 1317 (10th Cir. 1986): Holding that complaints about sexual harassment of students and teachers were on matters of public concern.

NOT PROTECTED:

- Batz v. City of Sebring, 794 Fed. Appx. 889 (11th Cir. 2019): Batz, the city fire marshal, spoke on a matter of serious public concern, but he spoke "pursuant to his official job duties"—not as a private citizen. After a historical building caught fire, Batz began the process of giving fire code safety violations to the owners of the building—the owners were Batz's supervisor's cronies. When the violations went unresolved, he realized that his supervisor was advising the landowners to not resolve the code violations and wait for bankruptcy and the accompanying automatic stay that would halt the condemnation. When he expressed his belief that his supervisor inappropriately interfered with the condemnation of the dangerous historical building the fire marshal was asked to resign or retire. The court held that even though Batz's speech pertained to matters of public concern, he spoke in his role as a government employee, not a private citizen—and, therefore, was not protected under the First Amendment. Id. at 899.

- King v. Board of County Commissioners, 916 F.3d 1339 (11th Cir. 2019): Dr. Nancy King's job was to determine the physical fitness of potential firefighter applicants. At the same time, a "diversity initiative" was in place. One of the "socially-disadvantaged" was an applicant named "J," who had pulmonary issues preventing him from passing Dr. King's physical examination. The supervisor of the diversity initiative became "unusually [and unnecessarily] involved in J's case," and insisted on J passing the physical exam. J eventually transitioned to the role of a non-firefighter EMT, but the county did not renew Dr. King's contract. Dr. King believes her non-renewal was due to her complaints to the county manager about the supervisor of the diversity initiative program. But because Dr. King's speech was expressed pursuant to her official job duties as an employee and not as a private citizen, her speech was not protected by the First Amendment. King, 916 F.3d at 1345.

- Wagner v. Lee County, 678 Fed. Appx. 913 (11th Cir. 2017): The First Amendment does not protect public employee who works in economic development office for reporting fraudulent activity to auditors where making such reports was expressly within her job duties.

- Boyce v. Andrew, 510 F.3d 1333 (11th Cir. 2007): The First Amendment does not protect social service workers who complain that their caseloads were too high, as the complaints were "matters only of personal interest." Id., at 1345.

- Morgan v. Ford, 6 F.3d 750 (11th Cir. 1993): The First Amendment does not protect employee who spoke on behalf of co-worker who was allegedly being sexually harassed where primary thrust of complaint was to improve her own work environment.

- Graziosi v. City of Greenville, 775 F.3d 731 (5th Cir. 2015): The First Amendment does not protect police officer's statement on Facebook® criticizing department's decision not to pay for gasoline to send officers to funeral of fellow officer because the criticism was not a matter of public concern, but instead involved a dispute over an intra-departmental decision.

- Jackson v. Bd. of Comm'nrs of Housing Auth. of Pritchard, 2018 WL 3715730 (S.D. Ala. Aug. 2, 2018): The First Amendment does not protect public employees from retaliation for giving truthful testimony that is unsworn where it directly related to the job he was hired to perform.

- Reed v. West Virginia State Police, 2016 WL 2970305 (W. Va. 2016): First Amendment did not protect a personal social media post made by a police officer that implied he might commit workplace violence because the thought expressed was a matter of private concern involving his frustration with the way the department put him on leave.

- Fernandez v. Sch. Bd. Of Miami-Dade County, 898 F.3d 1324 (11th Cir. 2018). Holding that the plaintiffs spoke as school officials with specific roles under Florida charter schools' statute and regulations, not as private citizens. Thus, no First Amendment protection. The Court listed "these considerations as relevant in determining whether a public employee spoke pursuant to his official duties: 1) speaking with the objective of advancing official duties; 2) harnessing workplace resources; 3) projecting official authority; 4) heeding official directives; and 5) observing formal workplace hierarchies."

- Cottrell v. Chickasaw City Schs. Bd. of Educ., 307 F.Supp. 3d 1264 (S.D. Ala. 2018). The court concluded that the plaintiffs had failed to demonstrate that the statements were made as a private citizen rather than as a teacher to a person in his chain of command. Plaintiffs also failed to prove that the reports were on a matter of public concern, because they were made privately without obvious expectation of bringing them to public light.

- Alves v. Board of Regents of the University System of Georgia, 804 F.3d 1149 (11th Cir. 2015). The court held that a group of four employees were not protected by the First Amendment's free speech protections when they co-authored a memorandum accusing their first-line supervisor of job deficiencies and poor performance. Because the

employees were not intending to speak on a matter of public concern, the memorandum—an employee grievance—was not afforded free speech protection.

2. The First Amendment only protects employees if their interest in commenting outweighs the potential disruptive effect to the public employer.

In Pickering, the Supreme Court recognized that the government employer has an interest in efficiently providing public services and maintaining good professional relationships within an office. According to the Court, the interest of the employer must be balanced against the interest of the public employee's right to freely comment on matters of public interest. In conducting this balancing and evaluating the employer's interest in limiting employee free speech, courts must consider "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." Rankin v. McPherson, 483 U.S. 378, 388 (1987). An employer can prevail on this balancing by either: (1) showing "actual disruption of services which results from the employee's speech." Finn v. State of N. M., 249 F.3d 1241, 1249 (10th Cir. 2001), quoting Ramirez v. Oklahoma Dept. of Mental Health, 41 F.3d 584, 594 (10th Cir. 1994); or (2) by showing the potential for disruption caused by particular speech, as long as the predictions are supported by specific evidence. Cragg v. City of Osawatomie, 143 F.3d 1343, 1346-47 (10th Cir. 1998).

However, with respect to an employer's "prediction" of disruption, the Tenth Circuit has held that when the fear of disruption does not result in the immediate termination of the employee, the employer must show actual disruption to justify regulating the speech at a later time. See Kent v. Martin, 252 F.3d 1141, 1145-46 (10th Cir. 2001) ("Our cases applying the 'reasonable prediction of disruption' standard have done so in the context of a termination soon after the employee's exercise of speech, when the intent of the termination was to avoid actual disruption."). When sufficient time between the speech and the termination has passed, the employer may satisfy its burden only by showing specific evidence of actual disruption. Id. at 1145-46 ("[The 'reasonable prediction of disruption'] standard is inapplicable when an employer has allowed an employee to continue to work after the protected expression."). Regardless of whether the employer seeks to win on this prong through evidence actual disruption or predicted disruption, it is clear that the disruption must be caused by the employee's speech. Gardetto v. Mason, 100 F.3d 803, 815-16 (10th Cir. 1996) (finding the employee's speech to be protected in the face of "rude and inappropriate conduct that may have interfered" with the employer's operations because that conduct did not involve the speech at issue in the case).

The following examples may help provide some guidance:

- Carr v. Department of Transportation, 230 A.3d 1075 (Pa. May 19, 2020): The Court reversed the lower court, holding that Carr was not protected by the First Amendment. The Court reasoned that the lower court failed to consider that the DOT's interest outweighing the public importance of Carr's speech. Carr was a seasonal clerk for the DOT. In a private Facebook® group, she posted a "rant" while at home and responded to subsequent comments. The post was in reference to the lack of driving skills of the

city's bus drivers. "I end this rant saying I don't give a flying shit about those babies and I will gladly smash into a school bus[.]" Members of the group took pictures of the post and her comments, asking the DOT to act. In light of the post's limited public importance coupled with the Facebook® post's detrimental effect on the DOT, the Court held that Carr was not protected by the First Amendment.

- Moss v. City of Pembroke Pines, 782 F.3d 613 (11th Cir. 2015): The First Amendment does not protect the assistant fire chief from criticizing the city's handling of budget and pension issues; budget and pension issues were divisive topics among city employees, and many employees disagreed vehemently as to whether to take a pay cut or agree to pension concession. [Cited as good authority by the Court this year in Rabon v. Roberts, Sheriff of Jackson County, No. 18-11227, Docket No. 5:17-cv-00024-RH-GRJ, May 9, 2019 (Appeal from the North. Dist. of Fla.)]

- Morris v. Crow, 117 F.3d 449, 458 (11th Cir. 1997): The government's interest outweighed the employee's right to free speech where the manner in which the employee expressed her message was disrespectful and rude.

- Belyeu v. Coosa Cnty. Bd. of Educ., 998 F.2d 925, 929-30 (11th Cir. 1993): Teacher's aide's speech at a PTA meeting about the school's failure to have a commemoration for Black History Month conducted in a polite manner did not disrupt racial harmony at the school. Therefore, the school's interest in reducing racial animosity did not outweigh the employee's right to free speech.

- Cowell v. Fuller, 362 So. 2d 124, 129 (Fla. 3d DCA 1978): Government interests in limiting speech outweigh employee's interest in making anti-Semitic remarks where such remarks disrupt the workplace.

B. Freedom of Speech as it Relates to Unions

In 2018, the U.S. Supreme Court issued a landmark decision ruling that adversely affects union membership. In Janus v. American Federation of State, County, and Municipal Employees, 138 S.Ct. 2448 (2018), the Court considered an Illinois statute that authorized the state to charge "agency or fair share fees" to public employees who chose not to joint a union. The historical premise behind such fees was to cover the benefits that the union provides to all employees, such as grievance procedures. Janus argued that the statute violated his First Amendment rights because it compelled him to speak through the union. The Supreme Court agreed, and ruled that public employers cannot deduct such fees from the wages of non-union members without their consent. In short, the Court ruled that requiring such fees without consent violated the free speech rights of non-members by compelling them to subsidize private speech on matters of public concern.

Since Janus, the Middle District of Florida has asked whether the Pickering balancing test applies to compelled speech. The court refused to carve out a special exception for compelled speech and announced that it will continue to apply the Pickering test to compelled speech. Gwinnett v. Southwest Florida Regional Planning Council, 407 F.Supp. 3d 1273 (M.D. Fla. Sept. 16, 2019) (holding that an employee's refusal to discuss with supervisor the sexual assault of co-

worker, who confided in employee, was not protected by First Amendment because it related to a private matter unrelated to work).

C. Freedom of Association as it Relates to Public Employees

In addition to freedom of speech, the First Amendment also protects public sector employees' right to be free from discrimination based on their political affiliations or associations. Ezell v. Wynn, 802 F.3d 1217, 1222 (11th Cir. 2015). As the Supreme Court instructed in NAACP v. Alabama, 357 U.S. 449, 460 (1958), "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

"The First Amendment protects public employees from discrimination based upon their political beliefs, affiliation, or non-affiliation unless their work requires political allegiance." Mason v. Oklahoma Turnpike Auth., 115 F.3d 1442, 1451 (10th Cir. 1997). In order to establish his First Amendment political discrimination claim, an employee must prove that: (1) his political affiliation and/or beliefs were a 'substantial' or 'motivating' factor behind his dismissal; and (2) his position did not require political allegiance. Jantzen v. Hawkins, 188 F.3d 1247, 1251 (10th Cir. 1999). "Once a plaintiff proves political patronage was a substantial or motivating factor behind his dismissal, the burden of persuasion shifts to the defendant to prove, as an affirmative defense, that the discharge would have occurred regardless of any discriminatory political motivation." Gann v. Cline, 519 F.3d 1090, 1093 (10th Cir. 2008).

There is an exception, however, for those holding certain positions, such as politically oriented positions, for which party affiliation is integral to performance of the job. This is known as the Elrod-Branti exception. See Elrod v. Burns, 427 U.S. 347 (1976) and Branti v. Finkel, 445 U.S. 507 (1980). In Branti, the Supreme Court clarified that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position [but whether] the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Id., at 518.

To determine whether the Elrod-Brant standard is met, the Eleventh Circuit uses a "categorical approach" to determine whether the employee has the same statutory powers and duties as the elected official. Id., at 1225. If the employee has the same duties and powers, she will be deemed the elected official's "alter ego," and thus is not protected by the First Amendment. Id.; see Underwood v. Harkins, 698 F.3d 1335, 1345 (11th Cir. 2012) (deputy superior court clerk was alter ego of Georgia superior clerk and thus not subject to First Amendment protections from running against her boss). If not the "alter-ego" of the elected official, courts will then make a determination whether, as a factual matter, the effectiveness of the employee's position requires political loyalty. Ezell, at 1224-25. Also, the seminal Eleventh Circuit case Terry v. Cook, 866 F.2d 373 (11th Cir. 1989) is cited by the Court this year, and the panel included two famous South Florida judges: C. Clyde Atkins and Peter Fay.

The following examples may help provide some guidance:

- Jones v. Lamkin, 2019 WL 3183635, at *1 (11th Cir. 2019): First Amendment did not protect deputy marshals from retaliation for supporting elected marshal's

opponent. The court found that the deputy marshals were just alter egos of the marshal since they had the same job duties and responsibilities under the law.

- Epps v. Watson, 492 F.3d 1240 (11th Cir. 2007): A former employee contended that her employment was terminated because she supported a political opponent of her employer (the county tax collector) and allowed the opponent to display campaign signage on her personal property. Epps was fired the day after her supervisor was re-elected. The court ruled that, as an entry level tax clerk, Epps did not fall within the policymaking exception to freedom of association claims and allowed Epps to proceed on those claims.

- Bogart v. Vermilion Cty., 909 F.3d 210 (7th Cir. 2018): First Amendment did not protect financial resources director of county, as it was effectively a cabinet-level position, which required duties such as planning, organizing and directing accounting activities, establishing fiscal control procedures, etc.

- Lawson v. Union Cty. Clerk of Court, 828 F.3d 239, 250 (4th Cir. 2016): Employee, who ran against supervisor in the opposing partisan position engaged in protected speech, since the political ideology of the employee, whose work involved primarily administrative and ministerial tasks such as record keeping, would not affect the manner in which she performed her job. However, the employee's other negative remarks about her employment and colleagues during her campaign were not protected and could support employer's reason for termination because it could cause significant disruption in the workplace.

D. Freedom to Petition the Government as it Relates to Public Employees

In addition to freedom of speech and association, the First Amendment also protects an individual's right to petition the government to seek redress of grievances. "[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." Borough of Duryea v. Guarnieri, 564 U.S. 379, 387. In light of this protection, a public employee has an inherent right to file a grievance without fear of retribution. However, like freedom of speech, the First Amendment only protects an employee's petition if it relates to a matter of "public concern." Id., at 398.

Guarnieri was employed as Chief of Police in a small town in Northern Pennsylvania. After he was fired, he filed a union grievance challenging his termination. His grievance proceeded to arbitration and he was ultimately reinstated. Following his reinstatement, Guarnieri alleged that he suffered a series of retaliatory acts. Guarnieri filed suit, alleging that his grievance was a "petition" protected by the First Amendment, and that the retaliatory acts he suffered violated the constitution. After he filed his lawsuit, Guarnieri contended he suffered further retaliation when he was denied overtime payment. Guarnieri amended his suit to allege that, like his grievance, his lawsuit was also a "petition" from which he suffered retaliation.

In considering Guarnieri's claim, the Supreme Court reasoned that the "public concern" test also applies to Petition Clause claims. Moreover, because petitions, like speech, can interfere

with the efficient operation of the government, the balancing test between the petitioner's First Amendment rights must be balanced against the government employer's interest in operating effectively.

E. Freedom of Association

The U.S. Supreme Court "has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—Speech, Assembly, Petition for the Redress of Grievances, and the Exercise of Religion." Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984). This right to associate is typically referred to as "the instrumental right of freedom of association for the purpose of engaging in speech …" Merrifield v. Bd. of Cty. Comm'rs of Santa Fe, 654 F.3d 1073, 1080 (10th Cir. 2011).

To state a claim for retaliation in violation of the freedom of association, a plaintiff must allege that: "(1) his First Amendment activity involved a matter of public concern; (2) his interests in the protected activity outweighed the employer's interest in regulating it; and (3) the protected activity was a substantial motivating factor in the employer's decision to take adverse action against him." Cillo v. City of Greenwood Village, 739 F.3d 451, 460-61 (10th Cir. 2013). To establish this type of freedom of association claim, a plaintiff need only allege that the association with another was for the purpose of engaging in First Amendment conduct. Owens v. Rush, 654 F.2d 1370,1378-1379 (10th Cir. 1981) (support for wife's discrimination charge by accompanying her to attorney's office and helping draft charge was protected association despite husband not speaking out).

F. Proving a First Amendment Retaliation Claim in Public Sector Employment

First Amendment retaliation claims are brought pursuant to 42 U.S.C. § 1983. Plaintiffs can bring actions for violations of their First Amendment rights against public entities or individuals. Traditional liability principles based on *respondent superior* do not apply when suing a public entity under 42 U.S.C. § 1983. Monell v. Dept. of Social Services, 436 U.S. 658, 690-91 (1978). Instead, Plaintiffs establish public entity liability under § 1983 by showing the existence of an official policy or custom and a direct causal link between the policy or custom and the constitutional violation. Bryson v. City of Okla. City, 627 F.3d 784, 788 (10th Cir. 2010). An official policy or custom is established by showing: (1) a formal regulation or policy, (2) an informal custom that is so widespread it amounts to a custom or usage with the force of law, (3) a decision of an employee with final policymaking authority, (4) the policymakers' ratification of their subordinates' actions, or (5) a failure to adequately train or supervise employees, so long as the failure results from deliberate indifference to constitutional injuries that may be caused. Id.

When government officials personally participate in the violation of an employee's First Amendment rights, the employee may sue those government officials in their individual capacities. See e.g. Dodds v. Richardson, 614 F.3d 1185 (10th Cir. 2010). However, individuals sued for constitutional violations under 42 U.S.C. § 1983 often claim to be protected from liability by qualified immunity (discussed in more detail below).

1. Elements of a First Amendment Retaliation Claim

Proof of a public employee's First Amendment retaliation claim is governed by the Garcetti/Pickering analysis:

> (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.

Dixon v. Kirkpatrick, 553 F.3d 1294, 1302 (10th Cir. 2009). The first three elements of the Garcetti/Pickering analysis are "issues of law to be decided by the court; the last two are factual issues to be decided by the factfinder." Id.; see also, Moss v. City of Pembroke Pines, 782 F.3d 613, 617–18 (11th Cir. 2015); Bd. of Regents of State v. Snyder, 826 So. 2d 382, 388–89 (Fla. 2d DCA 2002).

The fourth prong of the Garcetti/Pickering analysis addresses causation, which in First Amendment retaliation cases, is established under the "motivating factor" standard. Under this standard:

> the employee has the initial burden of establishing causation-that is, to show the exercise of constitutionally protected speech was a substantial motivating factor in the employer's decision to adversely alter the employee's conditions of employment. What constitutes a substantial motivating factor evades precise definition. An employee "need not prove his speech was the sole reason for defendants' action." Copp v. Unified School Dist., 882 F.2d 1547, 1554 (10th Cir. 1989). Nor is the employee required to show "but-for" causation; that is, to demonstrate but-for the employee's speech the subsequent employment action would not have occurred. See Spiegla v. Hull, 371 F.3d 928, 941-43 (7th Cir. 2004). Rather, the employee must show the protected speech played a substantial part in the employer's decision to adversely alter the employee's conditions of employment. See Anderer v. Jones, 385 F.3d 1043, 1052 n.14 (7th Cir. 2004); Quinn v. Monroe County, 330 F.3d 1320, 1329 n.10 (11th Cir. 2003); Ostad v. Oregon Health Sciences Univ., 327 F.3d 876, 885 (9th Cir. 2003); Davis v. Goord, 320 F.3d 346, 354 (2d Cir. 2003); Suppan v. Dadonna, 203 F.3d 228, 236 (3d Cir. 2000).

Maestas v. Segura, 416 F.3d 1182, 1188 (10th Cir. 2005). In First Amendment jurisprudence, a 'substantial factor' and a 'motivating factor' share the same meaning. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

Although some lower courts have characterized a "substantial motivating factor" as a term that "evades precise definition," see Maestas v. Segura, 416 F.3d at 188, the U.S. Supreme Court

has provided some guidance for defining "motivating factor" in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), a Title VII case. In defining "motivating factor" in Price Waterhouse, the Supreme Court held that "if an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision." Id. at 248. The Price Waterhouse decision also looked to NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), another case applying the motivating factor causation standard, in which the Supreme Court determined that an employee's union activity was a motivating factor in his termination when "the only evidence in that case that a discriminatory motive contributed to the plaintiff's discharge was that the employer harbored a grudge toward the plaintiff on account of his union activity." Price Waterhouse v. Hopkins, 490 U.S. at 257. Thus, proof that an employee's First Amendment activity played a part in an adverse action will establish the causation prong.

If the court determines the first three Garcetti/Pickering prongs in the employee's favor, and the employee proves that the First Amendment activity was a motivating factor for the adverse action, the employer has the opportunity to assert the "same decision" affirmative defense. Mount Healthy School Dist. v. Doyle, 429 U.S. 274, 287 (1977) (holding that if the plaintiff satisfies their burden of proof regarding the employer's motivation, the employer can still prevail if it shows by a preponderance of the evidence that it would have made the same decision regardless of the protected speech."). However, the "same decision" defense is an affirmative defense. Meyers v. E. Okla. County Tech. Ctr., 776 F.3d 1201, 1206 (10th Cir. 2015) ("The fifth prong involves an affirmative defense, and the defendants bear the burden of proof.").

2. What is an "Adverse Action" for Purposes of a First Amendment Retaliation Claim?

In Rutan v. Republican Party, a political affiliation case, the Supreme Court stated, in a footnote, that the First Amendment "protects state employees not only from patronage dismissals but also from even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." Rutan v. Republican Party, 497 U.S. 62, 75 n.8, 110 S. Ct. 2729, 2737 (1990) (quotation omitted). Despite that broad pronouncement, there has been a split among the circuit courts of appeal about what constitutes an adverse action in First Amendment retaliation cases. See Elizabeth J. Bohn, Put on Your Coat, a Chill Wind Blows: Embracing the Expansion of the Adverse Employment Action Factor in Tenth Circuit First Amendment Retaliation Claims, 83 Denv. U. L. Rev. 867 (2006).

However, in 2006, the Supreme Court decided Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006), which broadly redefined the definition of "adverse action" in the context of Title VII claims to include any action that "well might have dissuaded a reasonable worker" from engaging in protected activity. Id., at 68. Several circuits and district courts have adopted the Burlington standard in First Amendment retaliation cases or have been using similar standards. See. e.g., Rutan v. Republican Party, 497 U.S. 62, 73, 110 (1990) (reasoning that an employee is adversely affected when they are placed in a "dead-end" position because of their political background); Couch v. Bd. of Trustees of Mem'l Hosp. of Carbon Cnty., 587 F.3d 1223, 1237-38 (10th Cir. 2009) (adopting Burlington standard); Matrisciano v. Randle, 569 F.3d 723, 730 (7th Cir. 2009) (employee must establish that "he suffered a deprivation likely to deter free speech"), *abrogation on other grounds recognized in* Fairley v. Andrews, 578 F.3d 518, 525–26

(7th Cir. 2009); Zelnik v. Fashion Inst. of Tech., 464 F.3d 217, 227 (2d Cir. 2006) (adopting Burlington standard); Nair v. Oakland County Cmty. Mental Health Auth., 443 F.3d 469, 478 (6th Cir. 2006) (adverse action means "an injury that would likely chill a person of ordinary firmness from continuing to engage in [the protected] activity"); Nash-Utterback v. Sch. Bd. of Palm Beach Cty., WL 12865852, at *15 (S.D. Fla. June 8, 2012) (adopting Burlington standard); Tatroe v. Cobb County, Ga., No. 04–CV–1074, 2008 WL 361010, at *6 (N.D. Ga. 2008) (same); Sharp v. City of Palatka, 529 F.Supp. 2d 1371, 1375–1376 (M.D. Fla. 2006) (same); But see Akins v. Fulton County, Ga., 420 F.3d 1293, 1300–01 & n. 2 (11th Cir. 2005) (action must tend to chill free speech and alter some important condition of employment to be adverse; but also observing that the First Amendment and Title VII standards are "consonant").

3. Timing to Bring a Claim

The time limit for federal employee claims of First Amendment retaliation depends on the administrative remedies available. If the employee has a right to appeal internally, for example, through the Merit System Protection Board (MSPB), then he does not have the right to sue in court. Typically, the time limit for MSPB appeals is 30 days, but one should confirm specific time limits applicable to the specific employee and jurisdiction.

Congress did not specify the length of the statute of limitations to be applied to 42 U.S.C. § 1983 actions. Blake v. Dickason, 997 F.2d 749, 750 (10th Cir. 1993). Thus, "federal law borrows the most analogous state statute of limitations." Wilson v. Garcia, 471 U.S. 261, 263-64 (1985). The limitations period for a § 1983 claim is "that which the State provides for personal-injury torts." Wallace v. Kato, 549 U.S. 384, 387 (2007). Accordingly, the time limit for state and local employees' claims of First Amendment retaliation varies from state to state, depending on the time limit for personal injury claims where the court is located. In California and Colorado, for example, the statute of limitations is two years. Cal. Civ. Proc. Code § 335.1; Jones v. Price, 2022 U.S. Dist. LEXIS 97735 (E.D. Cal. Jun. 1, 2022); See C.R.S. § 13-80-102. As another example, in Florida, the personal injury statute of limitations originally was four years; however, for any cause of action that accrues after March 24, 2023, the statute of limitations was reduced to two years from when the cause of action accrued. Compare Ellison v. Lester, 275 Fed. App'x 900, 901 (11th Cir. 2008) and Fla. Stat. § 95.11(4)(a).

4. Remedies Available

A broad range of damages, including back pay, front pay, and compensatory damages, are available against local public entities. See e.g., Batista v. Weir, 340 F.2d 74, 86 (3rd Cir. 1965) (damages in a Section 1983 action are based on federal common law); Carey v. Piphus, 435 U.S. 247 (1978) (federal common law provides for a broad range of damages, including emotional distress).

Employees may also sue state or other public officials in their individual capacities, and recover compensatory and punitive damages. City of Newport v. Fact Concerts, 452 U.S. 247 (1981) (government organizations are typically immune from punitive damages).

Attorney fees are also recoverable. 42 U.S.C. §1988; Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res., 532 U.S. 598, 601 (2001).

5. Immunity Issues

Various issues concerning governmental immunity or qualified immunity often arise when litigating constitutional claims against public entities or public officials. The two most common immunity issues involve state sovereign immunity under the Eleventh Amendment and qualified immunity for public officials sued in their individual capacities.

a. State Sovereign Immunity

The Supreme Court has repeatedly held that the structure of the Constitution and the meaning of the Eleventh Amendment provide states with sovereign immunity from private suits for damages in federal court without the state's consent. Alden v. Maine, 527 U.S. 706, 712 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996). While those holding establish that Congress does not have the authority to abrogate the states' sovereign immunity under Article I of the Constitution, § 5 of the Fourteenth Amendment does grant Congress the power to pass laws intended to enforce the guarantees of the Fourteenth Amendment. City of Boerne v. Flores, 521 U.S. 507, 517 (1997).

Based on those principles, the Supreme Court has held that 42 U.S.C. §1983 does not abrogate Eleventh Amendment immunity of state governments, Quern v. Jordan, 440 U.S. 332, 345 (1979), and that neither a state nor a state official in his official capacity is a "person" for purposes of a §1983 damages action. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).

Only the states are the beneficiaries of the Eleventh Amendment. Bd. of Trs. v. Garrett, 531 U.S. 356, 369, 121 S. Ct. 955, 965 (2001). Accordingly, immunity is only available to the state itself, and not to local governments that are not arms of the state. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Sturdevant v. Paulsen, 218 F.3d 1160, 1164 (10th Cir. 2000) ("In interpreting Mt. Healthy, we have explained that "the arm-of-the-state doctrine bestows immunity on entities created by state governments that operate as alter egos or instrumentalities of the states.").

To determine if a public entity is an "arm of the state," courts analyze "the 'nature of the entity created by state law.' If a state entity is more like a political subdivision -- such as a county or city -- than it is like an instrumentality of the state, that entity is not entitled to Eleventh Amendment immunity." Steadfast Ins. Co. v. Agric. Ins. Co., 507 F.3d 1250, 1253 (10th Cir. 2007) (citations omitted). The Tenth Circuit looks at "four primary factors" to determine if a public entity is an "arm of the state": (1) "the character ascribed to the entity under state law," that is, whether state law defines the entity as a state agency; (2) "the autonomy accorded the entity under state law" which "hinges upon the degree of control the state exercises over the entity;" (3) "the amount of state funding the entity receives and consider whether the entity has the ability to issue bonds or levy taxes on its own behalf;" and (4) "whether the entity in question is concerned primarily with local or state affairs." Id. (citations omitted). In addition to being necessary for determining Eleventh Amendment immunity, the "arm of the state" analysis is helpful for

determining which local government units are considered "persons" for §1983 purposes. Monell v. Department of Social Services, 436 U.S. 658, 690 n.54 (1978).

A plaintiff may avoid Eleventh Amendment immunity under the *Ex parte Young* doctrine which permits suits for injunctive relief against state officers acting in their official capacity. Ex parte Young, 29 U.S. 123, 159 (1908). However, this is a very narrow exception to immunity that applies only when the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief. Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1166 (10th Cir. 2012). Claims for reinstatement of employment are proper claims for prospective relief under *Ex parte Young*. Meiners v. Univ. of Kan., 359 F.3d 1222, 1232-1233 (10th Cir. 2004) (finding reinstatement to be a form of prospective equitable relief that was permitted under Ex parte Young in a §1983 due process case).

b. Qualified Immunity

When applicable, qualified immunity protects government officials from being subjected to the burdens of discovery and trial. Harlow v. Fitzgerald, 457 U.S. 800, 818 (U.S. 1982). Qualified immunity is a defense for government officials sued in their individual capacities. In Harlow, the Supreme Court also acknowledged the long-standing principle that the defense of qualified immunity is inapplicable when an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff." Harlow v. Fitzgerald, 457 U.S. at 815 (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

The qualified immunity defense consists of two prongs: first, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Saucier v. Katz, 121 S. Ct. 2151, 2156 (2001); and second "is to ask whether the right was clearly established" at the time the defendant violated the constitutional right. Id. The order in which those two prongs must be addressed is at the discretion of the Court. Pearson v. Callahan, 555 U.S. 223, 235 (2009). For a right to be clearly established for purposes of qualified immunity:

> the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987); see also Mullenix v. Luna, 577 U.S. 7, 11 (2015) ("[a] clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.").

Traditionally, to satisfy that standard, "the plaintiff must show there is a 'Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" Doe v. Woodard, 912 F.3d 1278, 1289

(10th Cir. 2019). Recently though, the Supreme Court found that, if under the particular circumstances of the case, no reasonable officer could conclude that their conduct was "constitutionally permissible" pursuant to "a general constitutional rule already identified in the decisional law," then a Court cannot grant qualified immunity in that scenario. Taylor v. Riojas, 141 S. Ct. 52, 53 (2020); Routt v. Howry, 835 Fed. Appx. 379, 382 (10th Cir. 2020) (In reliance upon Taylor, holding that, "'A general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful,' if it 'gives fair and clear warning' that the conduct violates the plaintiff's rights.").

Because the determination of an employee's First Amendment retaliation claim requires an individual case-by-case analysis, there can be difficulty in also showing that law was clearly established to defeat qualified immunity. See Melton v. City of Okla. City, 879 F.2d 706, 727-730 (10th Cir. 1989) (reviewing differing ways of reconciling the Pickering balancing with qualified immunity). Recognizing that difficulty, the Tenth Circuit has stated that the proper inquiry in First Amendment retaliation cases ask: At the time the events took place, was the protected nature of the employee's speech sufficiently clear that the individual defendant should have been reasonably on notice that taking adverse action against the employee for that speech would not survive a balancing inquiry? See Melton v. City of Okla. City, 879 F.2d 706, 729 (10th Cir. 1989).

G. Other State Law Considerations

Depending on the jurisdiction, there may be additional causes of action under state law and/or state constitutions from retaliation for engaging in free speech or association. It is important to check your specific jurisdiction.

H. Additional Limitations on Federal Employees via the Hatch Act

Recently, the Hatch Act made numerous headlines when the Office of Special Counsel recommended in June 2019 that President Trump terminate Kellyanne Conway for her repeated violations of the Act. The Hatch Act (or the "Act to Prevent Pernicious Political Activities") prohibits federal employees from endorsing political candidates or otherwise affecting the result of an election. 5 U.S.C. §7323(a)(1). For example, federal employees cannot, while on duty, display partisan buttons or other items that show support for or opposition to a political party. Challenges to the law on the basis that it violates the First Amendment rights of public employees have been rejected by the Supreme Court. United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75 (1947).

Although the Act expressly applies to federal employees, state and local government employees may also be bound by the Act if they work in connection with the federal government.

I. Other Protections

Most public employees have other protections available to them beyond the First Amendment. For example, employees belonging to a union are typically protected from termination without a showing of "just cause." Indeed, for public employees, Article 1, Section 62 of the Florida Constitution embodies the fundamental constitutional right for such employees to

unionize and bargain collectively. Dade County Classroom Teachers Association v. Ryan, 225 So. 2d 903, 905 (Fla. 1969) ("with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees."). Likewise, many state and local governments have civil services laws that grant employees a hearing on whether termination or other discipline is appropriate. Finally, there are several whistleblower laws at the state and federal level that public employees to which they may avail themselves.

J. The Era of Public Employees and Electronic Speech on the World-Wide Web

For an in-depth look at this evolving topic, check out *Managing Public Employee Speech in the Age of Social Media – Instituting Policies Regulating Public Employee Conduct While Balancing Access to the 'Democratic Forums of the Internet'* by Roxana M. Underwood, Illinois Public Employee Relations Report, Vol. 35, No. 4, at https://scholarship.kentlaw.iit.edu/iperr/107/.

K. Third-Party Associational Retaliation

Public employees can also face challenges with First Amendment retaliation taken against them for the protected speech of an associated third party. An example of this would be an employee being fired for their mother speaking out against the actions of the public employee. Here, the employee could attempt to sue their employer as a third party to their mother.

1. Courts are divided on whether a third party has standing to sue for retaliation under the First Amendment

- Nailon v. University of Cincinnati, 715 Fed. Appx. 509 (6th Cir. 2017) (unpublished) (holding that an aunt was protected from retaliation based on the protected activity of her student niece).

- Reed v. Neiheisel, No. 2:15-cv-57, 2015 WL 4249130 (W.D. Mich. July 13, 2015) (declining to extend third-party retaliation claim under First Amendment/42 U.S.C. §1983), *compare* Benison v. Ross, 765 F.3d 649 (6th Cir. 2014) (because employer did not dispute standing to sue, court assumed that plaintiff can bring a third-party retaliation claim under the First Amendment based on the protected activity of the plaintiff's spouse).

- Matus v. Lorain Cnty. Gen. Health Dist., 1:13-cv-1029, 2016 WL 194238 (N.D. Ohio Jan. 15, 2016) (assuming that doctor's First Amendment third-party retaliation claim can proceed under §1983, but reasoning that where claim is based upon protected speech by plaintiff's brother-in-law, plaintiff has not proven to be within the "zone of interest" described by the Supreme Court in Thompson).

- Lewis v. Eufaula City Bd. Of Educ., 922 F.Supp. 2d 1291 (M.D.

Ala. 2012) (ruling that "a reasonable government official would know that he would violate the First Amendment's core protections if he retaliated against an employee for her own free speech. Knowing as much, it is clear that no reasonable official could think that he would be free to retaliate against an employee for her relationship or association with her father and his exercise of free speech").

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FLRA Jurisdiction over State National Guards:

- *U.S. DOD, Ohio Nat'l Guard*, 71 FLRA 829 (2020) (Member Abbott concurring; Chairman Kiko dissenting): An FLRA administrative law judge (the Judge) found that the FLRA had jurisdiction over the Respondent and that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute when it: (1) issued written communications to the Union and bargaining-unit employees (technicians) stating that it was not bound by the Federal Service Labor-Management Relations Statute (the Statute) or the parties' expired collective-bargaining agreement (CBA); (2) refused to comply with the CBA's mandatory terms; and (3) unilaterally implemented new dues-allotment and merit-promotion policies. On exceptions, the Authority found the Judge committed no prejudicial errors in his factual findings or legal conclusions. Thus, the Authority adopted the Judge's findings, conclusions, and recommended order and denied the Respondent's exceptions.
- *Ohio Adjutant General's Dep't v. FLRA*, 21 F.4th 401 (6th Cir. 2021)**:** The Ohio National Guard appealed the Authority's decision to the U.S. Court of Appeals for the Sixth Circuit (the Court). As relevant here, the Ohio National Guard argued the FLRA did not have jurisdiction over it because the Ohio National Guard is not an "executive agency" under the Statute. The Court – citing its own precedent and that of other circuits – found the Ohio National Guard was a "federal executive agency" under the Statute because state national guards, "in their capacity as employers of dual-status technicians who receive 'the benefits and rights generally provided for federal employees in the civil service,' . . . are executive agencies." Therefore, the Court found that the FLRA has jurisdiction over the Ohio National Guard with respect to labor-relations issues under the Statute.
- *Ohio Adjutant General's Dep't v. FLRA*, 598 U.S. 449 (2023): Affirmed the Sixth Circuit. The FLRA had jurisdiction because a State National Guard acts as a federal agency for purposes of the Statute when it hires and supervises dual-status technicians in their civilian role. In reaching its conclusion, the Court found: (1) the Statute defines "agency" to include the Department of Defense; (2) each dual-status "technician ... is an employee of the Department of the Army or the Department of the Air Force[;]" (3) those Departments, in turn, are components of the Department of Defense; and (4) Components of covered agencies plainly fall within the reach of the Statute.

Continuance Clauses:

- *USDA, Off. of the Gen. Couns.*, 71 FLRA 986 (2020) (*USDA*) (Member DuBester dissenting): The Authority issued a general statement of policy or guidance. Specifically, the Authority held that when – as a result of one or both parties seeking to renegotiate an existing CBA – a continuance provision extends the CBA's operation beyond the originally established, concrete expiration date, the first day of the

extension period that is beyond the original expiration date marks the beginning of a new term for the agreement under §§ 7114(c) and 7116(a)(7) of the Statute. As a result, the Authority held that, on that first day of the extension, all government-wide regulations that became effective during the previous term of the CBA will, where applicable, govern the parties immediately by operation of law, and the thirty-day period for agency-head review will begin.

- *NTEU v. FLRA*, 45 F.4th 121 (D.C. Cir. 2022) (*NTEU*): On appeal, the U.S. Court of Appeals for the D.C. Circuit (the Court) found the policy statement in *USDA* to be arbitrary and capricious. The Court noted that "a continuance clause allows either party to extend the duration of an expiring agreement until its successor is in place." Further, the Court noted that § 7114(c) of the Statute permits agency-head review of an agreement only "30 days from the date the agreement is executed." While the Statute does not define the term "executed," the Court noted that "a written agreement is executed when the parties complete the formalities necessary to bring the agreement into its final, legally enforceable form." The Court held that "an agreement with a continuance clause is simply a contract that expires on the later of a date certain or the adoption of a successor agreement." Therefore, the Court determined that "neither the invocation nor the operation of a continuance clause executes a new agreement." Next, the Court noted that § 7116(a)(7) of the Statute forbids agencies from enforcing most regulations that conflict with a collective-bargaining agreement that was in effect before the regulation issued. While the Authority maintained that that the phrase "in effect" is ambiguous because the terms of expired agreements sometimes have legal force, the court concluded that "an extended contract is the same 'agreement' that was 'in effect' before the extension. And so long as it remains in effect, the employing agency may not enforce new regulations that conflict with it."

Classification:

- *AFGE, Nat'l Council of HUD Locs., Council 222, AFL-CIO v. FLRA*, No. 22-5308 (D.C. Cir.):
  - In *U.S. Dep't of HUD*, 70 FLRA 605 (2018) (Member DuBester dissenting), the Authority vacated seven prior decisions and numerous arbitration awards on the ground that the grievance concerned classification and was, therefore, barred by § 7121(c)(5) of the Statute.
  - In *AFGE, Nat'l Council of HUD Locs., Council 222, AFL-CIO v. FLRA*, No. 19-cv-00998 (D.D.C.), the Authority moved to dismiss the case for lack of District Court jurisdiction. The Court granted the Authority's motion to dismiss all claims except a *Leedom v. Kyne* claim. On the *Leedom* claim, the District Court found that preclusion of judicial review under the Statute was implied rather than express, which allowed the District Court to exercise jurisdiction over the case. After further briefing, the Court granted the Union's motion for summary judgment on that claim. The District Court found the Authority exceeded its delegated powers when it vacated the arbitration awards that were not before it on exceptions.

- The Authority appealed to the D.C. Circuit, and oral arguments were held on 11/6/23.

Petitions to Amend Rules:

- 87 Fed. Reg. 78014 (MC-0033) (Member Kiko dissenting):
- Background: Section 7115(a) of the Statute provides, in pertinent part, that voluntary dues assignments "may not be revoked for a period of 1 year." Starting in 1981, the Authority found that § 7115(a) allows employees to revoke voluntary dues assignments only at one-year intervals. *See U.S. Army, U.S. Army Material Development & Readiness Command*, 7 FLRA 194 (1981) (*Army*), *recons. denied*, 8 FLRA 806 (1982). In 2020, the Authority issued a policy statement in *OPM*, 71 FLRA 571. There, the Authority reversed precedent and found that § 7115(a) addresses revocations of dues assignments only during the *first* year of an assignment – and that, after the first year, employees should be permitted to revoke their voluntary dues assignments at any time. Subsequently, the Authority promulgated 5 C.F.R § 2429.19, which states that an employee may initiate the revocation of a dues assignment pursuant to § 7115(a) of the Statute any time after the expiration of an initial one-year period following the dues assignment.
- Petition for Rulemaking: NTEU filed a petition with the Authority to amend § 2429.19 to provide dues revocations only at one-year intervals. NTEU contended that § 7115(a)'s legislative history requires the Authority to return to the rule that *Army* established – that voluntary due revocations must occur at one-year intervals, even after the first year. NTEU also argued that returning to the rule of one-year intervals would restore financial security and predictability for unions, restore unions' bargaining posture, and honor employee choice. The Authority granted NTEU's petition and published a *Federal Register* notice proposing to: (1) rescind the policy statement in *OPM*; and (2) revise § 2429.19 to provide that dues revocations may by processed only at one-year intervals, or, in the alternative, rescind § 2429.19 in its entirety. The notice solicited comments. The comment period has closed, and the matter is currently pending before the Authority.

- *NTEU*, 73 FLRA 428 (2023) (MC-0034) (Chairman Grundmann concurring): The Petitioner proposed that the Authority amend § 2427.2(a) of the Authority's Regulations. Section 2427.2(a) concerns the types of entities that may request a "general statement of policy or guidance" from the Authority. The Petitioner sought to change the wording of § 2427.2(a) to add the emphasized word:

> The head of an agency (or designee), the national president of a labor organization (or designee), or the president of a labor organization not affiliated with a national organization (or designee) may separately or jointly ask the Authority for a general statement of policy or guidance. The head of any lawful association of *federal* employees not qualified as a labor organization may also ask the Authority for such a statement provided the request is not in conflict with the provisions of chapter 71 of title 5 of the United States Code or other law.

The Petitioner argued that § 2427.2(a) is intended to exclude certain lawful associations from requesting policy statements and that the Authority should allow only federal agencies, unions, and lawful associations of federal employees to request policy statements because the Statute confines the Authority's jurisdiction to federal labor-management relations. However, the Authority found that § 2427.2(a)'s regulatory history demonstrates that the Authority envisioned broad access to the policy-statement process. Specifically, the Authority noted that the entity that preceded the Authority – the Federal Labor Relations Council (the Council) – also allowed "any lawful association" to "ask the Council for an interpretation of [Executive Order 11,491] or a statement on a major policy issue." Further, the Authority determined that the Statute does not specifically preclude the Authority from considering policy-statement requests made by entities outside of its jurisdiction and that the Authority's interpretation and application of the Statute also affects the general public. The Authority rejected the Petitioner's claim that the proposed amendment would conserve Authority resources, noting that the Authority has only received forty-eight policy-statement requests in its entire history – and, of those, only three were from a single "lawful association not qualified as a labor organization." Therefore, the Authority denied the petition.

Essence:

- *Nat'l Weather Serv. Emps. Org.*, 71 FLRA 380 (2019) (*NWSEO*) (Member DuBester dissenting): Article 29 of the parties' CBA provided that, if "formal negotiation[s]" of a successor agreement could not be completed within ninety days and neither party requested the intervention of the Federal Mediation Conciliation Service (FMCS) or the Federal Service Impasses Panel (FSIP), either party could terminate all or part of the agreement. The Agency terminated the CBA after the parties were unable to agree to the terms of a new agreement within ninety days. The Union filed a grievance over the CBA termination, and the matter advanced to arbitration. As relevant here, the Arbitrator found that the Agency violated Article 29 when it terminated the CBA because "formal negotiations" started when the parties were negotiating ground rules, which ultimately ended with FSIP intervention. The Arbitrator alternatively found that even if the term "formal negotiation" was intended to apply only to substantive negotiations, substantive negotiations began with the Agency's submission of its first round of proposals. Based on this finding, the Arbitrator found that the Union's subsequent contact with FMCS prevented the Agency from terminating the CBA under Article 29. On exceptions to the Authority, the Agency argued that the award failed to draw its essence from Article 29. The Authority agreed and vacated the finding of a contractual violation, concluding that the Arbitrator's interpretations were so "unconnected with the wording and purposes of [Article 29]" that those interpretations "manifest[ed] an infidelity" of Arbitrator's obligations. The Authority also found that the Agency did not violate the Statute by allegedly repudiating the CBA.
- *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875 (D.C. Cir. 2020) (*Weather Service*): The Union appealed the Authority's decision in *NWSEO*, arguing, as relevant here, that

the Authority acted contrary to law by applying the incorrect standard of review of an arbitrator's decision regarding the interpretation of a CBA. The U.S. Court of Appeals for the District of Columbia Circuit (the Court) found that the Authority's "sole inquiry under the proper standard of review should have been whether the Arbitrator was 'even arguably construing or applying the [CBA].'" The Court further found "[w]hether the Arbitrator correctly interpreted the CBA was beyond the scope of the Authority's review." As such, the Court found the Authority erred by failing to apply this standard of review, and therefore, the Authority acted contrary to law by vacating the award merely because the Authority concluded "the Arbitrator erred in [the] interpretation of the CBA."

- *U.S. DOD Education Activity, Alexandria, Virginia*, 71 FLRA 765 (2020) (*DODEA I*) (Member DuBester dissenting): The Agency notified the Union that it would implement a new performance-appraisal system the following year. The Union filed a grievance, alleging "an anticipatory breach and contractual violation and/or repudiation" of the parties' existing, negotiated appraisal system. The grievance went to arbitration, where the Agency claimed that the grievance was not grievable or arbitrable because the Agency had not yet implemented the new system. The Arbitrator rejected that claim. The Arbitrator cited Article 12, Section 5(C) of the CBA, which provided that a "grievance . . . that relates to a specific incident or occurrence[] must be filed within forty-five (45) calendar days after the incident or occurrence giving rise to the grievance." The Arbitrator found the forty-five-day window began when the Agency notified the Union that it planned to implement the new system and, thus, the grievance was timely. On exceptions, the Authority found that the Arbitrator's timeliness finding was not a plausible interpretation of – and, thus, failed to draw its essence from – the parties' agreement. Thus, the Authority set aside the award.
- *U.S. DOD Educ. Activity, Alexandria, Va.*, 73 FLRA 398 (2022) (Member Kiko dissenting): The Authority granted the Union's motion for reconsideration of *DODEA I*, finding the Union demonstrated extraordinary circumstances because: (1) an intervening court case – *Weather Service* – affected the dispositive issue in the case; and (2) on the basis of *Weather Service*, the Authority erred as a matter of law regarding the manner in which it decided the Union's essence exception in *DODEA I*. Specifically, relying on *Weather Service*, the Authority found *DODEA I* failed to afford the proper deference to the Arbitrator's interpretation of the parties' agreement. Because the Arbitrator applied the CBA provision's plain language of the provision in finding the grievance was timely filed, the Authority found the award drew its essence from the CBA. In so finding, the Authority emphasized that it was not eliminating the existing tests for analyzing essence exceptions – "an award fails to draw its essence from a CBA when the appealing party establishes the award: (1) cannot in any rational way be derived from the CBA; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the CBA as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the CBA; or (4) evidences a manifest disregard of the CBA." The Authority stated that these tests are consistent with *Weather Service* because they are "consistent with" the notion that "the relevant question . . . is not

whether the arbitrator erred – or even seriously erred – in interpreting the contract[,]" but "whether the arbitration was 'even arguably construing or applying the contract.'" However, the Authority stressed that, to the extent other Authority decisions have applied the tests in a way that do not comport with *Weather Service*, those decisions will no longer be followed.

Interlocutory Review of Arbitration Exceptions:

- *U.S. Dep't of the Army, Army Materiel Command, Army Security Assistance Command, Redstone Arsenal, Ala.*, 73 FLRA 356 (2022) (Member Kiko dissenting): This case involved the Agency's interlocutory exceptions alleging that the Arbitrator's interim award – finding the grievance procedurally arbitrable – failed to draw its essence from the parties' CBA. Before evaluating the exceptions, the Authority found the standard for interlocutory review established in *U.S. Department of the Treasury, IRS*, 70 FLRA 806 (2018) (then-Member DuBester dissenting) (*IRS*), was in error. Specifically, the Authority found that *IRS* failed to consider private-sector principles regarding interlocutory review of arbitral awards, and incorrectly based its holding on the Statute's general goal of effective and efficient government. Therefore, the Authority overturned *IRS*. In determining what the new standard should be, the Authority stated that, in reviewing arbitration awards, the Authority generally stands in the shoes of a federal district court in the private sector. The Authority further found that, in the private sector, the "complete arbitration rule" prohibits district courts from hearing piecemeal appeals from arbitration awards where arbitrators have not yet resolved the merits of the issues presented, even when hearing such appeals could resolve the entire case and avoid further proceedings, and even where a party is alleging the arbitrator's non-final award is unlawful. However, the Authority recognized that in the federal sector – unlike the private sector – certain matters are excluded, as a matter of law, from negotiated grievance procedures and grievance arbitration. As such, the Authority adopted a new standard for interlocutory review – finding that interlocutory exceptions will only be considered when the excepting party demonstrates *both* that the arbitrator lacks jurisdiction as a matter of law *and* that resolving the exceptions would bring an end to the entire dispute that the parties submitted to arbitration. Applying this standard, the Authority dismissed the Agency's interlocutory exceptions without prejudice because the Agency argued the grievance was inarbitrable under the terms of the parties' *agreement* – not that the Arbitrator lacked jurisdiction as a matter of *law.* The Agency has filed a motion for reconsideration, which is currently pending before the Authority.

Management Rights:

- ***NEW TEST*** - *Consumer Fin. Prot. Bureau*, 73 FLRA 670 (2023) (*CFPB I*): The Authority revised the test that will apply in assessing whether arbitration awards enforcing CBAs are contrary to management's rights under § 7106 of the Statute.

- *CFPB* Test:
  - 1. Does the excepting party demonstrate the arbitrator's interpretation and application of the CBA, and/or the awarded remedy, affects the cited management right under the Statute?
    - If yes, go to question 2.
    - If no, deny the exception.
  - 2. Did the arbitrator correctly find, or does the opposing party demonstrate, that the CBA provision, as interpreted and applied by the arbitrator, is enforceable under § 7106(b) of the Statute?
    - If yes, go to question 3.
    - If no, then:
      - (a) If the excepting party successfully challenges the underlying finding of a CBA violation, then the Authority will set aside *both* the finding of a violation *and* the remedy for the violation;
      - (b) If the exception party successfully challenges *only* the remedy, then the Authority will set aside only the remedy. If it is the sole remedy, then, absent unusual circumstances, the Authority will remand the matter to the parties for resubmission to the arbitrator, absent settlement, for an alternative remedy.
  - 3. Does the excepting party challenge the remedy, separate and apart from the CBA violation?
    - If yes, go to question 4.
    - If no, deny the exception.
  - 4. Does the excepting party demonstrate the remedy fails to "reasonably correlate" to the enforced CBA provision, as interpreted and applied by the arbitrator?
    - If yes, grant the exception – set aside the remedy and, if it is the sole remedy for the CBA violation, then remand for alternative remedy, absent unusual circumstances.
    - If no, deny the exception.

- **Application of *CFPB* Test**
  - *Consumer Fin. Prot. Bureau*, 73 FLRA 781 (2024) (*CFPB II*): The Union filed a grievance alleging that the Agency violated the CBA when it issued the grievant a letter of reprimand without first giving the employee an opportunity to explain the behavior. The CBA required "disciplinary actions [to] be taken only for such cause as will promote the efficiency of the federal service." The Arbitrator interpreted this provision as requiring a "pre-disciplinary hearing . . . before the [Agency] reached its disciplinary decision." Based on this interpretation, the Arbitrator found that the Agency violated the CBA. The Agency excepted,

arguing, among other things, that the award was contrary to management's right to discipline employees.

- Q1: The Authority assumed without deciding that the arbitrator's interpretation and application of the CBA affected management's right to discipline employees because the Union did not dispute the Agency's assertion.
- Q2: The Authority found that the Union showed CBA provision, as interpreted and applied by the arbitrator, was enforceable as a procedure under § 7106(b)(2) of the Statute. In reaching this conclusion, the Authority relied on precedent finding requirements that agencies give employees notice and an opportunity to respond, before imposing discipline, constituted procedures. Therefore, the answer to Q2 was yes.
- Q3: The Agency did not challenge the remedy separate and apart from the CBA violation, so the answer to Q3 was no. Accordingly, the Authority denied the Agency's management-rights exception.

- *U.S. DHS, U.S. CBP, U.S. Border Patrol, Rio Grande Valley Sector, Edinburg, Tex.*, 73 FLRA 784 (2024): The Union filed a grievance alleging the Agency acted improperly by revoking the employee's law-enforcement authority and assigning the grievant administrative duties during a misconduct investigation. The Arbitrator issued an award finding that the Agency violated Article 32 of the CBA by placing the grievant on an administrative detail for an unreasonable length of time. As relevant here, Article 32 of the CBA required the Agency to "furnish employees with notices of proposed disciplinary/adverse actions within a reasonable time after [an] investigation concludes," and required the Agency to have "just and sufficient" cause for adverse actions. The Arbitrator reasoned that "the essence of Article 32 . . . is that an unreasonably delayed [A]gency investigation violates just cause." As a remedy, the Arbitrator directed the Agency to compensate the grievant for all lost overtime, premium pay, or differentials from six months after the investigation began to the grievant's return to duty as a border patrol officer. The Agency excepted, arguing that the award was contrary to management's right to assign work.
  - Q1: The Authority found that the Arbitrator's interpretation and application of the CBA – restricting the Agency's authority to determine the duration of an administrative work assignment – affected management's right to assign work. Therefore, the answer to Q1 was yes.
  - Q2: As the Arbitrator did not address § 7106(b), the Union had the burden to show that the CBA provision, as interpreted and applied by the Arbitrator, was enforceable as an exception to management's right under § 7106(b). However, the Union did not make any § 7106(b) arguments, despite the opportunity to brief the issue. Because the Union failed to meet its burden, the answer to Q2 was no. As such, the Authority granted the Agency's exception and vacated the award, in part, setting aside the CBA violation and the remedy.

Classification vs. Temporary Promotion:

- *U.S. Marine Corps, Marine Corps Air Ground Combat Ctr., Twentynine Palms, Cal.*, 73 FLRA 379 (2022) (Member Kiko dissenting in part): This case involved a grievance requesting a temporary promotion under the parties' CBA. The Arbitrator found that the grievance was arbitrable because it did not concern a classification matter under § 7121(c)(5) of the Statute, and that the Agency violated the parties' CBA by not temporarily promoting the grievant. On exceptions to the Authority, the Agency argued that the award was contrary to § 7121(c)(5) because the grievance involved classification. The Authority first found that the standard for evaluating whether a grievance concerns classification established in *U.S. Small Business Administration* (*SBA*), 70 FLRA 729 (2018) (Member DuBester dissenting), failed to properly balance the countervailing interests of employees and employers, and was not relevant to whether the grievance concerned classification. The Authority further found that *SBA* failed to explain how its standard provided more clarity than the Authority's previous standard. As such, the Authority overruled *SBA* and returned to its previous, longstanding standard: "where the substance of a grievance concerns the grade level of the duties permanently assigned to and performed by an employee, the grievance concerns classification of a position within the meaning of § 7121(c)(5); however, where the substance of the grievance concerns whether an employee is entitled to a temporary promotion under a CBA because the employee has performed the established duties of a higher-graded position, the grievance does not concern the classification of a position within the meaning of § 7121(c)(5)." Applying this standard, the Authority found that the substance of the grievance concerned whether the grievant was entitled to a temporary promotion under the parties' CBA, not a classification matter. Accordingly, the Authority denied the Agency's exception.

Nonfact – Insufficient Record:

- *AFGE, Loc. 1286, Council of Prisons Locs. #33*, 73 FLRA 775 (2024): The grievant was a correctional officer. The Agency suspected he was intoxicated while on duty and asked him to submit to a breathalyzer test. The grievant requested the presence of his Union representative. The Agency contacted the Union representative, but prevented the representative from physically witnessing the breathalyzer test. According to the Agency, the breathalyzer showed alcohol was in the grievant's system, and while the Agency investigated, it reassigned him to a position that was ineligible for overtime. The Union grieved, claiming the way the Agency conducted the breathalyzer test violated § 7114(a)(2)(B) of the Statute and the parties' CBA. The Arbitrator found the Agency violated the grievant's *Weingarten* right under § 7114(a)(2)(B) of the Statute and the CBA by denying the grievant Union representation while the breathalyzer test was conducted. The Arbitrator also observed that, due to this violation, the grievant did not have a witness "to any possible irregularities regarding the preparation, administration[,] and reading of the breathalyzer test." Quoting an Agency policy, the Arbitrator noted that "[e]mployees are subject to disciplinary action if found to possess

a .02 or greater blood[-]alcohol content while on duty." The Arbitrator found no record evidence concerning the grievant's blood-alcohol content, and therefore, found the Agency failed to meet its burden of proof to show that there was just cause. As such, the Arbitrator sustained the grievance and directed the Agency to return the grievant to his previous assignment and make him whole for missed overtime opportunities. The Agency excepted, arguing, among other things, that the award was based on a nonfact because the Arbitrator's determination that the Agency failed to meet its burden of just cause was based on an erroneous finding that the Agency disciplined the grievant by reassigning him. The Authority found: (1) the award was unclear as to what the Arbitrator relied on for his just-cause findings because the Agency policy that the Arbitrator cited did not contain a just-cause provision, and the Arbitrator did not cite to any source – contractual or otherwise – for his just-cause findings; (2) the Arbitrator did not specify whether he considered the grievant's reassignment, or something else, to constitute discipline; and (3) the basis for the make-whole remedy was unclear because the Arbitrator based that remedy on his just-cause findings. Because the award did not contain sufficient findings to assess the Agency's nonfact exception, the Authority remanded the matter to the parties to resubmit to the Arbitrator for clarification, absent settlement.

Amicus Briefs:

- *SSA*, 73 FLRA 708 (2023): The Arbitrator issued three separate awards. The Agency filed exceptions with the Authority regarding two of the awards. The Arbitrator requested permission to file amicus briefs with the Authority, in order to address "factual issues excluded from the [e]xcepting party's filings as well as reinforcement of communications formally provided to the [p]arties." The Authority, relying on the plain language of § 2429.9 of the Authority's Regulations, found that it has discretion to determine whether amicus status is appropriate. The Authority emphasized that an arbitrator's role is an impartial decisionmaker, not an appellate advocate. The Authority found that, "even if the Arbitrator has a personal interest in seeing his award upheld, that does not provide sufficient basis for allowing him to participate in appellate proceedings before us." Finally, the Authority noted that, even if a party's exceptions are inaccurate or incomplete, there is a remedy for that: The opposing party – an *actual party* before the Authority – may file an opposition calling attention to those deficiencies. As such, the Authority rejected the Arbitrator's request and did not consider his amicus briefs.

Contractual Limitations on Arbitral Authority:

- *AFGE, Loc. 987*, 73 FLRA 722 (2023): The Agency emailed the Arbitrator, asking him to dismiss a grievance on procedural grounds. Article 7, Section 7.05 of the parties' CBA (Section 7.05) authorized arbitrators to "make all grievabil[i]ty and . . . arbitrability determinations" raised by the parties in pre-hearing briefs. Under Section 7.05, if an arbitrator made a threshold determination that a grievance is "grievable . . . or

arbitrable, the[n the] next available arbitrator will . . . hear the merits of the grievance to avoid a perceived conflict of interest." The Arbitrator responded to the Agency via email, stating, "[I]n the event I were to treat [the Agency's] email as a request to invoke the procedure set out in Section 7.05, . . . I would not find that the grievance lacked arbitrability." After receiving the Arbitrator's email, the Union claimed the Arbitrator made a Section 7.05 determination and requested the Agency's participation in selecting a new arbitrator to hear the grievance's merits. However, the Arbitrator notified the Union that he had "not issued a Section 7.05 ruling" but, instead, provided the parties with an "advisory email." The parties then attended the scheduled arbitration hearing, where the Agency argued again that the grievance lacked arbitrability. In the award, "the Arbitrator did not find [that] the grievance lacked arbitrability." Next, the Arbitrator resolved the grievance's merits, finding that the Agency did not violate the CBA. The Union filed exceptions with the Authority, arguing the Arbitrator lacked the authority to consider the grievance's merits after making the procedural-arbitrability determination. The Authority found that the Arbitrator, in the pre-hearing email and the award, made an arbitrability determination. As such, the Authority concluded that, under the "express, unequivocal" contractual limitation on his arbitral authority in Section 7.05, the Arbitrator exceeded his authority by resolving the grievance's merits. Accordingly, the Authority granted the Union's exception, set aside the merits portion of the award, and remanded the dispute to the parties, absent settlement, for resubmission to a different arbitrator to resolve the remaining merits issues.

Negotiability Process:

- *AFGE, Loc. 2031*, 73 FLRA 769 (2023): The Authority considered the negotiability of one proposal regarding the transportation of "sharps containers." Because the Agency failed to timely file a statement of position, the Authority – relying on precedent – considered the arguments in the Agency's allegation of nonnegotiability. However, the Authority found those arguments did not demonstrate the proposal was outside the duty to bargain.
    - Chairman Grundman concurred, saying she "question[ed] whether it is appropriate for the Authority to give agencies a 'pass'" when it files an untimely statement of position "by reaching back to, and relying on, the agency's prior allegation in order to resolve cases." Nevertheless, to form a majority and avoid an impasse in the resolution of the case, she joined the decision.

Arbitrability:

- *AFGE, Loc. 2053, Council 243*, 73 FLRA 752 (2023) (Chairman Grundmann concurring): The Arbitrator issued an award dismissing, as untimely, a union grievance alleging the Agency failed to pay employees overtime under the Fair Labor Standards Act (FLSA). The Union filed exceptions, arguing the award was contrary to the FLSA because the Arbitrator enforced timelines that were shorter than those in the FLSA. The Authority

noted that, where a CBA contains time limits for filing grievances that are shorter than the FLSA's filing periods, it is not contrary to the FLSA for an arbitrator to rely on those contractual limits to dismiss grievances as untimely. Therefore, the Authority denied the exceptions.

- Chairman Grundmann concurred, stating that, although the result was harsh, the Arbitrator noted that the Union may have other forums in which to seek a remedy. Further, she noted that she was open to revisiting some of the Authority's precedent regarding procedural arbitrability.

Hazard-Pay Differential:

- *U.S. DOJ, Fed. BOP, Fed. Correctional Inst., Englewood, Colo.*, 73 FLRA 762 (2023): The Arbitrator determined that the Agency violated the parties' CBA and other laws when it failed to provide hazard-pay differential (HPD) for bargaining-unit employees related to ambient exposure to COVID-19 in the correctional facility where they worked. As a remedy, the Arbitrator awarded backpay. The Agency filed exceptions with the Authority. The Authority found that the backpay remedy was contrary to law because 5 C.F.R. part 550, subpart I, Appendix A does not authorize HPD where COVID-19 exposure occurred due to infected humans or human-contaminated intermediary objects or surfaces. Because the Authority left the Arbitrator's CBA-violation finding undisturbed and set aside the only remedy, the Authority remanded the matter to the parties for resubmission to the Arbitrator.

Rehabilitation Act:

- *NTEU, Chapter 46*, 73 FLRA 654 (2023): After the grievant exhausted her approved Family and Medical Leave Act (FMLA) leave for health-related reasons, she requested 63.5 hours of advanced annual leave. When the Agency denied the request, the Union filed a grievance. The Arbitrator concluded the Agency did not violate law or the parties' CBA when it denied the grievant's request. Specifically, the Arbitrator found the Agency's denial of the grievant's request stemmed from her failure to engage in the interactive process required by the Rehabilitation Act, and to provide the Agency with further medical documentation to support her request. The Union filed various exceptions with the Authority. The Authority denied the exceptions. With specific regard to the Union's contrary-to-law exception, the Authority held that "the medical information available to the Agency related to the grievant's FMLA status and provided only general information about the frequency with which the grievant may experience incapacity due to her disability. That information did not necessarily support the grievant's request for the specific, 63.5 hours for which she was requesting advanced annual leave." Therefore, the Authority held that the award was not contrary to law.

Arbitrator Authority:

- *NTEU, Chapter 338*, 73 FLRA 487 (2023): The Union filed a grievance arguing that a suspension was invalid because it did not promote the efficiency of the federal service. Further, the grievance claimed the Agency violated the Whistleblower Protection Enhancement Act of 2016 (WPEA) and the Whistleblower Protection Act (WPA). At arbitration, the Arbitrator rescinded the suspension. However, the Arbitrator did not rule on the Union's WPA and WPEA claims and asserted that the Union could pursue the claims in other forums. The Union filed exceptions, arguing the award was contrary to law because the Arbitrator failed to award damages under the WPA and WPEA. Further, the Union asserted that it could not obtain compensatory damages under WPA and WPEA in another forum. The Authority found that the Arbitrator refused to consider the alleged WPA and WPEA violations altogether and, because the parties did not stipulate to the issues that were before the Arbitrator, the Authority deferred to the Arbitrator's formulation of the issues. Therefore, the Authority denied the exceptions.
-

Grievability of Probationary Employees' Terminations:

- *NTEU, Chapter 116*, 73 FLRA 479 (2023): The Union filed grievances concerning the Agency's termination of a probationary employee. The grievances went to arbitration, and the Arbitrator issued an award finding that he lacked jurisdiction to consider the grievances' merits. The Union filed exceptions with the Authority. As relevant here, the Authority noted that probationary employees' terminations are generally not grievable or arbitrable as a matter of law. The Authority also noted that, although a probationary employee's termination allegedly in violation of the Statute may be pursued through *statutory* ULP procedures, the Authority has not held that such a matter may be pursued through negotiated grievance procedures. However, the Authority found it unnecessary to resolve that issue because the Authority previously had held that where a negotiated grievance procedure excludes complaints involving a probationary employee's termination, that exclusion may lawfully extend to grievances alleging that the termination constitutes a ULP. Because there is no law that specifically permits a union to grieve a probationary employee's termination, the Authority denied the exceptions to the Arbitrator's finding that the CBA excluded probationary terminations from the negotiated grievance procedure.

Remedies:

- *AFGE, Loc. 2338*, 73 FLRA 756 (2023): An employee (the grievant) and the Agency entered into a temporary telework agreement to accommodate the grievant's upcoming surgeries and recovery. After the first of two surgeries, the Agency became aware that the grievant was meeting with a bargaining-unit employee onsite in his capacity as a union official. The Agency revoked the telework agreement, marked the grievant absent without leave (AWOL), and denied the official-time request for the meeting. The Union filed a grievance alleging the Agency violated the parties' CBA and law by

discriminating against the grievant based on a temporary disability and by retaliating against the grievant for engaging in union activity. The grievance requested the following remedies: (1) removal of the AWOLs from the grievant's personnel record, and repayment for time lost; (2) approval of a temporary telework agreement; (3) financial compensation for the actions to which the grievant was allegedly subjected; and (4) discipline of the grievant's supervisor. The parties engaged in informal discussions, which resulted in the Agency: (1) signing a temporary telework agreement for the grievant; (2) reimbursing the grievant for an additional seventy-two hours of pay, for the pay period involving the AWOLs; and (3) corrected his leave and earning statements to remove the AWOLs. However, the Agency refused to provide the grievant with (1) interest on backpay, and (2) approximately $12,000 for assets the grievant allegedly sold to earn money during the time of lost pay. The Union invoked arbitration regarding the outstanding requests. The Arbitrator found that the Union "failed to establish that [the grievant was] entitled to compensation over and above what he received in 2021 as part of the grievance[-]resolution process." In this regard, the Arbitrator found there were "no outstanding [backpay] issues and no legal authority under the . . . Act or the [parties' agreement] that would support the type of compensatory damages" the grievant sought. The Union filed exceptions, alleging: (1) the award was ambiguous or contradictory, was contrary to law, and failed to draw its essence from the CBA; and (2) the Arbitrator exceeded her authority. The Authority denied the Union's claim that the award was "ambiguous and contradictory" because the Union failed to support it as required by § 2425.6(e)(1) of the Authority's Regulations. The Authority denied the contrary-to-law exception because: (1) the Arbitrator expressly declined to find an unjustified or unwarranted personnel action, (2) such a finding is required under the Back Pay Act, and (3) the Authority defers to the factual findings of the Arbitrator unless the excepting party establishes they are nonfacts. The Authority denied the Union's exceeded-authority exceptions because they were premised on the contrary-to-law exceptions and the award was responsive to the issues *as framed by the Arbitrator*. Finally, the Authority denied the Union's essence exceptions because the Union failed to demonstrate the award was irrational, unfounded, implausible, or in manifest disregard of the CBA.

Sovereign Immunity/Exceeded Authority:

- *U.S. Dep't of State, Passport Servs.*, 73 FLRA 631 (2023): The Agency conceded that it violated a settlement agreement and the parties' CBA by failing to timely remove a letter of reprimand from the grievant's eOPF. The Arbitrator directed the Agency to pay the grievant $2000 and to establish a monitoring system to verify that it timely removes reprimands from employees' eOPFs. The Authority found the $2000 remedy violated the doctrine of sovereign immunity because it had no statutory support. The Authority also found the Arbitrator exceeded his authority by issuing the monitoring-system remedy because it awarded relief to employees who were not encompassed within the grievance.

Failure to Raise or Support Arguments:

- *AFGE, Loc. 153*, 73 FLRA 792 (2024): The Arbitrator issued an award finding the Agency did not violate the parties' CBA or § 7106(b) of the Statute when it required the grievant to complete certain trainings and when it issued the grievant an oral admonishment for failing to complete one of the trainings. The Authority found that §§ 2425.4(c) and 2429.5 of the Authority's Regulations barred some of the Union's exceptions because they were not raised at arbitration. The Authority denied the remaining exceptions under § 2425.6(e)(1) of the Authority's Regulations because the Union failed to explain how the award was deficient under any of the recognized grounds for review.

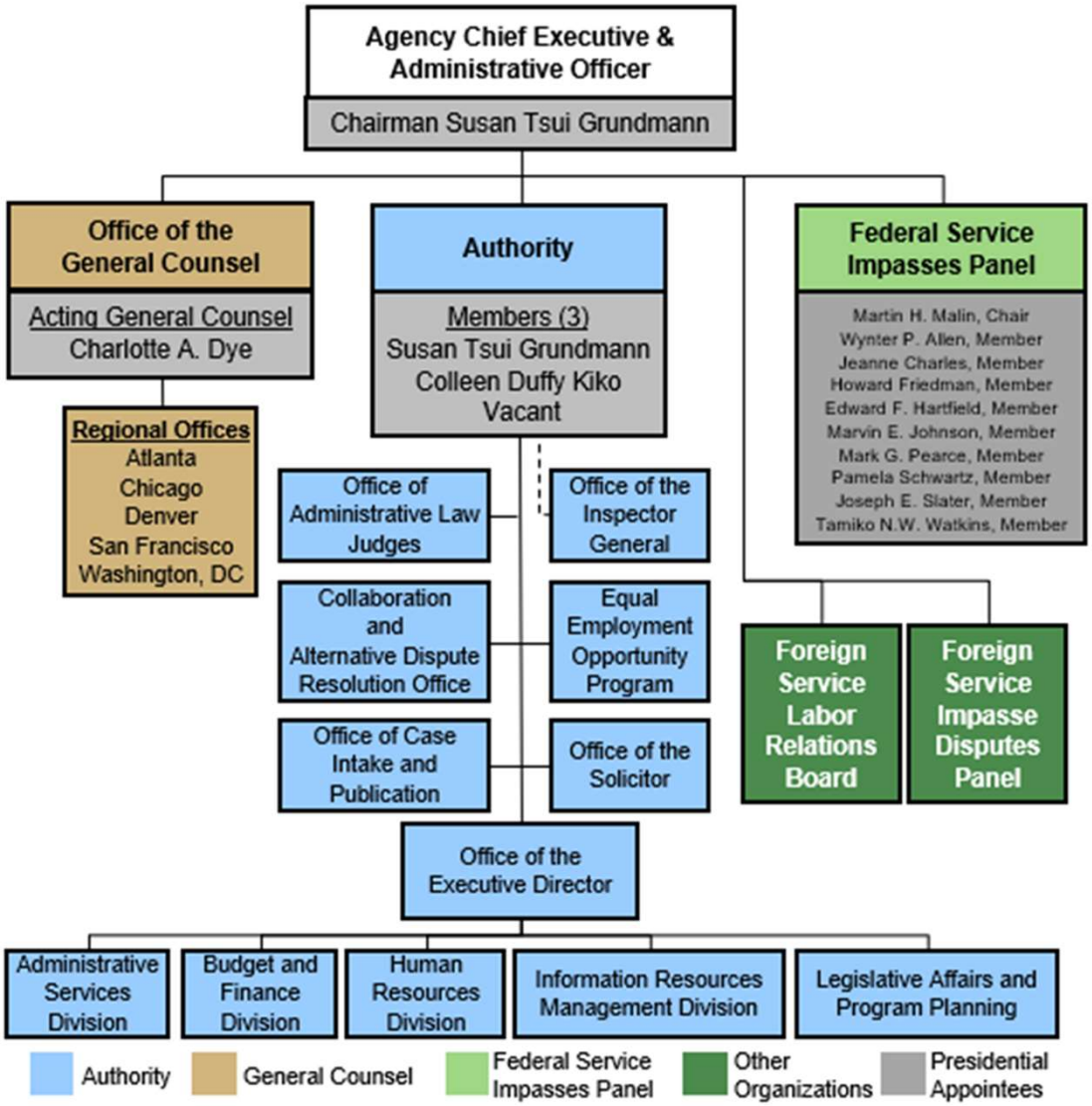
- *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 73 FLRA 620 (2023): After an employee reported a supervisor for harassment, the Agency issued the employee a cease-and-desist notice. The Union grieved the issuance of the notice, and the Arbitrator found that the action constituted retaliation against the employee in violation of Title VII of the Civil Rights Act of 1964. The Agency filed various exceptions. The Authority dismissed one exception because the arguments were not raised at arbitration; denied several exceptions because failed to support them; and found the remaining exception did not demonstrate the award failed to draw its essence from the CBA.

Federal Labor Relations Authority

Susan Tsui Grundmann

Chairman

National Employment Lawyers Association
"Representing Federal and Public Employees"
Symposium
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Other Organizations
Presidential Appointees

March 2023

U.S. DOD, Ohio Nat'l Guard,
71 FLRA 829 (2020) (Member Kiko dissenting)

- Authority affirmed ALJ's finding that the Agency violated the Statute by stating it was not bound by the Statute and disavowing the parties' CBA.
- Sixth Circuit affirmed. 21 F.4th 401 (6th Cir. 2021).
- Appealed to the Supreme Court: *Ohio Adjutant Gen.'s Dep't v. FLRA*, 143 S. Ct. 1193, 1201 (2023)
  - The National Guard functions as a federal agency covered by the Statute when employing and supervising dual-status technicians serving in their civilian role.
- *Laborers Int'l Union of N. Am.*, 73 FLRA 591 (2023) (Member Kiko concurring)

NTEU v. FLRA

45 F.4th 121 (D.C. Cir. 2022)

- Extension of agreement under a continuance clause did not permit agency-head review

- Agency could not enforce conflicting regulations that became effective before the extension

AFGE, Nat'l Council of HUD Locs., Council 222, AFL-CIO v. FLRA,

No. 22-5308 (D.C. Cir.)

- In *U.S. Dep't of HUD*, 70 FLRA 605 (2018) (Member DuBester dissenting), the Authority vacated seven prior decisions and held the grievance concerned classification and was, therefore, barred by the Statute.
- The Authority moved to dismiss the case for lack of District Court jurisdiction. The Court granted the Authority's motion to dismiss all claims except the *Leedom* claim. After further briefing, the Court granted the U's motion for summary judgment on that claim.
- The Authority appealed to the D.C. Circuit, and oral arguments were held on 11/6/23.

87 Fed. Reg. 78014
(Dec. 21, 2022) (MC-33)
(Member Kiko dissenting)

- NTEU filed a petition to amend § 2429.19 of the Authority's Regulations to provide that, once employees have authorized union-dues payroll deductions, they may revoke those authorizations only at yearly intervals.

- Authority granted petition and proposed to either amend or to revoke § 2429.19, and solicited comments

- Comment period closed; Authority reviewing

NTEU, 73 FLRA 428 (2022)
(Chairman Grundmann concurring) (MC-34)

- NTEU filed a petition to amend § 2427.2(a) of the Authority's Regulations to provide that the only non-union "lawful associations" that may ask the Authority for "general statements of policy or guidance or policy" are lawful associations "of federal employees."

- Authority denied petition, finding § 2427.2(a)'s wording and regulatory history, and statutory policies, supported broad access to the policy-statement process.

U.S. DOD Educ. Activity, Alexandria, Virginia
73 FLRA 398 (2022) (Member Kiko dissenting)

- Granting reconsideration of 71 FLRA 765 (2020) (Member DuBester dissenting)
- Clarified "essence" standard
- Based on D.C. Circuit opinion in *National Weather Service Employees Organization v. FLRA*, 966 F.3d 875 (D.C. Cir. 2020)

U.S. Dep't of the Army, Army Materiel Command, Army Security Assistance Command, Redstone Arsenal, Ala., 73 FLRA 356 (2022) (Member Kiko dissenting)

- Revisited standards for review of interlocutory exceptions
- Reversed *U.S. Department of the Treasury, IRS*, 70 FLRA 806 (2018) (Member DuBester dissenting)
- Reconsideration pending

Consumer Financial Protection Bureau
73 FLRA 670 (2023) (*CFPB I*)

- Revised management-rights test for arbitration cases involving CBA violations.
  - Does Arb's interpretation/application of CBA, and/or awarded remedy, affect a management right?
  - Is CBA provision, as interpreted and applied, enforceable under 7106(b)?
  - Does excepting party challenge remedy, separate and apart from CBA violation? If so,
  - Does remedy "reasonably correlate" to the CBA provision, as interpreted and applied?

CFPB II
73 FLRA 781 (2024)

The test defers to Arb's CBA interpretation unless award fails to draw essence.

- Q 1: Authority assumed w/o deciding that Arb's interpretation/application of CBA affected right to discipline (U did not dispute)
- Q 2: U showed CBA provision, as interpreted/applied by Arb, was enforceable as a procedure (7106(b)(2) (requiring Ag to give ee notice and opportunity to be heard, then wait a minimal amount of time to consider ee's explanation)
- Q 3: Ag didn't challenge remedy separate and apart from CBA violation, so inquiry ends.
- Result: Deny management rights exception: U wins.

CFPB Applied:

***U.S. DHS, U.S. CBP, U.S. Border Patrol, Rio Grande Valley Sector, Edinburg, Tex.*, 73 FLRA 784 (2024)**

- Q 1: Arb's interpretation/application of CBA – restricting Ag's authority to determine duration of an administrative work assignment – affected right to assign work.
- Q 2: As Arb didn't address 7106(b)(2) (and neither party argued for remand), U had burden to show 7106(b) – but made no 7106(b) arguments, despite opportunity to brief. Inquiry ends.
- Result: Set aside finding of CBA violation and related remedy: Ag wins.

U.S. Marine Corps, Marine Corps Air Ground Combat Ctr., Twentynine Palms, California

73 FLRA 379 (2022) (Member Kiko dissenting in part)

- Temporary promotion vs. classification
- Reversed *SBA*, 70 FLRA 729 (2018) (Member DuBester dissenting)

U.S. DHS, CBP,
73 FLRA 799 (2024) (Chairman Grundmann concurring)

- Ag failed to pay nightwork premiums, authorized by the Customs Officer Pay Reform Act (COPRA), to customs officers. Arb determined that the Ag was erroneously applying a Federal Employees Pay Act (FEPA) limitation called the "eight-hour rule" to COPRA-covered nightwork but found the Ag's failure to pay COPRA nightwork premiums did not constitute a repudiation of a settlement agreement.
- Authority asked OPM for an advisory opinion on its regulations. OPM determined FEPA's eight-hour rule does not apply to leave payments for employees receiving COPRA nightwork pay. Based on that opinion, the Authority denied the Ag's contrary-to-law exceptions.

U.S. DHS, CBP,
cont'd

- Analysis of repudiation allegations
  - the nature and scope of the alleged breach of the agreement – i.e., was the breach clear and patent?
  - the nature of the agreement provision allegedly breached – i.e., did the provision go to the heart of the parties' agreement?
- Authority determined the Ag did not commit a clear and patent breach of the settlement agreement.
- Concurrence: Authority should not be deciding for itself how important a contract provision is, relative to other provisions in the contract, when assessing whether a party has committed an unlawful repudiation.

U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky., 73 FLRA 775 (2024)

- Ag gave grievant a breathalyzer test then reassigned him during subsequent investigation.
- Un claimed Ag violated grievant's *Weingarten* (7114(a)(2)(B)) right by not allowing Un rep to witness the breathalyzer test.
- Arb found Ag failed to meet burden of showing "just cause," and directed Ag to return grievant to previous assignment and make him whole.
- Authority remanded because record was unclear as to basis of Arb's just-cause finding, so Authority could not resolve Ag's nonfact exception.

SSA v. AFGE, Local 2023,
73 FLRA 708 (2023)

- Arb requested permission to file amicus briefs to supplement the record and bolster his own award
- Authority denied request, finding it wouldn't be "appropriate" under Authority's regulations (5 C.F.R. § 2429.9)
- Arb's role is impartial decisionmaker, not appellate advocate

AFGE, Loc. 987, 73 FLRA 722 (2023)

- Arb found Un grievance procedurally arbitrable, but denied it on the merits.
- Un argued Arb exceeded his authority by addressing the merits.
- Authority agreed, and set aside the award, because the parties' CBA "expressly and unequivocally" prohibited arbitrators from resolving a grievance's merits if they also ruled on arbitrability.

AFGE, Loc. 2031,
73 FLRA 769 (2023) (Chairman Grundmann concurring)

- U proposed restricting which personnel could perform "sharps-container" duties.
- Because Ag failed to file timely statement of position, Authority looked to arguments Ag made in its allegation of nonnegotiability.
- Authority found Ag's arguments insufficient to establish proposal was nonnegotiable, and directed Ag to bargain.
- Chairman Grundmann concurred, questioning appropriateness of relying on arguments in allegations of nonnegotiability, but reserving the issue for a future, appropriate case.

AFGE, Loc. 2053, Council 243,

73 FLRA 752 (2023) (Chairman Grundmann concurring)

- Arb found U grievance alleging failure to pay overtime under the Fair Labor Standards Act was untimely because it wasn't filed within the CBA's 14-day time limit.
- Authority found award wasn't contrary to law, because arbitrators may permissibly find grievances untimely based on contractual time limits that are shorter than the FLSA filing period.
- Chairman Grundmann concurred, noting the Arb's finding that there might be other forums for the U to seek redress, and noting the Arb relied on several Authority decisions regarding timeliness of grievances that she might reconsider in a future, appropriate case.

U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Englewood, Colo.,
73 FLRA 762 (2023)

- Arb awarded hazard-pay differential (HPD) to correctional employees because they worked with inmates who had COVID-19.
- Authority relied on *AFGE, Local 3601*, 73 FLRA 515 (2023), and *Adams v. United States*, 59 F.4th 1349 (Fed. Cir. 2023), to find HPD wasn't authorized, and set remedy aside.
- Because Arb's underlying finding of a CBA violation was undisturbed, but Authority set aside the sole remedy, Authority remanded for an appropriate remedy, if any.

NTEU, Chapter 46,
73 FLRA 654 (2023)

- Arb found Ag didn't violate Rehabilitation Act or CBA when it denied grievant's request for advanced annual leave.
- Union excepted on nonfact, essence, and contrary-to-law grounds.
- Authority denied exceptions.

NTEU, Chapter 338,
73 FLRA 487 (2023)

- Arb directed Ag to rescind grievant's suspension
- Union excepted, challenging Arb's handling of its Whistleblower Protection Act (WPA) allegation.
- Authority denied exceptions, finding they were premised on incorrect belief that Arb found a WPA violation.

NTEU, Chapter 116, 73 FLRA 479 (2023)

- Arb found he lacked jurisdiction to consider the merits of the Un's 2 grievances because they concerned a probationary employee's termination.
- Union filed nonfact, contrary-to-law, and essence exceptions.
- Authority denied exceptions.

AFGE, Loc. 2338,
73 FLRA 756 (2023)

- After parties resolved several issues, U brought grievance regarding remaining compensation issues to arbitration
- Arb found U failed to establish grievant was entitled to additional compensation
- U excepted, arguing: (1) award was ambiguous or contradictory, contrary to law, and failed to draw essence; and (2) Arb exceeded authority
- Authority denied exceptions

U.S. Dep't of State, Passport Servs.,
73 FLRA 631 (2023)

- Ag conceded violation of a settlement agreement and the CBA by failing to timely remove a letter of reprimand from grievant's eOPF
- Arb directed Ag to pay grievant $2000 and establish a monitoring system to verify that it timely removes reprimands from employees' eOPFs
- Authority found $2000 remedy violated sovereign immunity, and Arb exceeded authority by issuing monitoring-system remedy, because it awarded relief to people not encompassed within the grievance

AFGE, Local 153,
73 FLRA 792 (2024)

- Arb found Ag didn't violate CBA or Statute by requiring grievant to attend certain trainings and by issuing oral admonishment for failure to complete one of the trainings

- U excepted on contrary-to-law, contrary-to-public-policy, exceeded-authority, and "other" grounds

- Authority partially dismissed and partially denied exceptions

U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.,
73 FLRA 620 (2023)

- Ag argued grievance wasn't procedurally arbitrable b/c U filed at wrong level (regional director, not warden)
- Authority rejected argument, finding Ag didn't establish award failed to draw essence from CBA.
- Authority dismissed some other exceptions for failure to raise below, and denied others for failure to support.

5 U.S.C. § 7101(a)

"Therefore, labor organizations and collective bargaining in the civil service are in the public interest."

5 U.S.C. § 7105(a)(1)

The FLRA ***"shall provide leadership in establishing policies and guidance"*** *for the labor relations program of the federal government.*

The FLRA exercises leadership to ensure that the federal government's labor relations program is a model for employers across the country.

Executive Order 14119 (March 6, 2024)

- Revokes E.O. 13812 and supersedes E.O. 13522.
- Requires agencies covered by the Statute to:
  - Establish Labor-Management Forums (LMFs)
  - Engage in pre-decisional involvement in workplace matters
  - Evaluate and document, in consultation with Union representatives and OPM guidance, changes in employee satisfaction, manager satisfaction, and organizational performance resulting from LMFs
  - In consultation with Union representatives, submit (within 180 days) implementation plans for OPM certification (within 60 days), and faithfully execute certified plans

Contact Information

FLRA.gov

The Authority

- Case Intake & Publication: 771-444-5805

Office of the General Counsel

- Atlanta Regional Office: 470-681-7630
- Chicago Regional Office: 872-627-0200
- Denver Regional Office: 303-225-0340
- San Francisco Regional Office: 510-982-5440
- Washington, D.C. Regional Office: 771-444-5780

Federal Service Impasses Panel: 771-444-5762

CADRO: 771-444-5802

REPRESENTING FEDERAL AND PUBLIC EMPLOYEES

National Employment Lawyers Association
NELA's Spring Seminar, Denver, CO
April 5-6, 2024

Panel Presentation

ISSUE SPOTTING & ELECTION OF REMEDIES IN THE FEDERAL SECTOR

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This paper presents a summary of the elections of remedies plus a discussion of some of the key elections issues that federal employees commonly encounter when bringing their workplace employment complaints.[1] Generally, federal employees must be provided with an administrative forum to redress their grievances and complaints of alleged unlawful treatment and deprivation, especially as a step before going to federal court. The corollary is that at key moments in some proceedings, federal employees are limited to choose only one forum, and the first one accessed will create an irrevocable election for those who have underlying MSPB appeal rights.

Whether challenging whistleblowing retaliation or other prohibited personnel actions, adverse actions appealable to the Merit System Protection Board (MSPB), or discrimination-related claims, you must decide which options to choose – that is, where to elect to pursue a remedy – and, just as importantly, what your deadlines are by which to do so. Choices must usually be made between and among seeking redress at the MSPB, OSC, EEOC, or through a union grievance. In this way, elections of remedies present a web of procedure-related choices involving jurisdictional and exhaustion of remedies issues, as well as choices that may shift a burden of proof (away or upon your client) or offer different discovery options and processing times.

At the end of the day in the best of all possible worlds, elections of remedies sometimes boil down to a strategic "forum-shopping" analysis. Knowing your client's

[1] This paper does not cover the full panoply of labor rights and enforcement options within the scope of the Federal Labor Relations Authority other than to note, below, when there is an election to pursue an action that is otherwise appealable through an available MSPB, EEOC, or negotiated union grievance process.

options will be the only way to avoid procedural traps and to take an offensive position against the powerful federal government, the largest U.S. employer with thousands of attorneys on staff who are ready to represent the wrongdoers in perpetuity at virtually no cost to the agency.

Despite popular assumptions, the remedy of punitive damages is not available against the federal government at the administrative level or in federal court for any EEO claims, MSPB-appealable claims, or OSC-exhausted claims.[2] Moreover, do not go to federal court under the misconception that you can obtain damages that are different from that which an administrative judge could award. While important differences exist, such as the potential availability of a jury in federal court and, arguably, possible access to some preliminary injunctive relief, and the possible ability to combine administratively disparate claims into one action, the scope of relief will be essentially the same.

PART ONE: OUTLINE OF ELECTION OF REMEDIES ISSUES

I. EEO claims

A. Election between CBA grievance and Agency EEO processing. 29 C.F.R. §§ 1614.107(a)(4); 1614.301.

A.1. Does not apply to agency grievance procedures that were not negotiated with a union

A.2. Does not apply to USPS cases as USPS unions are governed by NLRB and not FLRA

A.3. Election of EEO process requires filing formal complaint. Requesting informal counseling is not an election.

A.4. See Part Two, Branch I, below, on the “First-in-Time” rule.

B. Election between ADR or regular informal counseling. 29 C.F.R. §§ 1614.102(b)(2); 1614.105(d)

B.1. Unlikely to get good settlements at informal stage

B.2. Extends time for Agency’s informal processing

B.3. Requesting ADR may tip off managers to commencement of EEO complaint.

2 Although subject to some dispute, federal employees who are retaliated against for their protected disclosures in connection with the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9, may seek “exemplary” damages in their whistleblowing retaliation complaint filed with OSHA within 30 days of learning of the adverse action. 29 C.F.R. § 24.103(d)(1).

B.4. Employee might not be able to document management knowledge of EEO complaint, so consider sending a “revealment” email to document knowledge by Agency decision-makers.

C. Election of decision-maker.

C.1. 30 days to request a hearing with an EEOC AJ. 29 C.F.R. § 1614.108(f)

C.2. 90 days to file in U.S. District Court. 29 C.F.R. § 1614.407; 42 U.S.C. § 2000e-16(c).

C.3. If employee fails to make either election, Agency will issue Final Agency Decision (FAD)

D. Elections to appeal a FAD

D.1. 30 days to file Notice of Appeal with EEOC Office of Federal Operations (OFO). 29 C.F.R. § 1614.402(a).

D.1.a. If there was no hearing before an AJ, then OFO review is de novo

D.2. 90 days to file in U.S. District Court. 29 C.F.R. § 1614.407; 42 U.S.C. § 2000e-16(c).

D.2.a. De novo proceeding

E. After OFO decision, election to file for reconsideration. Time limit is 30 days. 29 C.F.R. § 1614.405(c).

F. After reconsideration, or if no reconsideration is sought, time limit to file in U.S. District Court is 90 days. 29 C.F.R. § 1614.407(c)

G. Employees may also file in U.S. District Court at any time after the 180th day after:

G.1. a formal complaint is filed, if the Agency has not served a FAD. 29 C.F.R. § 1614.407(b)

G.2. an appeal to OFO is filed, if no OFO decision has been issued. 29 C.F.R. § 1614.407(d)

II. <u>Appealable adverse actions</u>

A. Appealable adverse actions are:

A.1. Removals

A.2. Suspensions of over 14 days

A.3. Demotions

A.4. Denial of Within-Grade-Increases (WIGIs)

A.5. Furloughs

A.6. 5 U.S. C. § 7512; 5 U.S. C. § 7513(d)

B. Option to submit written response.

B.1. Time can be extended if Agency agrees

B.2. Information upon which decision was based can be requested

C. Option to submit an oral response.

C.1. Agency decision-maker does not have to answer questions or respond

D. Option to submit both written and oral responses. 5 U.S. C. § 7513(b)(2)

E. Elections of remedies among CBA grievance, MSPB appeal or OSC complaint. When alleging a prohibited personnel practice under 5 U.S.C. § 2302(b)(1), the employee may elect one and only one of the following:

E.1. a statutory procedure, i.e., a Board appeal or an equal employment opportunity complaint; or

E.2. a grievance under the applicable negotiated grievance procedures. 5 U.S.C. § 7121(d).

E.3. As with EEO complaints, USPS employees are not subject to this election of remedies requirement and may pursue both union grievances and MSPB appeals (if they are “preference eligible”). Non-bargaining unit USPS employees can also appeal to the MSPB.

F. When alleging a prohibited personnel practice other than under 5 U.S.C. § 2302(b)(1), the employee may elect one and only one of the following:

F.1. an appeal to the Board under 5 U.S.C. § 7701;

F.2. a grievance under the applicable negotiated grievance procedures; or

F.3. a complaint seeking corrective action from the Office of Special Counsel under 5 U.S.C. chapter 12, subchapters II and III.

F.4. 5 U.S.C. § 7121(g).

G. CBA grievance can be the best option if

G.1.a. Employee has support of the union and the union will take the grievance to arbitration

G.1.b. The union has experience with arbitrations, is competent to complete the process and has a track record showing success in similar cases.

H. OSC could be viable if

H.1.a. Whistleblower retaliation is the only defense (all other defenses would be waived); or

H.1.b. Other time limits were missed. Time limit for OSC complaint is 3 years (although the only penalty for missing this time limit is that OSC can dismiss without an investigation); see 5 U.S.C. § 1214(a)(6)(A)(iii).

H.1.c. Whistleblowers can then make a timely Individual Right of Appeal (IRA) to the MSPB within 65 days of an OSC close-out letter.

I. MSPB appeal must be made within 30 days of the effective date of the adverse action (60 days if ADR is properly documented).

I.1. 5 C.F.R. § 1201.22(b)(1): an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later. Where an appellant and an agency mutually agree in writing to attempt to resolve their dispute through an alternative dispute resolution process prior to the timely filing of an appeal, however, the time limit for filing the appeal is extended by an additional 30 days—for a total of 60 days.

J. If the Agency failed to give notice of the effect of electing a remedy, then the Agency cannot later assert an election of remedies.

J.1. *Kaszowski v. Air Force*, 2023 MSPB 15, Docket No. CH-0752-16-0089-I-1 (Apr. 4, 2023)

J.1.a. Appellant had elected to challenge her removal via a union-filed grievance.

J.1.b. Union did not pursue arbitration.

J.1.c. AJ found that, pursuant to 5 U.S.C. § 7121(e), the appellant had elected to challenge her removal through the negotiated grievance procedure, which precluded her Board appeal.

J.1.d. For an election of an option to be binding, it must be knowing and informed. *Agoranos v. Department of Justice*, 119 M.S.P.R. 498, ¶ 16 (2013).

J.1.e. The Board has held that, when an agency takes an action without informing the appellant of her procedural options under section 7121 and the preclusive effect of electing one of those options, any subsequent election by the appellant is not binding. Id., ¶ 17; cf. *Johnson v. Department of Veterans Affairs*, 121 M.S.P.R. 695, ¶¶ 6-7 (2014) (finding that the appellant's election to grieve his removal was not binding because the agency's removal decision did not inform him of his right to file a request for corrective action with the Office of Special Counsel (OSC), or of the effect that filing a grievance would have on his right to file an OSC complaint and a subsequent individual right of action appeal before the Board), *aff'd*, 611 F. App'x 496 (10th Cir. 2015).

J.1.f. The Board's regulations require that, when an agency issues a decision notice to an employee on a matter appealable to the Board, it must provide the employee with notice of the available avenues of relief and the preclusive effect any election will have on the employee's Board appeal rights. See 5 C.F.R. § 1201.21(d)(1).

J.1.g. "Given the various laws and [collective bargaining agreements] that come into play, it is essential that agency notices of appeal and grievance rights state the situation clearly with respect to the particular employee against whom the action is being taken." 64 Fed. Reg. 58,798 (Nov. 1, 1999).

J.1.h. The decision letter did not explicitly inform the appellant that she could raise the matter at issue with the Board or under the negotiated grievance procedure, "***but not both,***" [emphasis added] 5 U.S.C. § 7121(e)(1), nor did it provide her with notice as to "[w]hether the election of any applicable grievance procedure will result in waiver of the employee's right to file an appeal with the Board," 5 C.F.R. § 1201.21(d)(1).

J.1.i. *Kaszowski* is a reminder to agencies that they may wish to review and update, if necessary, the notice of appeal rights language in their decision notices consistent with the applicable statutes and 5 C.F.R. § 1201.21.

K. Election at MSPB to have a hearing

K.1. A hearing can be requested with the appeal, or separately within the time limit set by the ALJ. 5 C.F.R. § 1201.24(e).

K.2. Once made, an election to have a hearing can be withdrawn any time before the hearing.

K.3. If a hearing is held, the AJ is granted deference in findings about credibility. But see, *Miller v. Dept of Justice*, 842 F.3d 1252 (Fed. Cir. 2016), where the Federal Circuit rejected (over dissent) the agency's "same

decision" defense as falling short of "clear and convincing evidence" without disturbing the AJ's finding that the RMO was credible.

K.4. Issues to be considered may be added at any time, up to and including the pre-hearing statements and conference. 5 C.F.R. § 1201.24(b).

L. Election to file a Petition for Review (PFR) with the MSPB or with the Circuit Court of Appeals

L.1. Time to file PFR with MSPB is 35 days from Initial Decision. 5 C.F.R. § 1201.114(e)

L.2. Time can be extended by motion supported by declaration. 5 C.F.R. § 1201.114(f). Extensions of up to 30 days are routinely granted upon filing a compliant request.

L.3. To file with the Circuit Court of Appeals, miss the deadline to file a PFR with the MSPB, and then file a PFR with the Federal Circuit within 60 days of that deadline. 5 C.F.R. § 1201.113; 5 U.S.C. § 7703(b)(1). This deadline is jurisdictional and cannot be extended.

L.4. If the circuit appeal raises only issues arising under the Whistleblower Protection Act (WPA), then the All Circuit Review Act permits filing the petition for review in "any court of appeals of competent jurisdiction." 5 U.S.C. § 7703(b)(1)(B). Otherwise, it must be filed in the Federal Circuit.

L.5. If the case involves any issue of discrimination that could have been brought to the EEOC, then no Circuit Court of Appeals has jurisdiction, but the employee has 30 days to file a de novo mixed case civil action. 5 U.S.C. §§ 7703(b)(2), 7702. *Perry v. Merit Sys. Protection Bd.*, 137 S.Ct. 1975 (2017).

III. <u>No election of remedies between OSC and EEO for non-appealable adverse actions.</u>

A. Non-appealable adverse actions include:

A.1. suspensions of up to 14 days

A.2. Non-selection claims

A.3. Performance ratings

A.4. hostile work environments (HWEs)

A.5. For Whistleblower Protection Act claims:

A.5.a. detail, transfer, or reassignment; 5 U.S.C. § 2302(a)(2)(A)(iv)

A.5.b. denial of training “if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action” 5 U.S.C. § 2302(a)(2)(A)(ix)

A.5.c. a decision to order psychiatric testing or examination; 5 U.S.C. § 2302(a)(2)(A)(x)

A.5.d. the implementation or enforcement of any nondisclosure policy, form, or agreement; 5 U.S.C. § 2302(a)(2)(A)(xi)

A.5.e. any other significant change in duties, responsibilities, or working conditions; 5 U.S.C. § 2302(a)(2)(A)(xii)

B. Collateral estoppel and res judicata can still apply if either proceeding results in a final order.

IV. Mixed cases are complicated.

Congress provided rules, but little guidance and no statement of purpose. Mixed cases are controversial because most judges outside the Supreme Court disfavor them.

A. What is a mixed case?

A.1. It must include “an action which the employee or applicant may appeal to the Merit Systems Protection Board.” 5 U.S.C. § 7702(a)(1)(A)

A.1.a. This certainly includes the appealable adverse actions, listed above, from 5 U.S. C. § 7512

A.1.b. Does it also include whistleblower claims for which an “Individual Right of Action” (IRA) appeal can be made to the MSPB? The Fourth Circuit said “no” in a split decision. *Zachariasiewicz v. U.S. Dept of Justice*, 48 F.4th 237 (4th Cir. 2022). Judge Diaz dissented saying, “I would instead take Congress at its word that an employee need only allege agency action he can appeal to the Board, directly or not, to sustain a mixed case—as is true in an IRA appeal. So I dissent.” 48 F.4th at 250

A.2. It must also include an allegation of discrimination prohibited by—

A.2.a. (i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e–16),

A.2.b. (ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 206(d)),

A.2.c. (iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791),

A.2.d. (iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 631, 633a), or

A.2.e. any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

A.2.f. 5 U.S.C. § 7702(a)(1)(B)

B. Where do you file a mixed case complaint?

B.1. MSPB; 5 U.S.C. § 7702(a)

B.2. “an agency” presumably through its investigation of formal EEO complaints; 5 U.S.C. § 7702(b)

B.3. Through a union grievance and arbitration process authorized by U.S.C. § 7121 (so, not USPS union contracts).

B.4. Not more than one (except for USPS union employees). See 29 C.F.R. § 1614.302(b).

B.5. Savings clause for filing in the wrong agency. 5 U.S.C. § 7702(f):

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

C. When do you file a “mixed case”?

C.1. Direct appeals to the MSPB must be filed within 30 days of the effective date of the adverse action. 5 C.F.R. § 1201.22(b)(1).

C.1.a. In mixed cases, the employee may also file within 30 days “after the date of the appellant's receipt of the agency's decision on the appealable action[.]” 5 C.F.R. § 1201.154(a). This is a reference to the Agency FAD. 5 C.F.R. § 1201.154(b).

C.2. EEO complaints must be initiated through a request for informal counseling to the Agency’s EEO office within 45 days of “the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.” 29 C.F.R. § 1614.105(a)(1).

C.3. Because the federal government's administrative procedures for resolving complaints of discrimination are complex and confusing, individuals sometimes file their complaints with the wrong agency. In an effort to deal

with this problem, Congress adopted a savings clause: "[i]n any case in which an employee is required to file any action ... under this section and the employee timely files the action ... with an agency *other than the agency with which the action ... is to be filed,* the employee shall be treated as having timely filed the action ... as of the date it is filed with the *proper* agency." 5 U.S.C. § 7702(f) (emphasis added). So how does this provision apply where, as here, the complainant initiates an action before the wrong agency—timely according to the rules of that agency but untimely according to the rules of the proper agency? Because we understand that the savings clause measures timeliness with respect to the deadlines for filing with the *proper* agency, we affirm the district court's dismissal of the complaint.

Schlottman v. Perez, 739 F.3d 21, 22 (D.C. Cir. 2014)

D. Features of a mixed case

D.1. "Agency" has 120 days to decide both the civil service and discrimination claims. 5 U.S.C. § 7702(a)(2). See also:

D.1.a. MSPB: AJ has 120 days from the date the employee raises a claim of discrimination. 5 C.F.R. § 1201.156(b)

D.1.b. Agency EEO investigation. See, 29 C.F.R. § 1614.302(d)(1)(i); 5 C.F.R. § 1201.154(b)(2) (allowing MSPB appeal after 120 day period has expired).

D.2. Union arbitration decisions in mixed cases are subject to petitions for review to the MSPB. 5 C.F.R. § 1201.155. PFRs must be filed within 35 days of the arbitrator's decision, or within 30 days of receipt of the decision, whichever is later.

D.3. Agency EEO FADs in mixed cases may be appealed to the MSPB. 29 C.F.R. § 1614.302(d)(1)(ii)

D.4. MSPB decisions on discrimination claims can be appealed to EEOC. 29 C.F.R. § 1614.303.

D.4.a. Time limit is 30 days from a final MSPB decision.

D.4.b. Decisions of the MSPB on PFRs are final when issued.

D.4.c. AJ Initial Decisions are final on the 35th day after issuance if no PFR is filed; 5 C.F.R. § 1201.113.

D.5. If the EEOC and MSPB disagree about an employee's discrimination claim, a "special panel" will be convened to resolve the dispute.

D.5.a. 5 U.S.C. § 7702(d); 29 C.F.R. §§ 1614.306 to 1614.309 (EEOC regulations); 5 C.F.R. §§ 1201.171 to 1201.175 (MSPB regulations).

D.6. Employees can file in federal district court.

D.6.a. Any time after the 120 day time limit for a final decision has passed and there is no final decision. 5 U.S.C. § 7702(e).

D.6.b. Within 30 days of the final agency decision (EEO FAD). 29 C.F.R. § 1614.310

D.6.c. Within 30 days of a final MSPB decision. 5 C.F.R. § 1201.157.

D.7. District court will have jurisdiction over civil service issues even if the discrimination claim fails on the merits.

D.7.a. Perry v. Merit Sys. Protection Bd., 137 S.Ct. 1975 (2017) (reaffirming the district court's jurisdiction over all claims in a mixed case)

D.7.b. *Bonds v. Leavitt*, 629 F.3d 369, 379 (4th Cir. 2011) (remanding the WPA claim for a jury trial, even after affirming dismissal of the discrimination claim).

D.8. A jury's decision on the discrimination claim is binding on the court's review of the civil service claims.

"The Seventh Amendment demands that facts common to legal and equitable claims be adjudicated by a jury." *U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc.,* 675 F.3d 394, 404 (4th Cir. 2012), citing *Lytle v. Household Mfg.*, 494 U.S. 545, 550, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990) ("When legal and equitable claims are joined in the same action, the right to jury trial on the legal claim, including all issues common to both claims, remains intact.") (quotation marks omitted).

(Part Two, next page)

ISSUE SPOTTING & ELECTION OF REMEDIES IN THE FEDERAL SECTOR

PART TWO: DISCUSSION OF KEY ELECTION OF REMEDIES ISSUES

I. General First-In-Time Rule

Typically, the forum which is elected first-in-time will be held to be an irrevocable choice of forum, even if the election was an uninformed one, or if time appears not to have expired on other options. For our purposes and as explained in more detail below, the election generally occurs with the employee's (not the union's) filing of a 7121(d)-covered union grievance allowing discrimination claims, filing a formal EEO complaint (not just pre-complaint activity), filing an MSPB appeal, filing a claim of whistleblower retaliation with the Office of Special Counsel (instead of directly with the MSPB in connection with an otherwise MSPB appealable adverse action).

If the election was based on misinformation provided by the agency, discussed more below, you may have grounds to seek a new election under some form of equitable tolling or by a remand for the purposes of contacting an EEO counselor. Where the agency or MSPB judge questions the MSPB's jurisdiction on grounds that an MSPB appeal contains the same matter as one pending before the agency's EEO office, the appellant must bring the discrimination issue to the MSPB judge for review and "the agency shall hold the mixed case complaint in abeyance" until the MSPB judge rules on it. 29 CFR § 1614.302(c)(2)(ii). An agency shall dismiss an EEO complaint if the same claim is pending with or has been decided by the agency or the Commission (29 CFR § 1614.107(a)(1)), or that was raised in a negotiated grievance procedure that permits allegations of discrimination (29 CFR § 1614.107(a)(4) and 1614.301), or was raised in an appeal to the MSPB (29 CFR § 1614.107(a)(4) and 1614.302).

II. Election of Remedies via the EEO Process for Discrimination and Retaliation Claims Covered by 29 CFR Part 1614.

The firm rule is that the filing of a written formal EEO complaint constitutes an irrevocable election of the EEO process for claims that are covered by (and require administrative exhaustion by resort to) the procedures in 29 CFR Part 1614. Consulting with an EEO Counselor, filing an informal complaint, attending mediation, or merely filling out EEO processing forms (short of a formal complaint) does not constitute an election of the EEO process. 29 CFR § 1614.301(a).

The EEO counselor is required to provide notice of election of remedies for 7121(d) negotiated grievances and mixed cases, but in reality, they know little and just provide legalese-like notices that your client will likely not understand. 29 CFR § 1614.105(b)(1). Given how confusing it can be and given the general focus of EEO counselors on only the EEO process, an employee's attorney needs to be familiar with these options and provide good advice.

The election of the EEO complaint process, i.e. filing a formal EEO complaint (opposed to a 7212(d) negotiated grievance or an MSPB appeal in a mixed case), takes

extensive time because EEO counseling has to take place first, is usually not done by mistake, and will not generally create problems with electing other avenues because they would have already expired. Before filing a formal complaint (electing the EEO process), an employee must initiate contact with an EEO counselor or EEO Official logically connected with the EEO process with an intent to file a discrimination complaint within 45 calendar days of the effective date of the personnel action at issue or within 45 calendar days of when the employee knew or should have known of the discrimination. 29 CFR § 1614.105(a)(2).[3]

MSPB appeals must generally be filed within 30 days (or less for some VA actions), and union grievances often within 10 days. If employees do not first elect those options, if available, or if employees miss those deadlines, the EEO process provides 45 days within which to initiate EEO counseling. Although it is not even an election, if the other options have expired, the employee must timely initiate the EEO process within the 45-day window to preserve this option. EEO counseling typically takes about 30 days before the notice of an employee's right to file a formal complaint is issued, but it is generally extendable up to 90 days for mediation or if otherwise useful. After exhausting EEO counseling for 30 days, employees can file their formal EEO complaint – the irrevocable election of remedies – even if the notice of right to file (providing 15 days to file) has not been issued. Again, if the 45-day initiation is untimely, or the 15-day formal complaint (election) deadline is untimely, proceed apace and argue for equitable tolling of these deadlines. 29 CFR § 1614.604.

III. Election of Remedies for Mixed Cases – MSPB Appealable Adverse Action Plus an EEO Basis – Allow Filing Either with the MSPB or in the EEO Process.

If discrimination or EEO retaliation is suspected, the actions that you need to red-flag as likely to involve MSPB-appealable adverse actions and mixed case elections of remedies are:

- Removal
- Suspension without pay for more than 14 days
- Reduction in grade (demotion)
- Reduction in pay
- Furlough
- *Constructive* claims for the above appealable actions (e.g., constructive discharge/forced resignation, forced retirement, forced demotion) – see discussion in the next section.
- Denial of within grade increase
- Denial of restoration of employment rights

[3] For a discussion of who is logically connected with the EEO process, *see, e.g., Kinan v. Department of Defense*, EEOC Request No. 05990249 (May 6, 1999); *Floyd v. National Guard Bureau*, EEOC Request No. 05890086 (June 22, 1989).

If the agency is an executive agency subject to the MSPB (5 U.S.C. § 7511(b)), if an employee has standing to file an MSPB appeal (5 U.S.C. § 7511(a)(1)), and if an MSPB appealable action is at issue (see 5 CFR § 1201.3(a)), a claim generally must be filed, if at all, with the Merit Systems Protection Board (MSPB) within thirty (30) calendar days of the effective date of the adverse action. 5 CFR § 1201.22(b); *see also* 1201.22(c) (equitable tolling may apply); 38 U.S.C. § 714(c)(4)(B) (10 business days for certain Title 38 VA employees for removal, demotion, suspensions over 14 days). One exception is the case where the employee claims that an unlawful discriminatory or retaliatory basis motivated the decision-making. That is referred to as a mixed case. It can be filed either by initiating it within 45 days (as explained above) in the EEO process (called a mixed case complaint) or raising it directly as an affirmative defense in a claim challenging the adverse action at the MSPB (called a mixed case appeal). The election of remedies is making the irrevocable choice to initiate the claim through the agency EEO process (utilizing the mixed case complaint procedures, 29 CFR Part 1614) or at the MSPB (utilizing MSPB appeal processing regulations, 5 CFR Part 1201).

Regardless of whether the claim is started in the EEO process or directly at the MSPB, the hearing will only be at the MSPB. Once at the MSPB, the case processing will not be differentiated based on how it began.

When discrimination is at issue, the question of whether to elect the direct MSPB appeal process or the EEOC mixed complaint process is a complicated one. Some of the important factors to consider in whether to elect initiation in the EEO process or directly at the MSPB are:

- length of time to get to an MSPB hearing (delay of 120 days or more in EEO process)
- how the administrative record is developed (only the MSPB agency file or an EEOC Report of Investigation and then the agency file)
- mediation programs
- case fragmentation issues (cannot necessarily be overcome)
- perception of a loss of EEO perspective at the MSPB (cannot necessarily be overcome)

If the employee elects to initiate the claim via the EEO process as a mixed case complaint, it must begin with the same EEO counseling pre-complaint process as a non-mixed case. Likewise, once EEO counseling concludes, the same (one and only) formal EEO complaint form can be used as for a non-mixed case. While the form is not required, using it to anchor a written description of the claim ensures the inclusion of necessary information. The EEO office must accept or reject the formal complaint just as with a non-mixed case.

If the EEO office rejects the entire EEO complaint, it is appealable to the EEOC's Office of Federal Operation just like a non-mixed case. (Partial rejections are not subject to interim appeal.) However, an OFO appeal takes a long time (months to years, even if priority is given to reverse improper dismissals). It would be advisable to file the OFO

appeal AND jump to the MSPB where you can file a new MSPB appeal on the same matter right away on the electronic filing system. The OFO appeal will take a long time. At the MSPB during the early jurisdictional stage, argue that the EEO office improvidently dismissed the mixed case complaint. Advise the MSPB Administrative Judge that you will immediately withdraw the OFO appeal once the MSPB AJ issues an order finding MSPB proper. The MSPB should not deem it untimely because the EEO office erroneously dismissed the claim. Waiting for an OFO reversal will harm and delay necessary MSPB processing.

Assuming the EEO office accepts the mixed case complaint, it will be assigned to an EEO investigator who will have only 120 days to finish the EEO investigation (instead of the usual 180 days). 29 CFR § 1614.302(d)(1)(i). When the investigation is concluded, the employee will not receive an election between a final agency decision and an EEOC hearing. Instead, the agency must produce a final agency decision (FAD) within 45 days. 29 CFR § 1614.302(d). The EEO will issue the FAD to the complainant along with a notice of their right to file an MSPB appeal at the MSPB and seek a hearing at the MSPB (not EEOC) within thirty (30) days (or pursue a civil action). 29 CFR § 1614.302. The employee will have the benefit of an EEO investigation (which may be of debatable use) but has lost about 150 days in processing time at the MSPB (had the appeal been directly filed with the MSPB in the first instance). If the EEO office does not conclude the EEO investigation within 120 days, you may file the MSPB appeal without further delay.

Allegations that may be connected with the MSPB appealable action but which do not independently have MSPB appeal rights, will *not* be able to be taken to the MSPB.[4] *See Greenidge v. USPS,* EEOC Appeal No. 01A52532 (Sept. 27, 2006) (a series of non-mixed events leading to a claim appealed to the MSPB are not in themselves appealable to MSPB; these claims are background for the MSPB case and the Commission has jurisdiction to process them) (citing EEOC, Management Bulletin 100-1, ¶ 2 (Oct. 24, 2003)). For example, if an employee was not reasonably accommodated by an agency, filed an EEO complaint about it, and the agency – perhaps during the EEO investigation – separated the employee due to an alleged medical inability to perform or for attendance, only the separation goes to the MSPB. The underlying EEO complaint alleging failure to accommodate must go to the EEOC for a hearing. There is no MSPB jurisdiction over related claims. Likewise, if there is evidence that the proposal to remove (or a proposal for another MSPB appealable adverse action) is itself retaliatory or discriminatory, it must be described and amended as an EEO claim, not an MSPB claim.

That said, beware of – or celebrate – unified penalties at the MSPB. It is a double-edged sword. If the record demonstrates that at least one of the reasons for an otherwise unappealable reassignment was also the reason, or cause, of the adverse action (e.g., removal), the penalty is said to be unified (or compound) and within the

[4] If an agency is required by the Board to cancel an adverse action, such as removal, and then, as part of or soon after the reinstatement process, the agency reassigns the employee, you can attempt to challenge the agency's restoration of the status quo ante in an enforcement action.

Board's jurisdiction. Originally articulated by the Federal Circuit when striking down a geographical reassignment that was factually tied to the appealable adverse action, the Federal Circuit determined that the Board has jurisdiction to review an otherwise-unappealable action that accompanies or implements an appealable adverse action as a portion of the penalty imposed by an agency. *Brewer v. American Battle Monuments Comm'n*, 779 F.2d 663, 665 (Fed. Cir. 1985), after remand, 31 MSPR 243, 245-47 (1986). This holding has permitted the Board to order an agency to return an employee to his or her former position when the unified penalty of reassignment is tied to an adverse action that is found to be unwarranted. *Brown v. USPS*, 64 MSPR 425, 431 (1994). If the adverse action is affirmed, it could also affirm the reassignment and harm your chances in another forum, like the EEOC. The Board has jurisdiction over such a reassignment even if it is not effected simultaneously with the appealable adverse action if the record shows that the adverse action and the reassignment constitute a "unified penalty arising out of the set of circumstances of which" the employee "was found culpable." *Brewer*, 779 F.2d at 664-65. A reassignment or detail tied to a proposed removal that does *not* ripen into a removal decision (or resignation challenged as a constructive removal) remains an unappealable action. *See Pann v. Dept. of Navy*, 82 MSPR 294, 295-96 ¶ 1 (1999) (remanding for determination of whether an appealable reduction in pay occurred when the appellant was shifted into a position that no longer carried "dive pay").

Strictly speaking, there is no pendent jurisdiction at the MSPB, although it might seem like there should be. According to the MSPB, preliminary steps and proposals to take appealable adverse actions are not within their limited statutory appellate jurisdiction and you should strongly argue that the EEO office and EEOC AJs should accept such amendments and claims as EEO claims in their own right even if a subsequent MSPB-appealable adverse action is factually connected to it.[5] While

[5] The Board rejects any type of claim that is not explicitly set forth by statute as one within its limited jurisdiction. The most authoritative position for MSPB practitioners would be the recent brief by the MSPB filed in *Crowe v. Wormuth*, 74 F.4th 1011 (9th Cir. 2023), discussed below, upon which the Ninth Circuit relied. (Attached).

Formerly, the EEOC took the position that such actions could remain at the EEOC if the complainant argued that they were inextricably intertwined with non-MSPB-appealable issues (e.g., an underlying harassment claim or failure to accommodate that led to a forced retirement). The MSPB objected. The EEOC overruled their doctrine by case law and in its guidance. *See Complainant v. Inter-American Foundation*, EEOC Appeal No. 0120132968 (Jan. 8, 2014) (wherein the Commission explicitly overturned the doctrine of inextricably intertwined); *see also* EEOC-MD-100, Chapter 4 (2015). Until the EEOC amends or otherwise rejects one part of its regulations, the EEOC may continue to take the untenable position that a proposed adverse action and preliminary actions to an appealable adverse action merge with the ultimate adverse action (and cannot be separately processed) except as a retaliation claim. *See* 29 CFR 1614.107(a)(5); *Wilson v. VA, EEOC Appeal* No. 0120122103 (Sept. 10, 2012) (“The doctrine of inextricably intertwined was effectively overturned … We note, however, that a proposed action merges with the decision on an appealable action, i.e., a proposed removal merges into a decision to remove.”). The Federal Circuit and MSPB believe otherwise. See *Mays v. Dept. of Transportation*, 27 F.3d 1577 (Fed. Cir. 1994); *Lethridge v. USPS*, 99 MSPR 675 (2005) (firmly rejecting consideration of an alleged discriminatory proposed removal claim). There is a circuit split on the issue of whether preliminary steps to an adverse action need to be exhausted as a mixed case at the MSPB. *See McAdams v. Reno*, 64

fragmentation of an arguably related claim is inefficient as is litigating similar claims in two fora, on a positive note, your client will have two opportunities to obtain damages. Both parties may still pursue global resolution.

IV. How to *Unmix* MSPB Constructive Adverse Action Claims Based on Discrimination – Like a Discriminatory Constructive Discharge Claim or a Discriminatory Forced Retirement Claim – and Return to the EEOC for a Hearing.

An important corollary to understanding mixed cases and one's elections of remedies connected thereto is understanding when and how to *unmix* them. This may be covered in other materials, but in case not, for completeness, the basics are set forth below.

Any constructive adverse action claim that includes a discrimination allegation needs to be treated like a mixed case described in the previous section. It is an otherwise-appealable MSPB adverse action claim with a discrimination allegation. Whether it starts with a direct appeal to the MSPB or as a mixed case complaint in the EEO process, the employee should request a hearing before the MSPB *at first*. It will just cost you precious time to correct the error later if you are mistakenly allowed to request an EEOC AJ first.

When you get to the MSPB (by filing your MSPB appeal), the MSPB AJ will almost immediately require you to show cause why jurisdiction exists. This is because a forced resignation or forced retirement, etc., is just a voluntary resignation and voluntary retirement if you do not prove that the EEO basis involuntarily forced it to happen. Voluntary resignations (any voluntary major personnel action) are not adverse actions appealable to the MSPB. Thus, the MSPB lacks jurisdiction to hear them unless you prove they were involuntary. The MSPB will expect you to prove your entire case in a jurisdictional hearing (or by brief), and typically before discovery takes place. That is almost assuredly a losing proposition. MSPB AJs routinely find insufficient evidence and dismiss the appeal for lack of jurisdiction. Because the dismissal technically denies the allegation of discrimination from being heard (even if there is a jurisdictional hearing because the MSPB finds it lacks jurisdiction to hear the case), the discrimination allegation still needs processed and a potential hearing. Therefore, the MSPB AJ dismisses the constructive adverse action for remand to the agency's EEO office for issuance of a notice of the complainant's right to request an EEOC hearing on the now-unmixed EEO complaint.

Unless you have strategic considerations and/or incredible evidence motivating you to keep fighting for MSPB jurisdiction, do not oppose (or take any action) to try to convince the MSPB AJ that there is MSPB jurisdiction. Do not waste attorneys fees or time briefing it. Let the MSPB AJ dismiss it, accept it, and get back to the EEOC AJ

F.3d 1137 (8th Cir. 1995) (exhaustion required); *Crowe v. Wormuth*, 74 F.4th 1011 (9th Cir. 2023) (no exhaustion required).

process, where you can do discovery or request a FAD. The EEOC process provides a much better forum to decide liability and damages on a discrimination claim.

V. Election of Remedies for Whistleblower Reprisal – MSPB Appealable Adverse Action (Ch. 75 or 43) Plus Whistleblower Reprisal Basis – Allows Filing Either with the MSPB or OSC-then-IRA.

This is probably the single most important election of remedies issue. If the agency has taken an "appealable action" (e.g., removal, suspension of 15-days or more, etc.), your client can *either* file a timely direct appeal at the MSPB or file a whistleblowing PPP complaint with OSC (deadline is three years, 5 U.S.C. § 1214(a)(6)(A)(iii)). Your choice significantly impacts the burdens of proof in the case. The agency maintains the burden of proof on a direct MSPB appeal, as it typically does in any other similar action, even if you raise whistleblowing retaliation as an affirmative defense. If you initially file with OSC, and return to the MSPB with an IRA, the agency has no burden of proof. You must prevail on the prima facie claim of your affirmative whistleblowing retaliation claim, including a showing that protected activity was a "contributing factor, in order to reverse the action. 5 U.S.C. § 1221(e)(1).

If the agency takes an action against your client based on Chapter 75 for misconduct, 5 U.S.C. § 7501 *et seq*., or Chapter 43 for poor performance, 5 U.S.C. § 4301 *et seq*., if your client has MSPB appeal rights, and <u>if you file an appeal of that action directly with the MSPB</u>, <u>the agency has the burden of proof on the adverse action</u>. For Chapter 75 adverse actions, the agency bears the preponderance of the evidence burden of proof, and a substantial evidence burden in Chapter 43 actions. The employee bears the preponderance of evidence burden of proof on their affirmative defense (whether on the EEO basis, or something else like another prohibited personnel action). If the agency fails to meet its burden, your client wins the appeal of the adverse action, even if they fail to prove whistleblowing reprisal. Your client's whistleblower claim will be subject to the WPA's bifurcated causation standard in which the whistleblower has to show protected activity, an adverse action, and that the protected activity was a "contributing factor." 5 U.S.C. § 1221(e)(1). Thereafter, the burden shifts to the agency to show that it would have taken the same adverse action without the protected activity by "clear and convincing evidence." 5 U.S.C. § 1221(e)(2); *Whitmore v. Dept. of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012) (" 'Clear and convincing evidence' is a high burden of proof for the Government to bear.").

Instead, <u>if you first file a complaint with the Office of Special Counsel</u> asking that the Special Counsel seek corrective action from the Board under the Whistleblower Protection Act of 1989, as amended, and if the OSC declines, your client only has the option of filing an Individual Right of Action (IRA) appeal at the MSPB. *See* 5 C.F.R. 1209.5 (60- or 65-day filing period after OSC issues notice or your receipt thereof). In an IRA appeal, 5 CFR § 1209.6, the agency has no burden of proof on the underlying Chapter 43 and Chapter 75 adverse actions. The only burden of proof is on your client to prove prohibited whistleblowing reprisal (same contributing factor bifurcated causation standard explained above). Failing that, the adverse action will be upheld.

If your client missed the MSPB filing deadline, it is great to have the OSC and IRA option, even with this upside-down result on the burden of proof. The point is, as always, to not lightly miss the MSPB deadline. The MSPB rarely allows equitable tolling. *See Heimberger v. Commerce*, 121 MSPR 10, ¶10 (2014) (equitable tolling is rare, for unusual circumstances, requires a showing that the appellant has been pursuing her rights diligently and some extraordinary circumstances stood in her way; maybe proper when the complainant has been induced or tricked by her adversary's misconduct into allowing the deadline to pass); *see Robinson v. Dept of Homeland Sec. Off. of Inspector Gen.*, 71 F.4th 51 (D.C. Cir. 2023) (finding that the 30-day appeal filing period is non-jurisdictional and subject to equitable tolling).

Bypassing the MSPB direct appeal is risky. If the employee fails to prove their whistleblowing allegations, they will NOT win their case. The OSC rarely takes these whistleblowing reprisal cases to the Board. The OSC may investigate, creating a record which you will never see, leaving you where you began, but bearing a more substantial burden of proof and longer odds of obtaining any relief.

VI. Election of 7121(d) Negotiated Grievance Procedure Reserved for CBAs That Allow Claims of Discrimination and/or Prohibited Personnel Actions.

Relatively few 7121(d) negotiated grievance procedures appear to include EEO claims. But when they do, they will create an election of remedies. The general rule is that whichever one is filed first – a union grievance or a formal EEO complaint – will control. Thus, having first filed a timely written grievance containing an allegation of discrimination under the auspices of a 7121(d) negotiated grievance procedure that explicitly *allows* for the processing of the particular discrimination claim will constitute an irrevocable election of that negotiated grievance procedure and rejection of the EEO process. 29 CFR § 1614.301(a). This is true even if you do not actually raise the discrimination issue in your union grievance. This is also true even if the particular CBA does not guarantee a hearing/arbitration on the issue.

Allegations of discrimination by employees who are *excluded* from 7121(d) grievance procedures, including those covered by one that will not allow complaints of discrimination and those who are employed by an agency not subject to 7212(d), shall only be processed through the EEO process. 29 CFR § 1614.301(b) & (c). Any attempt to raise them in other processes will not exhaust their EEO claims.

Generally, for an employee covered by a 7121(d) negotiated grievance procedure, if the claim also includes a discrimination allegation arising under the auspices of 29 CFR Part 1614, certain actions arising under 5 U.S.C. § 4303 or 5 U.S.C. § 7512, and/or an allegation of a prohibited personnel action, the employee has an election of remedies. They must make an election between a 7121(d) negotiated grievance procedure, a direct MSPB appeal (raising the issues as affirmative defenses), or by seeking corrective action for a prohibited personnel action at the Office of Special

Counsel. (See discussion below about concerns with filing at OSC first.) The first action filed constitutes an election. 5 CFR § 1201.3(c)(2). The employee may NOT withdraw their union grievance (or OSC complaint) and then file an MSPB appeal, even if the MSPB appeal-filing deadline has not passed yet. Once the election is made, it is irrevocable.

Withdrawal of a 7121(d) grievance (filed by the employee opposed to the union) will not negate the election. *See Marsh v. Dept. of Treasury*, EEOC Appeal 05910383 (Aug. 8, 1991); *Atanus v. MSPB and GSA*, 434 F.3d 1324 (Fed. Cir. 2006) (J. Newman dissenting, statute only prohibits filing both, and she just timely changed her mind). It will be the agency's burden to prove that an employee elected a negotiated grievance procedure (instead of the EEO process) under 29 CFR Part 1614. *See Mkrtchyan v. Broadcasting Board of Governors International Broadcasting Bureau*, EEOC Appeal No. 01991800 (Feb. 16, 2001). This means that if the union filed the grievance instead of the employee, the employee remains free to elect to file an EEO complaint on the same matter.

Filing of a formal EEO complaint – and *not merely participating in EEO counseling* – will constitute an irrevocable election of the EEO process. 29 CFR § 1614.301(a). Because time limits for filing a grievance are universally much shorter than exhausting EEO counseling and filing a formal complaint, it is typically the case that an employee may have quickly filed a union grievance that will preclude their subsequent EEO complaint even without knowingly doing so. There is no duty under EEOC regulations for an agency to provide notice of this election of remedies before an election is made, i.e., before a grievance is filed. Always check to see exactly what your PC/client filed as a union grievance and figure out whether it counts as an election. EEO complaints can be dismissed at any time on this jurisdictional issue, even at hearing or on an appeal. For MSPB appeals, the Agency does have a duty to clearly explain the effect of electing a remedy and its failure to do so will preserve the employee's option to appeal to the MSPB. *See Kaszowski v. Air Force*, 2023 MSPB 15 (2023), discussed at page 5, above.

If the union grievance is defective because it is discovered that the employee is not actually covered by a negotiated grievance procedure that allows allegations of discriminations in connection with the agency action at issue, the grievance will be dismissed. Appeal rights must be provided to the EEOC's Office of Federal Operations or to the MSPB if it is a mixed case (discussed below). 29 CFR § 1614.401(d). However, the discrimination claim will remain viable. Time used to process the misplaced grievance will act as a tolling mechanism such that the employee should be provided 45 days within their receipt of the dismissal to initiate contact with an EEO counselor because no valid election had been made. *See Holmes v. Navy*, EEOC Appeal 05931010 (Oct. 14, 1994). If the grievance was dismissed as untimely, and the EEO complaint was subsequently timely initiated, the EEO complaint will not be precluded. *See Ball v. Dept. of Veterans Affairs*, EEOC Appeal No. 05930261 (Jan. 31, 1994).

In any case in which the employee was confused and seeks EEO counseling late, the employee should argue for equitable tolling, which the regulations explicitly provide for. (29 CFR § 1614.105(a)(2), 1614.106(b), 1614.604(c)). It would be best to press your case both before the EEO office (to get them to change their mind and accept the issue) and also to file a notice of appeal with the EEOC's Office of Federal Operation to reverse the dismissal on grounds of equitable tolling. The best tolling argument is generally when actions of the agency misled or substantially confused the options. Argue waiver by the agency and equitable estoppel based on your reliance upon the agency advice (at several junctures, no doubt).

VII. HR Complaints and "Administrative Grievances" Are Allowed Because They Are Not a Covered 7121(d) Negotiated Grievance Procedure.

If an employee (regardless of whether they are covered by any CBA or not) files what is typically referred to as an administrative grievance (or really any other internal complaint, often through HR), and even if it alleges or mentions discrimination, it will *not* constitute an election of remedies and it will not exhaust administrative processing for an EEO claim. An administrative grievance or HR complaint will have no effect on an EEO complaint. *See* 29 CFR § 1614.301(b). That said, an EEO office may erroneously dismiss the subsequent EEO complaint, but it should be relatively easily to sort out or reverse.

Beware of vague grievances. If the employee is subject to a negotiated grievance process under 5 U.S.C. § 7121 (thus, not at USPS), and also an administrative grievance process, care should be taken in filing to grievance to make clear that the employee is filing it only pursuant to the agency's administrative process and not the negotiated grievance process. Otherwise, the agency is likely to argue that it was a grievance under the procedure negotiated by the union.

This means that employees are free to file an administrative grievance on the *same action* that may also be incorporated in an EEO complaint (i.e. violation of an agency policy regarding work schedules, leave time, etc.) without fear that it will have any preclusive effect on an EEO complaint. It is occasionally useful to pursue informal administrative grievances for the purpose of cornering the agency on an issue of pretext such as its failure to follow a certain policy that is important in a discrimination claim.

VIII. Non-7121(d) Negotiated Grievance Procedures are Not Binding.

Employees who work at an agency which is not subject to 5 U.S.C. § 7121(d), but which is covered by another negotiated union grievance procedure, shall only be permitted to raise discrimination allegations in the EEO process. 29 CFR § 1614.301(c). However, if they take the same adverse action through their other union grievance process, the agency may inform the employee that it is placing the EEO complaint in abeyance (tolling all deadlines) until the grievance is decided. 29 CFR § 1614.301(c).

Once the grievance is decided, the EEO complaint will be allowed to proceed, and it may be amended as necessary depending upon the outcome of the grievance.

IX. Age Discrimination Claimants May Bypass the EEO Process.

Age complaints fall within 29 CFR Part 1614. Everything discussed above applies to them. However, in addition to the processing rights provided for in 29 CFR Part 1614, federal employees may file age claims directly in federal district court, bypassing the administrative EEO process by simply giving a thirty (30) day notice to the EEOC at the address specified in the EEOC regulations. 29 CFR § 1614.201. If one chooses to file a formal EEO complaint regarding an age claim, it must stay in the EEO process for a minimum of 180 days before exhausting administrative remedies and opening up another option to file in federal district court. 29 CFR § 1614.201(c)(1). Beware that the statute of limitations does not stop (is not tolled) during the EEO administrative process. If federal court action is envisioned, calculate whether you have time for the EEO administrative process.

X. Equal Pay Act Claimants May Bypass the EEO Process or Do Both.

Like age claims under the ADEA, the EEO process covers claims arising under the Equal Pay Act, and claimants may file their EPA claims directly in federal court if they wish, bypassing the EEO process. 29 CFR § 1614.408. The interesting difference is that a complainant with an EPA claim may jump from the EEO administrative process into federal court at any time “regardless of whether he or she pursued any administrative complaint processing.” 29 CFR § 1614.408. Unlike ADEA claims, notice need not be provided to the EEOC as a precondition of filing a civil action. As such, even if a federal employee files a formal EEO complaint alleging an Equal Pay Act violation, it does not constitute an election of remedies for purposes of administrative exhaustion of remedies. It would constitute an election of remedies, however, for purposes of MSPB jurisdiction and options under negotiated grievance procedures, as discussed above.

While it is naturally best to plead both Equal Pay Act violations and sex-based Title VII compensation claims at the same time, the sex-based compensation claims may not be filed directly in federal court even if they are factually the same as the EPA claims. All wage claims alleged under Title VII as sex discrimination must be administratively filed and exhausted through the EEO process.

Like age claims, a federal employee’s EPA statute of limitations does not stop (is not tolled) during the EEO administrative process. 29 CFR § 1614.408. Even though there is not a minimum exhaustion time period like there is for age claims, if federal court action is envisioned, care should be taken to ensure the statute of limitations does not expire while sitting in the EEO process.

XI. Settlement Breach

There is one minor election of remedies issue in the case of a breach claim regarding a settlement agreement. The EEO complainant may elect whether to seek enforcement (specific performance) or to reinstate the complaint where processing ended. 29 CFR § 1614.504(a). Likewise, an MSPB appellant may elect to enforce the agreement or rescind it and reinstate the underlying appeal. *Poett v. Dept. of Agriculture*, 98 MSPR 628, ¶ 20 (2005).

XII. ATTACHMENT

MSPB Amicus Brief, filed November 18, 2022, in *Crowe v. Wormuth*, 74 F.4th 1011 (9th Cir. 2023).

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NO. 21-15802

BRIEF FOR AMICUS MERIT SYSTEMS PROTECTION BOARD IN SUPPORT OF PETITIONER

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

STEVEN W. CROWE,
Plaintiff-Appellant,
v.
CHRISTINE WORMUTH, SECRETARY OF THE ARMY,
Defendant-Appellee.

PETITION FOR REVIEW OF A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII IN NO. 1:18-CV-00288

Respectfully submitted,

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DATE: November 18, 2022

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(A)(4)

The Merit Systems Protection Board ("MSPB" or "Board") submits this amicus brief pursuant to its independent litigating authority under 5 U.S.C. § 1204(i) to aid the Court in determining the proper requirements for exhaustion of administrative remedies with respect to discrimination claims not appealable by statute to MSPB.

On October 14, 2022, oral argument was held in this matter, during which counsel for the petitioner referenced a 2003 document issued by the Equal Employment Opportunity Commission ("EEOC" or "Commission"), Management Bulletin 100-1 ("MB 100-1"), in which the EEOC rescinded prior guidance to Federal agencies that had directed agencies to seek to have claims of discrimination involving personnel actions not otherwise appealable to MSPB consolidated with MSPB appeals involving related personnel actions that are within the MSPB's statutory jurisdiction.

On October 21, 2022, this Court ordered the parties to file supplemental briefs addressing the meaning of EEOC's MB 100-1 document. MSPB sought and was granted leave to file an amicus brief, and now submits this brief to explain its jurisdiction over these types of claims. MSPB believes that parties should not be required to bring claims before the MSPB that do not fall within its statutory

jurisdiction in order to exhaust those claims for further proceedings before an Article III court, even if the non-appealable claims relate to claims separately appealable to MSPB.

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JURISDICTIONAL STATEMENT

The amicus agrees with the parties' statements regarding this Court's jurisdiction to review the decision of the district court below. For the reasons stated below, the amicus disagrees with any implication from the district court's ruling below that MSPB had jurisdiction to review claims of discrimination in connection with matters outside of MSPB's statutory jurisdiction.

NO. 21-15802

BRIEF FOR AMICUS MERIT SYSTEMS PROTECTION BOARD IN SUPPORT OF PETITIONER

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

STEVEN W. CROWE,

Plaintiff-Appellant,

v.

CHRISTINE WORMUTH, SECRETARY OF THE ARMY,

Defendant-Appellee.

PETITION FOR REVIEW OF A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII IN NO. 1:18-CV-00288

STATEMENT OF THE ISSUE

Whether petitioner having discrimination claims appealable to the Merit Systems Protection Board ("MSPB" or "Board") and related discrimination claims appealable to the Equal Employment Opportunity Commission ("EEOC"), but *not* to MSPB, was required to appeal to MSPB the personnel actions not otherwise appealable to the Board, in order to administratively exhaust his claims for those actions.

ADDENDUM OF PERTINENT STATUTES

5 U.S.C. § 7512:

This subchapter applies to--

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to--

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title,

(E) an action initiated under section 1215 or 7521 of this title, or

(F) a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service.

5 U.S.C. § 7701(a):

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

5 U.S.C. § 7702:

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who--

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by--

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves--

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of--

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to

consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either--

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law--

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period

prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5)(A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and--

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter of law, (A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole--

(i) reaffirm the initial decision of the Board; or

(ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate.

If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.

(d)(1) If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including--

(A) the factual record compiled under this section,

(B) the decisions issued by the Board and the Commission under this section, and

(C) any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

(2)(A) The special panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the record, decide the issues in dispute and issue a final decision which shall be a judicially reviewable action.

(B) The special panel shall give due deference to the respective expertise of the Board and Commission in making its decision.

(3) The special panel shall refer its decision under paragraph (2) of this subsection to the Board and the Board shall order any agency to take any action appropriate to carry out the decision.

(4) The special panel shall permit the employee or applicant who brought the complaint and the employing agency to appear before the panel to present oral arguments and to present written arguments with respect to the matter.

(5) Upon application by the employee or applicant, the Commission may issue such interim relief as it determines appropriate to mitigate any exceptional hardship the employee or applicant might otherwise incur as a result of the certification of any matter under this subsection, except that the Commission may not stay, or order any agency to review on an interim basis, the action referred to in subsection (a)(1) of this section.

(6)(A) Each time the Board takes any action under subsection (c)(2) of this section, a special panel shall be convened which shall consist of--

(i) an individual appointed by the President, by and with the advice and consent of the Senate, to serve for a term of 6 years as chairman of the special panel each time it is convened;

(ii) one member of the Board designated by the Chairman of the Board each time a panel is convened; and

(iii) one member of the Commission designated by the Chairman of the Commission each time a panel is convened.

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(B) The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.

(C) The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.

(e)(1) Notwithstanding any other provision of law, if at any time after--

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or

petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

5 U.S.C. § 7703:

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel

practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals.

The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(2) This paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of

appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

STATEMENT OF THE CASE

I. Nature of the Case

The plaintiff, Steven Crowe, seeks review of a decision of the United States District Court for the District of Hawaii, which affirmed an MSPB decision sustaining Mr. Crowe's removal from the Department of the Army ("Army"). 1-ER-65-104. The District Court dismissed Mr. Crowe's remaining discrimination claims because they were presented to EEOC but not to MSPB. 1-ER-3-64.

II. Statement of Facts and Disposition Below

On August 15, 2016, Mr. Crowe filed a discrimination complaint with EEOC alleging sex, sexual orientation, and race discrimination in connection with the following workplace-related complaints: reassignment of his duties, placement on administrative duty, and being subjected to an investigation. 2-ER-256-280.

On December 6, 2017, Mr. Crowe separately appealed to MSPB his removal from employment. 5-ER-864-869. Mr. Crowe alleged that his removal was due to his sex, sexual orientation, race, and prior reports of discrimination. 5-ER-869. An MSPB administrative judge issued a decision affirming the Army's removal of Mr. Crowe, and denying Mr. Crowe's discrimination claims related to his removal. 1-ER-65-102.

On July 27, 2018, Mr. Crowe filed a complaint with the U.S. District Court of Hawaii, in which he appealed MSPB's decision respecting his removal. 2-ER-381-390. Mr. Crowe also alleged separate claims of discrimination and retaliation in connection with the non-removal events contained within his prior EEOC complaint, which was still pending with EEOC at the time he filed his district court complaint. 2-ER-381-390. The Army moved to dismiss Mr. Crowe's discrimination claims other than his removal claim for lack of subject matter jurisdiction, arguing that even though Mr. Crowe pursued these claims before EEOC, and they were not within MSPB's jurisdiction, he was required to exhaust them before MSPB. D. Ct. Dkt. No. 55.

On March 2, 2021, the district court affirmed MSPB's removal decision and dismissed Mr. Crowe's claims of discrimination regarding the non-removal personnel actions for lack of subject matter jurisdiction. 1-ER-3-64. The court held that Mr. Crowe failed to administratively exhaust his non-removal discrimination claims by not first litigating them at MSPB. 1-ER-20-29.

Mr. Crowe appealed to this Court. Dkt. No. 1. At oral argument, Mr. Crowe discussed guidance from EEOC regarding exhaustion of discrimination claims not within MSPB's statutory jurisdiction. Dkt. Nos.

48, 50. The Court ordered Mr. Crowe to submit the referenced guidance, which Mr. Crowe did. Dkt. Nos. 49, 51. The Court subsequently ordered the parties to file supplemental briefs and granted MSPB leave to file an amicus brief. Dkt. Nos. 52, 62.

SUMMARY OF ARGUMENT

This case is about the intersection of the EEOC's adjudication of claims of illegal discrimination in Federal employment, and MSPB's jurisdiction of Federal employees' appeals of a limited set of adverse employment actions. The district court's holding that Mr. Crowe should have transferred certain discrimination claims previously submitted to the EEOC, suggests an administrative path which had he followed, conflicts with well-established MSPB caselaw and statutory interpretation, and would only result in the MSPB dismissing those claims for lack of jurisdiction.

The MSPB has jurisdiction over "mixed cases," which are cases that involve an MSPB appealable action like a removal, and a related discrimination claim. The MSPB does *not* have jurisdiction over cases involving a non-appealable action such as a proposed removal. That fact is well established by MSPB's statutory authority and caselaw. In turn, MSPB also does not have jurisdiction over discrimination claims *related* to non-appealable employment actions. The EEOC, however, may preside over a

discrimination claim related to an action not otherwise appealable to MSPB, which makes it appropriate that Mr. Crowe submitted such a claim to EEOC and not MSPB.

To suggest that the petitioner should have followed through with the administrative exhaustion path contemplated by the district court – one that ultimately would have led to his claims being dismissed by the MSPB without being adjudicated on the merits – thwarts the purpose of the administrative exhaustion requirement.

ARGUMENT

I. Background

A. Overview Of The MSPB And The EEOC

In 1978, Congress passed the Civil Service Reform Act ("CSRA" or "Act"), a "comprehensive system for reviewing personnel action[s] taken against federal employees." Pub. L. No. 95-454, *codified at* 5 U.S.C. § 1101, *et seq*.; *United States v. Fausto*, 484 U.S. 439, 455 (1988). The Act created a structure by which two separate agencies, each with differing expertise in separate subject matters, would be able to review employment claims brought by Federal employees. One of these agencies, the EEOC, already existed, having been created by Congress through the Civil Rights Act of 1964. Pub. L. No. 88-352, § 705(a), *codified at* 42 U.S.C. § 2000e-

4. The Act created the MSPB to, among other functions, adjudicate claims by Federal employees who believe they have been wrongfully subjected to an adverse personnel action. 5 U.S.C. § 1204(a).

B. Claims Adjudicated By The MSPB Are Limited To Specific Enumerated Adverse Employment Actions

Under the Act, MSPB is permitted to hear an appeal of any adverse employment action over which it has been specifically granted jurisdiction by law, rule, or regulation. 5 U.S.C. § 7701(a); *Prewitt v. Merit Sys. Prot. Bd.*, 133 F.3d 885, 886 (Fed. Cir. 1998); *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Pursuant to the Act, qualified Federal employees are entitled to appeal certain adverse actions imposed by their employing agency to MSPB, which has the authority to affirm the action or provide appropriate relief to the employee. *See* 5 U.S.C. § 7701. Among the limited actions appealable to MSPB are the following: (1) removals (from federal service); (2) suspensions for more than 14 days; (3) reductions in grade; (4) reductions in pay; and (5) furloughs of 30 days or less. 5 U.S.C. § 7512. Unless otherwise provided

by statute or regulation, MSPB may not hear appeals of employment actions other than these enumerated actions.[1]

When an appeal of an adverse action is filed with MSPB, an administrative judge in one of MSPB's regional offices adjudicates the appeal and issues an initial decision. 5 C.F.R. § 1201.111. Any party may then file an administrative petition for review of the administrative judge's initial decision to the full Board. 5 C.F.R. § 1201.114. The full Board will then issue a final decision in the individual's appeal. 5 C.F.R. § 1201.117. If neither party files an administrative petition for review of the administrative judge's initial decision, the initial decision will become the final decision of the Board 35 days after issuance. 5 C.F.R. § 1201.113.

After MSPB issues a final decision, either from an MSPB administrative judge or the full Board, the employee may seek judicial review of the decision in federal court. 5 U.S.C. § 7703(a)(1). The Act dictates the forum for review depending on the nature of the employee's appeal. *See* 5 U.S.C. § 7703(b). The default for judicial review of MSPB decisions takes place at the United States Court of Appeals for the Federal

[1] One primary exception is for claims of whistleblower reprisal, which are not at issue in this case. Procedures for such claims are addressed under 5 U.S.C. § 1221(a). *See e.g., Young v. Merit Systems Protection Board*, 961 F.3d 1323, 1327-28 (Fed. Cir. 2020).

Circuit, which reviews MSPB's decision on the administrative record, and will set aside a decision found to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.[2] 5 U.S.C. §§ 7703(b)(1)(A), 7703(c); *U.S. Postal Service v. Gregory,* 534 U.S. 1, 6 (2001).

If the case is a "mixed case" – that is, the employee has been affected by an action which the employee may appeal to MSPB, and alleges that a basis for that action was discrimination, judicial review takes place in federal district court. 5 U.S.C. §§ 7702(a)(1), 7703(b)(2). A decision in a mixed case appeal is subject to two different standards of review by the district court. *Grant v. Mnuchin*, 373 F. Supp. 3d 286, 294 (D.D.C. 2019). The claims of discrimination are reviewed by the court *de novo*; the claims that the adverse actions were otherwise wrongful are reviewed under the same § 7703(c) record review standard applied by the Federal appellate courts. *Id*.

[2] An exception to this rule not relevant to the present matter relates to Whistleblower Protection Act cases, which can be reviewed by the Federal Circuit or any other circuit court of competent jurisdiction. 5 U.S.C. § 7703(b)(1)(B).

C. Employees Alleging Discrimination In Connection With An Adverse Employment Action *Not* Appealable To The MSPB, *Must* Submit Their Complaint To The EEOC

EEOC's mission differs significantly from MSPB's. In contrast to MSPB's task of adjudicating adverse actions within its limited jurisdiction, regardless of the reason the action is alleged to be wrongful, EEOC's charge is to ensure that personnel actions are made free from prohibited discrimination. 42 U.S.C. § 2000e-16(a). EEOC carries out its mission in part through Equal Employment Opportunity (EEO) professionals within Federal agencies, who, *inter alia,* investigate and issue first-line decisions if federal employees allege discrimination in connection with their employment – all internal agency functions for which there is no MSPB counterpart. 29 C.F.R. §§ 1614.105, 1614.106, 1614.108, 1614.110. Individuals who are dissatisfied with the internal agency processing of an EEO complaint are also entitled to have their claims heard at the EEOC, with the opportunity for a hearing before an EEOC administrative judge, as well as review of a decision of an EEOC administrative judge by the EEOC. 29 C.F.R. §§ 1614.109, 1614.110, 1614.401.

To administratively exhaust claims of discriminatory personnel actions not within MSPB's jurisdiction, employees *must* pursue their claims first through the agency's EEO complaint process. *See* 29 C.F.R. §§

1614.105, 1614.106, 1614.108(e). Once they complete the agency EEO process, if unsatisfied with the outcome or they do not receive a final agency decision on their claims within a certain time frame, the employee is deemed to have administratively exhausted their claims and may file a district court complaint where their claims receive a *de novo* review.[3] *See* 29 C.F.R. § 1614.407; 42 U.S.C. § 2000e-16(c).

D. An Employee Alleging Discrimination Related To An Action Appealable to MSPB – A Mixed Case – May Be Heard By the EEOC, MSPB, And/Or District Court

The "mixed case" administrative adjudication process provides a route for employees to exhaust MSPB-covered claims through an appeal with the MSPB, while permitting them to access EEO resources and procedures in connection with related discrimination claims. Under "mixed case" procedures, an individual has the right to file his first complaint or appeal with either the EEOC or MSPB.[4]

[3] The employee may also pursue redress at the EEOC through the hearing process, but is not required to do so to administratively exhaust his claims. 29 C.F.R. § 1614.407.

[4] Whichever forum an employee selects first, will be considered a binding election for the route he wishes to take. 29 C.F.R. § 1614.302. However, the election is primarily as to timing, rather than an irrevocable choice of forum: no matter which forum is selected first, if MSPB holds it lacks jurisdiction, the employee has the option to return to the EEO process to pursue a non-mixed case. 29 C.F.R. § 1614.302(b).

If the employee elects the EEO process for their mixed-case complaint, the complaint is processed by the agency largely pursuant to the standard procedures set forth for EEOC complaints. 29 C.F.R. § 1614.302(d). Upon issuance of the agency's final decision, rather than appeal to EEOC as in a non-mixed case, the employee has the right to appeal to MSPB, which will adjudicate both the appeal of the adverse action and the claim that the action was based on prohibited discrimination. *Id.*; 5 U.S.C. § 7702(a)(1). The MSPB's final decision is appealable to a district court. 5 U.S.C. § 7702(a)(1).

Conversely, if the individual first files a mixed case appeal with MSPB, the individual has the right either to appeal to district court or to pursue additional administrative process by petitioning EEOC to review MSPB's decision on the discrimination claim, whereupon EEOC will determine whether MSPB's decision correctly interpreted the evidence and the applicable discrimination statute. 5 U.S.C. § 7702(b). If, after either agency is afforded the opportunity to review the other agency's decision on the discrimination claim, the EEOC and MSPB decisions disagree as to the final outcome of the case, the matter is then referred to a special panel, consisting of one representative from both EEOC and MSPB, and a third representative appointed by the President and confirmed by the Senate.

5 U.S.C. § 7702(d). The panel will consider the appeal and render the final decision in the matter, which, again, is judicially appealable to district court. *Id*.

Under all of these scenarios, eventual judicial review takes place in Federal district court. *Supra*, at 23. Additionally, the mixed case statutory scheme includes languishing provisions that allow an individual to file suit in Federal district court if no administrative action (EEOC or MSPB) has been taken at several different points in the process, typically 120 days without a specified action. 5 U.S.C. § 7702.

Although this statutory scheme is undeniably complex, a single point of clarity dictates the outcome of the instant case. As explained below, although an employee with mixed claims can navigate any number of paths to administrative exhaustion, an employee with non-mixed claims – discrimination claims not connected to an action appealable to MSPB – *must* exhaust through EEOC procedures only and cannot bring non-mixed claims to MSPB.

II. MSPB Lacked Jurisdiction Over all of Mr. Crowe's Personnel Actions Other Than His Removal

A. MSPB Will Not Decide Non-Appealable Actions "Inextricably Intertwined" With Appealable Actions

The dispositive issue before this Court is the proper route for administrative exhaustion of claims raising discrimination in connection with personnel actions *not* appealable to MSPB, when those claims are factually or procedurally related to adverse actions that *are* appealable to MSPB and are presented to MSPB. The district court found that the non-appealable personnel actions were "" and thus must be presented to MSPB along with the appealable actions. This holding conflicts with MSPB's longstanding decision in *Lethridge,* and the procedures followed by MSPB and EEOC in the nearly 20 years since *Lethridge*, and as explained below, would not achieve the purpose of the CSRA. 99 M.S.P.R. 675 (2005).

In 1999, the EEOC considered the same question now presented to this Court and provided guidance by way of its Management Directive 110 ("MD-110"), in which it directed attorneys for Federal agencies to file with MSPB motions to consolidate non-appealable actions with pending MSPB mixed case appeals. EEOC, Management Bulletin 100-1, ¶ 2 (Oct. 24, 2003) (produced at Dkt. No. 51 at 3-5). Several years later, MSPB notified the EEOC that this guidance was improper, because it encouraged agency

attorneys to request that MSPB hear claims outside its limited jurisdiction. *Id*. As a result, in 2003 EEOC issued Management Bulletin 100-1 ("MB 100-1"), which rescinded the portion of the 1999 MD-110 that had directed agencies to file motions to consolidate non-mixed claims with mixed case appeals at MSPB. MB 100-1.

In 2005, MSPB issued a precedential decision that further elaborated on the process and MSPB's interpretation of its jurisdiction. In *Lethridge v. United States Postal Service*, 99 M.S.P.R. 675, 677 (2005), an appellant appealed his removal by the United States Postal Service and alleged prohibited discrimination in connection with the removal. *Lethridge v. United States Postal Service*, 99 M.S.P.R. 675, 677 (2005). The appellant also had three pending complaints with the EEOC in which he alleged that, due to prohibited discrimination, the agency: (1) denied him reasonable accommodation and placed him in a non-pay status; (2) ended his detail, called him a "bastard," and notified him that his workers compensation benefits were being terminated; and (3) proposed to remove him, which was a denial of reasonable accommodation and/or in retaliation for prior EEO activity. *Id*. at 677-78. For all three complaints, EEOC found, consistent with its pre-2003 guidance, that it lacked jurisdiction because the events underlying the complaints were inextricably intertwined with the appellant's

ultimate removal by the agency, which was within MSPB's jurisdiction. *Id*. at 677-79. The MSPB administrative judge hearing the removal claim disagreed with EEOC's decision regarding the first two complaints, but agreed with EEOC's decision for the third complaint regarding the proposed removal, finding it "intertwined" with the removal action. She then certified her ruling on all three complaints for interlocutory review by the full Board. *Id*. at 678-79.

The Board held that it lacked jurisdiction over these claims and stated that its statutory jurisdiction was limited to appeals of certain adverse actions, and that there was no indication in the statutory text that its jurisdiction was expandable to hear adverse actions not assigned to it by statute, regardless of whether they were factually or procedurally related to claims under its jurisdiction. *Id*. at 679-80. The Board found that the legislative history of the CSRA supported its conclusion: "[i]n the case of discrimination complaints involving personnel actions not otherwise appealable to the Board, the [EEOC] will have full responsibility for deciding the matter," and "[t]he jurisdiction of the Board is determined entirely by the nature of the personnel action taken, not by the kind of legal or factual arguments raised or the procedures used to raise the discrimination issue." *Id*. at 679-80 (quoting S.Rep. 95-969, *56). The

Board noted EEOC's MB 100-1, which reached the same conclusion. *Id*. at 680. The Board thus held that, even if policy concerns could support hearing non-appealable actions, the statutory text did not allow the Board to hear claims not within its jurisdiction – "inextricably intertwined" with claims within its jurisdiction or otherwise – and thus held that the Board lacked jurisdiction over the claims in all three EEOC complaints. *Id*. at 679-81.

B. The MSPB Lacks Jurisdiction Over Mr. Crowe's Non-Appealable Personnel Actions

Mr. Crowe's appeal is squarely governed by *Lethridge*. His removal appeal alleged discrimination and thus was a mixed case properly appealed to MSPB. His simultaneously pending (and earlier filed) EEOC complaints alleged discrimination in connection with claims of being subjected to an investigation, placed on administrative duty, and deprived of overtime. 2-ER-256-280; 5-ER-864-869. None of these events were adverse actions within the definition of § 7512, and thus none were appealable to MSPB. As such, none met the definition of a mixed case as defined by § 7702 and EEOC's mixed-case complaint/appeal regulation, 5 C.F.R. § 1614.302(a). Had Mr. Crowe actually filed an appeal with MSPB about the investigation, assignment of administrative duties, or deprivation of overtime, as the district court held he should have done, pursuant to *Lethridge,* the Board

would have dismissed these claims for lack of jurisdiction. *See, e.g., Royal-Bird v. Department of Defense*, 2016 WL 7439567, ¶ 6 (M.S.P.B. Dec. 20, 2016); *Gottlieb v. Department of Labor*, 2016 WL 3541240, ¶ 10 (M.S.P.B. June 29, 2016); *McDermott v. United States Postal Service*, 2015 WL 5943662, ¶ 28 (M.S.P.B. Oct. 13, 2015); *Sarratt v. United States Postal Service*, 2015 WL 456397, ¶ 8 (M.S.P.B. Feb. 3, 2015); *Bailey-Moore v. Department of the Navy*, 2016 WL 308708, ¶ 17 (M.S.P.B. Jan. 22, 2016).

One of the primary purposes of an administrative exhaustion requirement is to allow an administrative agency to apply its expertise to a problem. *McKart v. United States*, 395 U.S. 185, 193-94 (1969). Another purpose is to promote judicial efficiency by letting an individual vindicate his rights in the administrative process without involving the courts. *Id*. at 195. Had Mr. Crowe brought his non-appealable, non-mixed claims to MSPB, they would have been dismissed. Thus, not only would his claims not have been brought to the agency with the expertise and authority to address them (the EEOC), but he would not have been given the opportunity to vindicate his claims before going to district court. The first forum to ever hear the merits of Mr. Crowe's non-appealable actions would have been the district court. Requiring Mr. Crowe to bring his non-appealable claims to MSPB to exhaust them, merely because he also had a claim within MSPB's

jurisdiction already pending at MSPB, defeats the entire purpose of the exhaustion requirement. Moreover, it potentially leaves employees like Mr. Crowe who dutifully follow both agencies' prescribed administrative schemes, without a judicial remedy.

The district court's requirement that Mr. Crowe bring his non-appealable personnel actions to MSPB was thus in error. As the Board correctly held in *Lethridge*, the statutory text and intent of the CSRA does not permit MSPB to hear claims intertwined with or related to matters not within MSPB's jurisdiction – only matters that actually *are* within MSPB's jurisdiction. *See* S.Rep. 95-969, *56 ("[t]he jurisdiction of the Board is determined entirely by the nature of the personnel action taken, not by the kind of legal or factual arguments raised or the procedures used to raise the discrimination issue."). Congress designated only the EEOC to hear these claims. Accordingly, MSPB submits that Mr. Crowe should not have been required to appeal his non-appealable actions to MSPB.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the district court dismissing Mr. Crowe's non-removal discrimination claims for lack of subject matter jurisdiction. MSPB takes no position on Mr. Crowe's remaining claims.

Respectfully submitted,

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DATE: November 18, 2022

STATEMENT OF RELATED CASES

Counsel for the amicus is not aware of any related cases that are pending in this Court.

STATEMENT WITH RESPECT TO ORAL ARGUMENT

The amicus believes that the facts and legal arguments are adequately represented in the briefs and excerpts of the record and that the decisional process would not be significantly aided by oral argument.

CERTIFICATE OF SERVICE

I hereby certify that on this date, service of the foregoing Brief for Amicus was made upon all parties via CM/ECF.

DATE: November 18, 2022

/s/ Naomi D. Williams
Naomi D. Williams
Paralegal

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I hereby certify that the text of the electronic version of the foregoing brief is identical to the paper copies, has been scanned by Symantec Endpoint Version 12.1 and found to be virus-free, and that the textual portion of the brief, exclusive of the tables of contents and authorities, certificates of service and compliance, and statement of related cases, but including headings, footnotes, and quotations, contains 3,595 words as determined by the word counting feature of Microsoft Word, and therefore complies with this Court's November 7, 2022 order.

/s/ Stephen W. Fung
STEPHEN W. FUNG

Representing Public Employees in Pre-Disciplinary Matters
NELA Spring Seminar April 6, 2024
By: Attorneys Tad A. Delegal, Alicia K. Haynes and Martin C. Kuhn

Existence of a Property Right in Public Employment

Public employees generally only have the right to pre-disciplinary hearings, post-disciplinary hearings and *Garrity* immunity when they have a property interest in continued employment. The Fourteenth Amendment prohibits deprivations "of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. A public employee can have a property interest in her job that was deserving of due process protection. *See, e.g., Cleveland Bd. of Educ. v. Loudermil*l, 470 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985); *Perry v. Sindermann,* 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). To have a property interest in a job, however, a person must have more than a unilateral expectation of continued employment; rather, she must have a legitimate entitlement to such continued employment. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

Usually, a property interest will be created by a civil service or career service statute. An at-will employee does not have a legitimate entitlement to continued employment because she serves solely at the pleasure of her employer. *Elmore v. Cleary*, 399 F.3d 279, 282 (3d Cir. 2005). State law creates the property rights protected by the Fourteenth Amendment. *Kelly v. Borough of Sayreville*, 107 F.3d 1073, 1077 (3d Cir. 1997). A local ordinance or charter can likewise create such an interest. *Silberstein v. City of Dayton*, 440 F.3d 306, 312 (6th Cir. 2006) (municipal charter); *Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976) (municipal ordinance). A collective-bargaining agreement can create an employment contract thus a promise of continued employment when it guarantees continued employment absent cause for termination.. *Krieg v. Seybold*, 481 F.3d 512, 519-20 (7th Cir. 2007); *Palka v. Shelton*, 623 F.3d 447, 452 (7th Cir. 2010).

The Third Circuit has held that a handbook requiring terminations be only for cause cannot create a property right in the absence of a law or statute. *Elmore*, 399 F.3d at 282. However, the Eleventh Circuit has held that a personnel policy providing for a post-termination hearing process under which employees may only be terminated for cause was sufficient to establish a property interest. *Epps v. Watson*, 492 F.3d 1240, 1246-47 (11th Cir. 2007). Probationary employees are generally considered at-will, and do not have a property interest in continued employment. *Gonzalez v. City of Hialeah,* 744 F. App'x 611 (11th Cir. 2018). Where an employee has established permanent status in one position, and is probationary in another, generally the employee will have established a property interest in continued employment. *McGraw v. Huntington Beach*, 882 F.2d 384 (9th Cir. 1989). However, state law can provide that probationary service in a new position eliminates a property interest in the previous job. Some statutory provisions (such as law enforcement officer or firefighter bills of rights) create a procedure for contesting discipline, which does not necessarily create a substantive right to the job; rather it grants only the right to the specific procedures created by the statute or ordinance. *Johnson v. Beary*, 665 So. 2d 334 (Fla. 5th DCA 1995).

Loudermill Hearings

A public employee with a property interest in his or her job is entitled to a pretermination opportunity to respond, which is a form of pre-disciplinary hearing. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). This hearing serves as an initial check against mistaken decisions, essentially determining whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action *Farhat v. Jopke*, 370 F.3d 580 (6th Cir. 2004), *Staples v. City of Milwaukee*, 142 F.3d 383 (7th Cir. 1998), *Nagel v. City of Jamestown,* 952 F.3d 923 (8th Cir. 2020). The pretermination hearing need not be elaborate, and the existence of post-termination procedures is relevant to the necessary scope of pretermination procedures. *Nagel*, Heinen v. Brewer, 171 F.3d 612. The essential elements required for due process in this context are notice and an opportunity to respond, either in writing or in person *Farhat*; *Walls v. Cent. Contra Costa Transit Auth.*, 653 F.3d 963 (9th Cir. 2011). The employee should receive oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to present their side of the story. *Gniotek v. Philadelphia,* 808 F.2d 241 (3d Cir. 1986); *Staples*; *Heinen*; *Runge v. Dove*, 857 F.2d 469 (8th Cir. 1988). A full evidentiary hearing is not required prior to a public employee's termination. *Farhat*. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. *Heinen*.

When full post-termination processes are available, the pre-determination hearings may be very informal. "[W]here post-termination proceedings are available, 'informal meetings with supervisors' may be sufficient pre-termination hearings." *Pena v. Kindler,* 863 F.3d 994, 998 (8th Cir. 2017); *Brasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985) (holding an interview of a firefighter by the town manager to discuss an on-camera interview satisfied pre-termination due process); *Powell v. Mikulecky*, 891 F.2d 1454, 1459 (10th Cir. 1989) (holding an interview between a supervisor and employee where supervisor asked employee two questions and immediately terminated employment satisfied due process); *Ricco v. County of Fairfax*, 907 F.2d 1459 (4th Cir. 1990) (holding police officer's interview with Major of police department prior to termination satisfied due process). The "notice" required need not generally be prior to the opportunity for a hearing. *Sutton v. Bailey*, 702 F.3d 444, 448 (8th Cir. 2012)) ("although notice is required, there need not be a delay between the notice and the opportunity to respond accorded to a public employee"). In a unionized workplace or a workplace with a post-disciplinary grievance process, courts have found that the availability of a grievance process limits the type of pre-termination process necessary. *Adams v. Suozzi*, 517 F.3d 124, 128 (2d Cir. 2008) ("there is no due process violation where pre-deprivation notice is provided and the deprivation at issue can be fully remedied through the grievance procedures provided for in a collective bargaining agreement.")

Name-Clearing Hearings.

Under the Fifth Amendment to the United States Constitution, a governmental entity may not deprive an individual of liberty without due process of law. "Liberty," for purposes of due process clause, is the right for an employee to pursue their chosen trade and profession. If the disciplinary charges against the employee damage the employee's ability to find future employment, the employee is entitled to a "name-clearing hearing." A liberty interest can exist

even when an employee does not have a property interest in continued employment.

> THE TEST: Whether an employer has made and published a false statement of a stigmatizing nature.

Allegations that the employer merely imposed excessive or unwarranted discipline are insufficient to obtain a hearing. Rather, the employer's disciplinary charges, and its publication of those charges, must create a "stigma" for the employee, i.e. it must be sufficiently detrimental to seriously affect the employee's ability to find employment.

Allegations such as dishonesty, criminal behavior, and other serious forms of misconduct have been found sufficiently stigmatizing to warrant a name-clearing hearing. See, *Bartholomew v. Fischl*, 782 F.2d 1148,1150 (3d Cir. 1986)(Dishonesty); *Rodriguez de Quinonez v. Perez*, 596 F.2d 486 (1st Cir.1979) (Dishonesty); *Rolles v. Civil Service Commission*, 512 F.2d 1319 (D.C. Cir.1975)(Dishonesty); *Burkhart v. Rnadles*, 764 F.2d 1196 (6th Cir. 1985) (Scheming to bug supervisor's office); *Walker v. U.S.*, 744 F.2d 67 (10th Cir.1984) (Lying on employment application); *Clemons v. Dougherty County*, 684 F.2d 1365 (11th Cir.1982) (Hostile with neighbors, provoked fights, improperly used police facilities to investigate neighbor); *Colalmi v. Walker*, 542 F.2d 969 (7th Cir.1976) (Using influence to force company to drop criminal charges against employee); *Suarez v. Weaver*, 484 F.2d 678 (7th Cir.1973) (Possible drug violations); *Wellner v. Minnesota State Junior College Board*, 487 F.2d 153 (8th Cir.1973) (Manifest racism).

Liberty interests are not violated where the charges involve general job performance such as substandard performance, profanity, lack of respect, inability to accept guidance and direction, poor judgment, insubordination, hostility, or violation of no-strike law or other protected union activity. See generally *Bristol Virginia School Bd. v. Quarles*, 366 SE2d 82 (Va.1988).

The statement must have been "published," meaning that the employer must have made the statement publicly so that the employee would be damaged by it. In Florida, publication of a statement is accomplished when the statement is placed in a file such as that is subject to the public records law [personnel file, internal affairs file, etc.] *Buxton v. City of Plant City*, 871 F.2d 1037, 1042-43 (11th Cir. 1989).

Name clear hearings are designed only to allow the employee to clear his or her name. For this reason, the name-clearing hearing need not be as thorough as a disciplinary hearing. All that need be granted is a meaningful opportunity to prove that the employee did not commit the offense or action of which she or he is accused. The hearing need not be conducted prior to the termination or other discipline. *Campbell v. Pierce County, Georgia*, 741 F.2d 1342, 1345 (11th Cir. 1984).

If the employer does not provide the opportunity for a name-clearing hearing, the employee may recover damages in a civil rights suit.

In order to establish a claim, an employee must prove the existence of:

(1) a false statement
(2) of a stigmatizing nature

(3) attending a governmental employee's discharge
(4) made public
(5) by the governmental employer
(6) without a meaningful opportunity for employee to clear his name.

Buxton v. City of Plant City , 871 F.2d 1037, 1042-43 (11th Cir. 1989).

Preparing the Employee for the Interview

When the representative prepares for the investigation, he or she should assist the employee by trying to anticipate the questions the interviewer will ask and helping the employee prepare to answer those questions. The representative's role is to assist the employee emphasize those portions of the testimony that will lead the investigator to a favorable conclusion of the case. Often how an employee answers a question is more important than the substance of the answer. Highly charged emotional exchanges with the employer will likely lead to the conclusion that the employee is hiding the truth or acted improperly during the incident in question. Likewise, shaky or evasive responses will generally lead an interviewer or IA detective to find against the employee. Calm, professional answers using terms or language from the agency's rules or standards will lead to a better result for the employee.

Checklist for Interview

Factors which the employee should consider when giving a statement:

1. whether or not the employee was on duty, the manner in which the employee was dressed, the manner in which the employee identified himself or herself, the type of vehicle he or she was driving, etc.;

2. background knowledge regarding the complainant, and any actions of the suspect or complainant known to the employee immediately prior to the incident;

3. any statements made by the employee either to the suspect or to other persons immediately prior to the incident;

4. any requests by the employee or other employees for back-up or supervisory assistance prior to the incident;

5. how and whether the employee's actions were consistent with training and regulations as well as supervisory direction;

6. any facts which led the employee to believe that his or her actions were consistent (or were not inconsistent) with the agency's policies, including any knowledge that supervisors previously condoned or approved such conduct;

7. if the investigation involves a use of force: the specific aspects of the suspect's

behavior which the employee interpreted as threats to himself or to others, including whether or not the employee believed that the suspect had a weapon; a detailed recitation of all actions which the employee took in order to avoid a confrontation or the use of force;

8. any information which may explain the ability or inability of witnesses to view or hear the events in question;

9. any persons who can support the employee's account of the events, or the employee's interpretation of the relevant procedures, and any statements by witnesses, the suspect, or complainants after the incident;

10. the employee's actions immediately after the incident, including any report to a supervisor, or any calls made to headquarters for assistance;

11. if the employee is admitting some guilt in the incident, the actions which the employee has taken which demonstrate that the employee is truly remorseful for his or her actions;

12. if the employee was unaware that he or she was violating a specific policy, specific facts that would support the belief that the violation was innocent (i.e., if the employee violated a policy for payment of off-duty employment fees based on a wrongful belief that certain jobs were exempt, the employee should be able to show that he or she paid the fee for certain other jobs);

13. identify how and whether the employee should address any discrimination or retaliation concerns if discrimination or retaliation based on a protected characteristic is a possibility.

14. address any possible violations of laws rules or regulations by other individuals or the employer and determine how and whether to report those matters either before or during the interview. Some whistleblower statutes protect individuals who make disclosures in the course of an investigation. Even if the conduct does not rise to the level that would permit a claim of whistleblower retaliation, it is sometimes helpful to raise issues regarding the misconduct of others or of the employing organization.[1]

15. evaluate any strategy to pursue grievances, charges of discrimination, or whistleblower complaints, and addressed whether or not any of those matters needs to be handled prior to the end of the interview.

It is often useful for the employee's representative to "map out" the incident, drawing a diagram or running through the account of events, step by step. Reviewing the testimony prior to

[1] In addition to state whistleblower statutes, a large number of federal protections exist. *See* https://crsreports.congress.gov/product/pdf/r/r46979

the interrogation will help to make sure that the employee doesn't forget important facts.

Potential of Mitigation of the Penalty During Interview

In many situations, a representative may find that the employee has committed some wrongful act, but is seeking to reduce the penalty. Employees sometimes make mistakes and use poor judgment. Most mistakes are not career-ending, but an employee who lies about such mistakes or makes up bogus excuses can easily lose a career. If the employee has made an error, it is often most helpful to confess the error up front, and then express true remorse during the interview. Although the investigator may not be the one who decides the penalty, the investigator will usually convey to management the fact that the employee is truly remorseful and whether the employee is likely to commit the same mistakes in the future. Of course, making statements of remorse will undercut any later defense, and the employee should carefully weigh whether showing remorse at the interview or admitting guilt may undercut a valid defense in a hearing or grievance.

Checklist for Giving Statement

1. Review all of your file(s) and the facts of the case.

2. **Always tell the truth**! Don't try to cover a mistake. If you make an error, simply state you were mistaken and correct your statement.

3. Take your time, go slow and **think before you speak**. Listen attentively to the question. Frame the proper response in your mind before speaking. Pause before each answer - it gives you time to think and a chance for your representative to object.

4. Answer the particular question you are asked. If you volunteer any other information, make sure it is only information which you provide for a particular purpose and which you have discussed with your representative. Do not volunteer any additional information which may only give the investigator new ideas on how to make a better case against you.

5. Do not ever guess. If you don't know the answer, say so. If you don't recall, say so. If the question involves a complicated procedure, or chain of events, summarize it if at all possible. The more detail you try to fill in your answer, the more likely you will make an error in recall.

6. Never inflate your testimony. For example, never say "in all candor," "honestly," or "I'm doing the best that I can."

7. Avoid using absolutes like “never,” “always” or “completely.”

8. If shown a document or exhibit during the interrogation and you are asked a question about that document, take the time to thoroughly examine the document before answering any questions about it. Listen to any questions regarding documents carefully - the investigators may read a portion and then ask “is that right?” - not specifying whether they are asking you to confirm the truth of the statement, or simply whether the document contains the statement.

9. Do not let the examiner put words in your mouth. Do not accept the examiner’s characterization of time, distance, personalities, events and similar things. Restate it again in your original or previous words.

10. Pay particular attention to the introductory clauses preceding the body of the question. These are the so-called “leading questions” which are often preceded by statements that are either half-truths or contain facts the examiner knows not to be true. He is trying to get you to get you into a set of facts, some yours and some his, and commit you to a yes or no answer for the entire set.

11. Do not accept the examiner’s summary of your prior testimony. Often the examiner will ask a series of questions, sometimes in chronological order, stopping and summarizing and trying to commit you to a yes or no answer by suddenly saying, “Is that correct?” or “would you say that is an accurate statement?” simply reply that your previous statements were accurate at the time provided and you stand on your testimony.

12. Do not expand on an answer to a question when you feel it is complete. Often the examiner will continue to stare at you as if she or he expects more until you feel obligated to tell more.

13. Never volunteer to supply any documents or draw any diagrams.

14. It is not often that an objection is made during an interrogation. When an objection is made by the representative, to a particular phrase or question, stop talking immediately and listen to the objection very carefully. You must generally still answer the question even if an objection is made but wait for your representative to instruct you that you may still answer the question.

15. Never express anger or try to argue with the examiner. Any unpleasantness should be handled by your representative. Testify in a calm, confident manner and do not attempt levity or suggest even the mildest obscenity. Be careful to avoid any racial or sexual stereotypes or slurs!

16. Do not attempt to educate the investigator if she or he seems confused or unable to comprehend a term or procedure you have mentioned. Many times this is a trap

to get you to expand your information.

17. Do not say anything in a joking manner, or give sarcastic or facetious responses - they can come back to haunt you when they are printed out in a transcript.

18. Never testify as to what another person saw or knows unless you are completely sure of what they will say. Often another witness will have forgotten the details or will otherwise contradict you and you will lose your credibility.

19. If you are not absolutely positive about dates, times, distances, or other measurements, don't get "pinned down" to an answer that may later hurt you. Explain that you cannot be sure of the exact measurement and qualify your estimates by explaining that they are just approximations.

Checklist for Employee Representatives in Internal Affairs Investigation

1. Be familiar with the means of enforcement of specific rights (i.e. law enforcement or firefighter bills of rights) in your jurisdiction.

2. Specifically request to review the complaint and any statements that have been written or transcribed if that right is afforded to you. Remember that the investigators generally do not have to provide these statements if you don't ask for them.

3. Ensure that the employee is being ordered to give testimony under threat of termination in order for *Garrity* rights to attach.

4. Discuss the Employee's *Garrity* protections.

   A. Explain to the employee that Internal Affairs Statements are considered compelled testimony, and thus cannot be used in any criminal prosecution (other than for perjury).

   B. Explain to the employee that the statements are not privileged for the purposes of any disciplinary or administrative hearings. If the employee is ordered to make a statement, failure to do so can lead to disciplinary action.

   C. Begin any written statement or interdepartmental memo with a statement that "This document is being written in response to the order of supervisor _____ given on _____(date) to provide information regarding _____."

   D. Encourage the employee to answer all questions clearly, professionally and truthfully, emphasizing the facts and sequences of events which demonstrate that the employee was acting in a manner consistent with departmental policy.

Garrity/Gardner Rights

Under the U.S. Supreme Court's ruling in *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967), an employee is not required to give a statement unless he or she is given an order by a supervisor, in which case the statement will be inadmissible in any criminal case. Although the substance of the testimony may be protected from criminal prosecution, the employee can be prosecuted for giving a false statement under oath. See *U.S. v. Veal*, 153 F.3d 1233, 1243 (11th Cir. 1998). In *Gardner v. Broderick,* 392 U.S. 273, 278, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968), it was held that a public employer could not take disciplinary action against

an employee who refused to answer questions, invoking the Fifth Amendment privilege against self-incrimination. If the employee had been informed that *Garrity* prevented the use of the testimony in a criminal prosecution, the agency could have fired the employee for failing to give testimony in the disciplinary investigation. Therefore, under *Gardner* a public employee may be fired for refusing to answer questions when ordered to do so, since such compelled testimony is inadmissible in a criminal proceeding.

Garrity protections are even greater than the *Miranda* protections against use of statements without proper notification of an accused's rights. *Garrity* protected statements are considered coerced, involuntary testimony: in the eyes of the law, the effect of threatening a public employee with his job is the same as beating a statement out of him. While non-Mirandized statements may be used in a criminal trial for the purposes of impeachment, courts have held that the type of coerced statements prohibited by *Garrity* cannot be used for any purposes. *Plaster v. City of Houston,* 721 S.W.2d 421, 423 (Tex. 1st Dist. Ct. App. 1986). Further, while non-Mirandized statements can lead to the discovery of other admissible evidence, evidence derived from Garrity-prohibited coerced statements is not admissible. "This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *In re Grand Jury Subpoenas Dated December 7 And 8*, 40 F.3d 1096, 1101, (10th Cir. 1994), citing *Kastigar v. United States*, 406 U.S. 441, 460, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972)2 .

An internal affairs or other departmental misconduct interview can very easily create real problems for the prosecutor seeking to convict an employee of a criminal offense. If the employee's interview is conducted prior to the criminal case, the existence of that privileged statement may result in the suppression of critical evidence. If the employee says something in his disciplinary interview which leads to evidence in the criminal case, that evidence will be suppressed unless the prosecutor can show that the evidence would have been obtained independently without the statement. Further, the employee's statement cannot be used for impeachment in the criminal case.

There are several practical effects of Garrity for the union representative who is assisting a member in a disciplinary case. First, it is essential that the member be ordered to give a statement. You should clarify with an investigator, if the investigator has not already done so, that the employee is being ordered to give a statement. If there is no order, the employee should generally refuse to give a statement: the employee cannot be disciplined for refusing to obey a non-existent order. Further, if an employee is asked to write an inter-departmental memo on his or her conduct, the employee should clarify that a superior employee has ordered the memo to be written, and start out the memo with the statement such as: "This memorandum is written in response to your order

[2] The District of Columbia Circuit in *United States v. Oliver North* ("North I"),910 F.2d 843, modified, ("North II"), 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991), and *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), cert. denied 121 L. Ed. 2d 583, 113 S. Ct. 656 (1992) have required the prosecution to prove both (1) that there is an independent source for all matters on which the witness testifies; and (2) that any witness exposed to compelled statements has not shaped or altered her testimony in any way, either directly or indirectly, as a result of that exposure. Other circuits have required only the first prong of this test, not the second. *United States v. Koon*, 34 F.3d 1416, 1433 (9th Cir. 1994).

given on (date).” By clarifying that the statement was ordered, the employee can be protected from future criminal prosecution.

An employee should be advised of the implications of Garrity in order to make the employee feel more comfortable with telling the investigator the truth. It is often the case that employees are disciplined much more harshly for lying about a situation than they would have been for the actual misconduct investigated. If the employee knows that no criminal prosecution will result from a truthful statement made under orders, the employee will be more comfortable with telling the full story to internal affairs. Lastly, the employee may be willing to provide more information than he or she would have otherwise in the internal affairs interview, based on the fact that the information provided cannot be used criminally. If the employee provides the names of witnesses, or information requested in the internal affair interview, the prosecutor must later prove that such evidence was obtained independently from the immunized testimony, or else such information may not be used in the criminal case.

False Statement or Departure from the Truth.

Prior to 1998, employees were protected against charges of “making false statement” or “departure from the truth” where they simply denied disciplinary accusations against them. *King v. Erickson*, 89 F.3d 1575 (Fed. Cir. 1996). However, the United States Supreme Court reversed this interpretation in *LaChance v. Erickson*, 522 U.S. 262, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998), finding that a governmental employee’s due process right guaranteeing a meaningful opportunity to be heard before disciplinary action, does not entitle the employee “to 'put the government to its proof' by falsely denying the charged conduct.” Therefore, public employees have no “right to make false statements with respect to the charged misconduct” in an agency investigation. Some argument supports the proposition that Article I, § 9 of Florida’s constitution provides its citizens greater due process rights than the federal constitution, and that the previous rule would still apply in Florida. See, *Doyle v. Dept. of Business and Professional Regulation*, 713 So. 2d 1040, 1044-1045 (Fla. 1st DCA 1998), the court noted this argument but ruled for appellant on other grounds.

The statement must be one of fact, and not of opinion or belief. It cannot be based on interpretations of alleged agreements, either oral or written, or on opinions calling for the exercise of judgment, or on statements as to the legal effect of certain facts. *Doyle*, supra.

One court has found that no just cause existed for the termination of a law enforcement officer for lying to investigators where the transcript showed that the questions posed to the officer were “vague, ambiguous, and inartfully phrased,” and therefore the officer's answers did not constitute specifically identifiable untruths sufficient to support the charge. *Florida Dept. of Law Enforcement v Stanley* , 566 So 2d 20 (Fla 1st DCA 1990).

Federal Employees

MSPB Disciplinary Cases

Federal employee discipline cases are generally heard by the Merit Systems Protection Board (MSPB). The MSPB considers adverse actions involving suspensions of 15 days or more, demotions or removals. MSPB also hears whistle-blower reprisal cases, retirement claims, reduction in force appeals and several other types of specific claims. Postal Service Employees generally cannot use the MSPB process.[3]

Proposal Letter: The thirty-day notice letter proposes the action that the Agency wants to take. The letter should indicate that the employee may issue an oral/written reply, that the employee has a right to representation, and that the employee has a right to request the "material relied upon."

Douglas Factors: The Merit Systems Protection Board in its landmark decision, *Douglas vs. Veterans Administration*, 5 M.S.P.R. 280 (1981), established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct.

> The following relevant factors must be considered in determining the severity of the discipline:
>
> > (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
> >
> > (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
> >
> > (3) the employee's past disciplinary record;
> >
> > (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
> >
> > (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties;
> >
> > (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
> >
> > (7) consistency of the penalty with any applicable agency table of penalties;

[3]Chapters 10 and 12 of the Postal Reorganization Act ("PRA") set out a comprehensive scheme governing employment relations within the Postal Service. See 39 U.S.C. §§ 1001-11, 1201-09 (1994). Although the Civil Service Reform Act ("CSRA") generally excluded postal employees from its coverage, see 5 U.S.C. § 2105(e) (1994), the PRA provided for CSRA coverage for some postal employees, called "preference eligible" postal employees, who are entitled to avail themselves of the CSRA's procedures for administrative and judicial review of adverse personnel actions. See 39 U.S.C. § 1005(a)(4) (1994). For other postal employees, the Postal Service is required to establish procedures guaranteeing them "an opportunity for a fair hearing on adverse actions, with representatives of their own choosing." 39 U.S.C. § 1001(b) (1994).

(8) the notoriety of the offense or its impact upon the reputation of the agency;

(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

(10) the potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

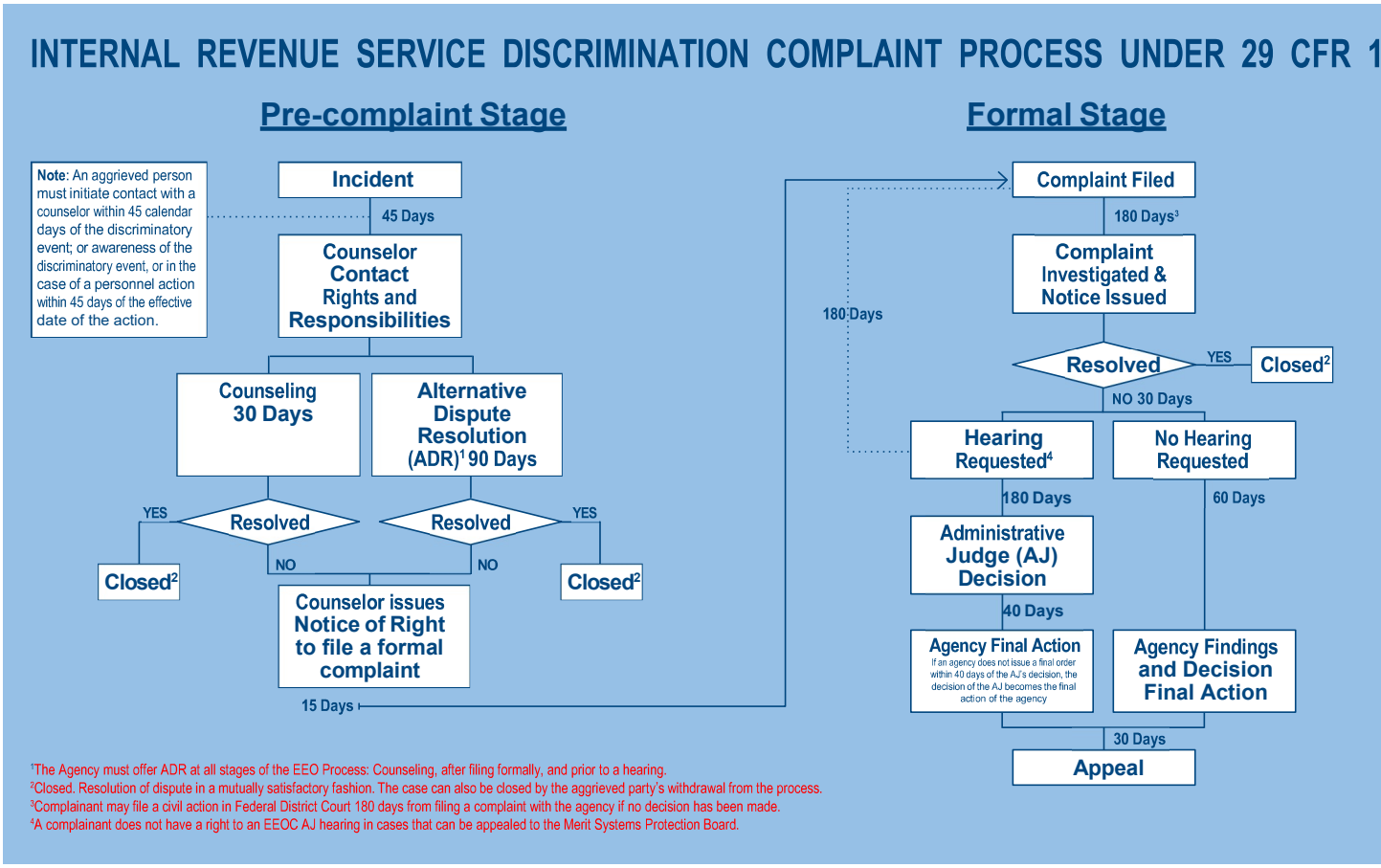
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

After the proposal letter and any oral/written reply, the Agency will issue its decision letter. The decision letter must contain certain enumerated rights, including an MSPB appeal right. Appeals must be filed within 15 days of the decision letter. The Administrative Judge will send an "Acknowledgment Order" requiring the Agency to designate a representative and provide the Agency's Evidentiary File within a certain number of days. Discovery is available, if it is initiated within a specific number of days (if not, the right is lost). The judge will issue a Scheduling Order. The Scheduling Order will specify the deadline to present Pre-Hearing Submissions, including the identity of the witnesses and the substance of their testimony. If you cannot justify a witness's relevance at the pre-hearing conference, the judge will disallow the witness. After the hearing (usually 30 – 90 days later) the Administrative Judge will issue an Initial Decision, along with appeal rights. The decision is not final until approved by the MSPB.

5 U.S.C.A. § 7121(d) provides that an employee may not pursue an MSPB appeal over a matter that has been pursued through the collective bargaining process or agency-created grievance process. Pursuant to § 7121(d) a federal employee "may raise [prohibited personnel practice under 2302(b)(1)] under a statutory procedure or the negotiated procedure, but not both." Section 7121(d) applies if the prohibited personnel practice "falls under the coverage of the negotiated grievance procedure."

Federal EEO Cases

The time for a federal employee to bring an EEO case is short. The following chart provides a general explanation of the process:



The time for raising an EEO case is 45 days from the date that an employee is notified of a decision. The time period is subject to equitable tolling, waiver, or estoppel. The employee must notify the local EEO counselor, who will generally assist in determining if a resolution may be reached. The employee may pursue the initial step confidentially or non-confidentially. The counselor, unless the pre-complaint process is extended with the employee's consent, must prepare a report and provide the employee with an opportunity to file a written formal complaint file a formal written complaint with the agency's director of equal opportunity or designated official within 15 days. The complaint is then investigated, and an employee may file suit once more than 180 days have elapsed if the EEO process has not reached a final determination. After the investigation is completed, the employee will have thirty days to pursue an administrative hearing with an EEO administrative judge, during which time the employee may obtain discovery and conduct an adversarial hearing through the processes provided for an EEO hearing. The employee may alternatively ask for an agency determination without the involvement of an administrative judge. If the employee proceeds with the administrative hearing, the judge issues a determination, which is then sent to the agency to accept or reject the judge's decision. Within 40 days of receipt of the AJ's ruling, the agency must issue a final order. Failure to do so will have the AJ's ruling as the binding, final order of the agency. 29 C.F.R. § 1614.109. The employee may appeal to the Office of Federal Operations of the EEOC within 30 days. The employee also maintains the right to file suit in federal court within 90 days of the agency's final determination if the employee elects not to appeal the determination to the Office of Federal Operations.

Mixed Case Appeals

An employee may assert a a "mixed case," challenging both a disciplinary action and allegations of discrimination before the Merit Systems Protection Board (MSPB), and an appeal may be taken to court from the MSPB. A mixed case is investigated in the same way as a federal employee EEO complaint, but the investigation must be completed within 120 days rather than 180 days, and the employee may request an MSPB hearing after the 120 days following the filing of a formal complaint. If no determination is reached within the 120 days, the employee may appeal the claim to the federal district court. *Butler v. West,* 164 F.3d 634, 643 (D.C. Cir. 1999). An MSPB decision on discrimination issue appealable to either EEOC or district court within 30 days, with either claim proceeding de novo.

As the Butler court explained, the employee has several paths available:

> At the outset, the aggrieved party can choose between filing a "mixed case complaint" with her agency's EEO office and filing a "mixed case appeal" directly with the MSPB. *See* 29 C.F.R. § 1614.302(b). By statute, the relevant agency EEO office and the MSPB can and must address both the discrimination claim and the appealable personnel action. *See* 5 U.S.C. § 7702(a). Should she elect the agency EEO route, within thirty days of a final decision she can file an appeal with the MSPB or a civil discrimination action in federal district court. *See* 29 C.F.R. §§ 1614.302(d)(1)(ii), 1614.302(d)(3), 1614.310(a). If 120 days pass without a final decision from the agency's EEO office, the same avenues of appeal again become available: the complainant can file either a mixed case appeal with the MSPB or a civil action in district court. *See* 5 U.S.C. §§ 7702(e)(1)(A), 7702(e)(2); 29 C.F.R. §§ 1614.302(d)(1)(i), 1614.310(g); 5 C.F.R. § 1201.154(b)(2).
>
> When a complainant appeals to the MSPB, either directly or after pursuing her claim with the agency EEO office, the matter is assigned to an Administrative Judge who takes evidence and eventually makes findings of fact and conclusions of law. *See* 5 C.F.R. §§ 1201.41(b), 1201.111. The AJ's initial decision becomes a final decision if neither party, nor the MSPB on its own motion, seeks further review within thirty-five days. *See* 5 C.F.R. § 1201.113. However, both the complainant and the agency can petition the full Board to review an initial decision. Should the Board deny the petition for review, the initial decision becomes final, *see* 5 C.F.R. § 1201.113(b); if the Board grants the petition, its decision is final when issued. *See* 5 C.F.R. § 1201.113(c). At this point, the complainant again has a choice: within thirty days of receiving a final decision from the MSPB, she can either appeal the discrimination claim to the EEOC, *see* 5 C.F.R. § 1201.157, or appeal the entire claim (or any parts thereof) to the appropriate district court. *See* 5 U.S.C. § 7703(b), 5 C.F.R. § 1201.175, 29 C.F.R. § 1614.310(b). Finally, if the MSPB fails to render a judicially reviewable decision within 120 days from the filing of a mixed case appeal, the aggrieved party can pursue her claim in federal district court. *See* 5 U.S.C. § 7702(e)(1)(B).

Butler v. West, 334 U.S. App. D.C. 55, 164 F.3d 634, 638-39 (1999)

An MSPB judge will hear both the prohibited personnel practice claim and the discrimination claim and issue a ruling. Petitions for review (PFRs), by the MSPB, are available for petition and may be filed by either party. If there is no filing for a PFR, the MSPB AJ's initial decision will become final 35 days after it was issued. The full Board adjudicates PFRs and after the review, they will issue a final decision. However, should an appellant employee disagree with the MSPB's decision, within 30 days of notice of decision they may:

•File a lawsuit in an appropriate federal district court
•File an appeal with the U.S. Circuit Court of Appeals for the Federal Circuit, with the appellant's choice that all discrimination claims be waived –or–
•File a petition to the EEOC to consider the MPSB's decision on the discrimination issue

A mixed case appeal is available only to tenured employees and applicants for employment may pursue certain discrimination claims before the MSPB. *Castle v. Rubin*, 316 U.S. App. D.C. 293, 78 F.3d 654, 658 (1996) (probationary employees may pursue claims of marital status discrimination or partisan political discrimination to the MSPB). A probationary employee may submit a claim of whistleblower retaliation to the Office of Special Counsel.

Federal Employee Performance Issues.

Pursuant to 5 U.S.C. 43, an agency must give the employee a reasonable opportunity to demonstrate acceptable performance and must show by substantial evidence that:

a. its action was taken under a performance appraisal system approved by OPM;
b. the appellant's performance standards are valid; and
   i. Under 5 U.S.C. § 4302(b)(1), performance standards must, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the job in question. Lee v. Environmental Protection Agency, 2010 M.S.P.B. 240, 115 M.S.P.R. 533, P 29 (2010).
   ii. In cases involving a performance-based action, the agency must prove that its action was based on valid performance standards. See Boyd v. Department of the Navy, 88 M.S.P.R. 435 (2001); Neal v. Defense Logistics Agency, 72 M.S.P.R. 158 (1996).
   iii. An agency may make its required showing through the standards themselves, or by giving content to the standards by informing the employee of specific work requirements through other methods, including instructions or directions provided during a PIP. See Greer v. Department of the Army, 79 M.S.P.R. at 484; Dancy v. Department of the

Navy, 55 M.S.P.R. 331, 335 (1992); Baker v. Defense Logistics Agency, 25 M.S.P.R. 614, 617 (1985), aff'd, 782 F.2d 1579 (Fed. Cir. 1986).

iv. The Board has held that performance standards are not valid if they do not set forth the minimum level of performance that an employee must achieve to avoid removal or demotion for unacceptable performance under 5 U.S.C. chapter 43. Van Prichard v. Department of Defense, 2011 M.S.P.B. 94, 117 M.S.P.R. 88, P 16 (2011); Jackson-Francis v. Office of Government Ethics, 2006 M.S.P.B. 255, 103 M.S.P.R. 183, P 8 (2006).

v. Standards are required to be reasonable, realistic, attainable, and clearly stated in writing. Lee, 2010 M.S.P.B. 240, 115 M.S.P.R. 533, P 29. Where an agency meets these requirements, the Board will defer to the agency's managerial discretion in determining what an employee must do in order to perform acceptably in his position. Id.

c. the appellant's performance was unacceptable in at least one of his critical elements.

i. To support its denial of the appellant's WIGI, the agency must prove by substantial evidence that the appellant's performance was not at an acceptable level of competence. See Smith v. Department of Agriculture, 64 M.S.P.R. 46, 56 (1994); Chaggaris v. General Services Administration, 49 M.S.P.R. 249, 255 (1991).

ii. The Board has held that the agency's evidence need not be more persuasive than the evidence presented by the appellant. See Lovshin v. Department of the Navy, 767 F.2d 826, 834 (Fed. Cir. 1985) (en banc), cert. denied, 475 U.S. 1111, 106 S. Ct. 1523, 89 L. Ed. 2d 921 (1986).

2. Under OPM's regulations, an employee must be give an opportunity to demonstrate acceptable performance in the critical element at issue. 5 C.F.R. § 432.104 (2011).

3. The Agency's actions may not be sustained if the appellant shows that the agency's decisions were based on a prohibited personnel practice. 5 U.S.C. § 7701(c)(2)(B).

a. Discrimination and retaliation for protected activities are prohibited personnel practices under 5 U.S.C. § 2302(b).

b. The appellant has the burden of proving his affirmative defenses by preponderant evidence. Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2) (2011).

c. As a general rule, an employee may establish a prima facie case of prohibited discrimination by introducing preponderant evidence to show that he is a member of a protected group, he was similarly

situated to an individual who was not a member of the protected group, and he was treated more harshly or disparately than the individual who was not a member of his protected group. Buckler v. Federal Retirement Thrift Investment Board, 73 M.S.P.R. 476, 497 (1997).

d. Where a hearing has been held, however, and the evidentiary record is complete, the question to be determined is whether, after weighing all of the evidence presented by both parties, the appellant has met his burden of proving discrimination. See Simien v. U.S. Postal Service, 99 M.S.P.R. 237, P 28 (2005); Jackson v. U.S. Postal Service, 79 M.S.P.R. 46, 51 (1998).

Federal Employee Whistleblower

The Civil Service Reform Act, 5 U.S.C.A. § 2302(b)(8)), prohibits reprisal, for the reporting of violations of law, rule, regulation, gross mismanagement, abuse of authority, gross waste of funds, or serious danger to the public health or safety. Whistleblower claims must be filed with the Office of Special Counsel, which will conduct investigations. The statute protects applicants and former or probationary employees as well as tenured federal employees, and contractors and grantees. Disclosures of wrongdoing are covered by whistleblower protections if they are made to the Office of Inspector General, the Office of Special Counsel, a supervisor or someone higher up in management, or a member of Congress or congressional committee. Retaliation includes almost any personnel action, failure to take a personnel action, or threat to take a personnel action, which adversely affects the whistleblower, including a non-promotion; a disciplinary action; a detail, transfer or reassignment; an unfavorable performance evaluation; a decision concerning pay, benefits or awards; or a significant change in duties, responsibilities or working conditions. Federal employees, former employees and applicants may file complaints with the Office of Personnel Management OIG or the the Office of Special Counsel which may receive, investigate, and prosecute allegations of prohibited personnel practices, including whistleblower retaliation. OSC has authority to seek a temporary stay of a pending personnel action. OSC can also seek corrective action (such as back pay and reinstatement) on behalf of victims of whistleblower retaliation, either by negotiation with the employing agency or by seeking an order from the MSPB. Additionally, OSC is authorized to file complaints at the MSPB to seek disciplinary action against individuals who commit prohibited personnel practices. Following an OSC investigation, a federal employee may appeal to the Merit Systems Protection Board. Employees of contractors, subcontractors, grantees, sub-grantees, and personal services contractors, may submit a whistleblower reprisal complaint to the OPM OIG within three years from the date of the alleged retaliatory action to file a reprisal complaint.

Open records act by state

State	Law
Alabama	The Alabama Open Records Law, § 36-12-40, Code of Alabama 1975, provides that " [e]very citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute."
Georgia	The Georgia Open Records Act (GORA or the Act) is a state law, found at **Section 50-18-70 to Section 50-18-78**(link is external) of the Official Code of Georgia (OCGA), that requires state agencies to make governmental records available for inspection and copying by the public.
Louisiana	Louisiana's Public Records Law (PRL) is a state law, starting at Section 44:1(link is external) of the Louisiana Revised Statutes, that gives members of the public the right to access the records of any "public body" in the state. The right to "examine public documents" is also enshrined in the Louisiana Constitution
Mississippi	The MPRA is a state law that was passed in 1983 with the intention of giving access to public requests of "records of all public bodies of government." The official citation to the law is Miss. Code § 25-61 and the full language can be found online here: https://www.ethics.ms.gov/thepublicrecordact(link is external)
Alaska	AS 40.25.110. Public Records Open to Inspection and Copying; Fees. Unless specifically provided otherwise, the public records of all public agencies are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of the fee established under this section or AS 40.25.115 a certified copy of the public record.
Arizona	39-121. Inspection of public records Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours.
Arkansas	25-19-105. Examination and copying of public records. (a)(1)(A) Except as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying, including without limitation copying through image capture, including still and moving photography and video and digital recording, by any citizen of the State of Arkansas during the regular business hours of the custodian of the records.
California	In 1968, the California Legislature enacted the California Public Records Act (CPRA) under Government Code (GC) sections 6250-6270. the Legislature declared it was the public's right to access information concerning the people's business. The Act provides for two types of access. One is a right to inspect public records:

	"Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided." The other is a right to prompt availability of copies of those records: "Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so."
Colorado	The Colorado Open Records Act, (CORA) C.R.S. § 24-72-201 to 206, provides that all public records shall be open for inspection by any person at reasonable times, except as provided in part 2 or as otherwise specifically provided by law. It is the intention of CDOR to apply this Act in a uniform and reliable manner to comply with its provisions.
Connecticut	Sec. 1-210. (Formerly Sec. 1-19). Access to public records. Exempt records. (a) Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212
D.C.	The District of Columbia Freedom of Information Act, or FOIA, DC Code §§ 2-531-539, provides that any person has the right to request access to records. All public bodies of the District government are required to disclose public records, except for those records, or portions of records, that are protected from disclosure by the exemptions found at **DC Code § 2-534.**
Delaware	The Act (29 Del. Code, Chapter 100) establishes that "it is vital in a democratic society that public business be performed in an open and public manner" and that "it is vital that citizens have easy access to public records in order that the society remain free and democratic."
Florida	119.01 General state policy on public records.— (1) It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.
Hawaii	**§92F-11 Affirmative agency disclosure responsibilities.** (a) All government records are open to public inspection unless access is restricted or closed by law.
Idaho	74-102. PUBLIC RECORDS — RIGHT TO EXAMINE. (1) Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

Illinois	Under the Illinois Freedom of Information Act (5 ILCS 140), records in the possession of public agencies may be accessed by the public upon written request. [Illinois FOIA statute]
Indiana	The Access to Public Records Act (APRA), Indiana Code 5-14-3, provides that a person has the right to access information regarding the government and the official acts of public officials and employees. The statute also states that government officials have a responsibility to provide that information to you.
Iowa	22.4 Public records requests. The rights of persons under this chapter may be exercised under any of the following circumstances: 1. In person, at any time during the customary office hours of the lawful custodian of the records. 2. In writing, by telephone, or by electronic means. The lawful custodian of the records shall post information for making such requests in a manner reasonably calculated to apprise the public of that information.
Kansas	45-216. Public policy that records be open. (a) It is declared to be the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy. (b) Nothing in this act shall be construed to require the retention of a public record nor to authorize the discard of a public record.
Kentucky	In 1976, the General Assembly enacted the Open Records Act, KRS 61.870 to KRS 61.884, which establishes a right of access to public records. The General Assembly recognized that free and open examination of public records is in the public interest. All public records, whether they are stored in a computer or on paper, must be open for inspection unless the records are exempted by one or more of the fourteen exemptions found in the Act. You may inspect any nonexempt public record regardless of your identity, and you may seek enforcement of the Act if you are denied this right.
Maine	**§408-A. Public records available for inspection and copying** Except as otherwise provided by statute, a person has the right to inspect and copy any public record in accordance with this section within a reasonable time of making the request to inspect or copy the public record. [PL 2011, c. 662, §5 (NEW).]
Maryland	Maryland's Public Information Act ("PIA") gives the public the right to access government records without unnecessary cost and delay. The PIA is found in the General Provisions Article ("GP"), §§ 4-101 through 4-601, Annotated Code of Maryland
Massachusetts	The Massachusetts Public Records Law (Law), found at Chapter 66, Section 10 of the Massachusetts General Laws, applies to records made or received by a Massachusetts governmental entity. Unless the requested records fall under an exemption to the Law, the responsive documents must be made available to the requester.
Michigan	Michigan's Freedom of Information Act (FOIA), MCL 15.231 et seq, provides that all persons are entitled to full and complete information as to a public body's fulfillment of statutory functions and concerning the inner working of government in general.
Minnesota	All government data are public (can be inspected and copied by anyone) (Minn. Stat. § 13.03, subd. 1)

Missouri	The Missouri Sunshine Law, found in Missouri Revised Statutes Chapter 610, RSMo, states that records of public governmental bodies are open to the public unless otherwise provided by law.
Montana	Montana's Constitution says, "No person shall be deprived of the right to examine documents or to observe the deliberation of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."
Nebraska	**84-712.01. Public records; right of citizens; full access; fee authorized.** (1) Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.
Nevada	NRS 239.001 Legislative findings and declaration. The Legislature hereby finds and declares that: 1. The purpose of this chapter is to foster democratic principles by providing members of the public with prompt access to inspect, copy or receive a copy of public books and records to the extent permitted by law; 2. The provisions of this chapter must be construed liberally to carry out this important purpose; 3. Any exemption, exception or balancing of interests which limits or restricts access to public books and records by members of the public must be construed narrowly; 4. The use of private entities in the provision of public services must not deprive members of the public access to inspect, copy or receive a copy of books and records relating to the provision of those services; and 5. If a public book or record is declared by law to be open to the public, such a declaration does not imply, and must not be construed to mean, that a public book or record is confidential if it is not declared by law to be open to the public and is not otherwise declared by law to be confidential. (Added to NRS by 2007, 2061; A 2011, 2723; 2015, 455; 2019, 4002)
New Hampshire	**91-A:4 Minutes and Records Available for Public Inspection. –** I. Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, "to copy" means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.
New Jersey	OPRA is the State statute that replaces the old "Right to Know Law" which governs the public's access to government records in New Jersey. The law is compiled in the statutes as N.J.S.A.47:1A-1 et seq.

	Specifically, OPRA is intended to: □ Expand the public's right of access to government records; □ Create an administrative appeals process if access is denied; and □ Define what records are and are not "government records.
New Mexico	The Inspection of Public Records Act (IPRA), NMSA 1978, §14-2-1 to – 12, is a New Mexico state law that provides the public access to public records. The law requires open access to almost all public records in state and local government, with a few exceptions.
New York	The Freedom of Information Law ("FOIL"), Article 6 (Sections 84-90) of the NYS Public Officers Law, provides the public right to access to records maintained by government agencies with certain exceptions.
North Carolina	The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information. (1935, c. 265, s. 1; 1975, c. 787, s. 1; 1995, c. 388, s. 1.)
North Dakota	North Dakota's laws state that all government records and meetings must be open to the public unless otherwise authorized by a specific law. The basic laws are found in North Dakota Century Code, beginning at §44-04-17.1. The public has the right to know how government functions are performed and how public funds are spent.
Ohio	The **Ohio Open Records Law**, first enacted in 1963, is contained in Section 149.43 of the Ohio Revised Code. The law describes what records are available, what agencies are covered, what fees can be charged, who can ask for records, etc. Records include all records kept by any public office as well as records of both non-profit and for-profit private schools. Anyone may request public records and no statement of purpose is required. In fact records requests need not even be submitted in writing and can be made anonymously. There are no restrictions to the use of records and the **Ohio Open Records Law** does not specify a time limit on open records request. **Open Records Law** Ohio Rev. Code sec. 149.43 et seq.
Oklahoma	The **Oklahoma Open Records Act** is a series of laws designed to guarantee that public has access to all public records of governmental bodies. Section 24A.2 defines records as "all documents, including, but not limited to, any book, paper, photograph, microfilm, data files created by or used with computer software, computer tape, disk, and record, sound recording, film recording, video record or other material regardless of physical form or characteristic, created by, received by, under the authority of, or coming into the custody, control or possession of public officials, public bodies, or their representatives in connection with the transaction of public business, the expenditure of public funds or the administering of public property." This specifically includes all records of the transfer of public funds.

	According to the **Oklahoma Open Records Act**, anyone may request public records and no statement of purpose is required. However, if the purpose is commercial, fees will be charged for document collection. There is no restriction on the use of records and the law does not specify a time limit for responses to requests.
Oregon	The **Oregon Public Records Law**, first enacted in 1973, is a series of laws designed to guarantee that the public has access to public records of government bodies at all levels. The ORS 192.410(4)(a) says that a public record includes any writing that contains information that relates to the conduct of the public's business, is prepared, owned, used or maintained by a public body regardless of physical form or characteristics
Pennsylvania	Section 701. Access. (a) General rule.--Unless otherwise provided by law, a public record, legislative record or financial record shall be accessible for inspection and duplication in accordance with this act. A record being provided to a requester shall be provided in the medium requested if it exists in that medium; otherwise, it shall be provided in the medium in which it exists. Public records, legislative records or financial records shall be available for access during the regular business hours of an agency.
Rhode Island	The **Rhode Island Access to Public Records Act**, first enacted in 1979, is a law that guarantees access to public records of government bodies at all levels in Rhode Island. The act is defined in Chapter 38.2 of the Rhode Island General Laws and has been significantly revised in 1991, 1998 and 2008. Public records are all documents, no matter their physical form that are "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."
South Carolina	**SECTION 30-4-15.** Findings and purpose. The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.
South Dakota	1-27-1. Public records open to inspection and copying. Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in § 1-27-1.1, are hereby fully empowered and authorized to examine such public record, and make memoranda and abstracts therefrom during the hours the respective offices are open for the ordinary transaction of business and, unless federal copyright law otherwise provides, obtain copies of public records in accordance with this chapter. Each government entity or elected or appointed government official shall, during normal business hours, make available to

	the public for inspection and copying in the manner set forth in this chapter all public records held by that entity or official.
Tennessee	The Tennessee open records law (the "Act") provides for a Tennessee citizen's personal inspection of all state, county and municipal records at all times during business hours unless the records are statutorily declared to be confidential.
Texas	Sec. 552.001. POLICY; CONSTRUCTION. (a) Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy.
Utah	**63G-2-102. Legislative intent.** (1) In enacting this act, the Legislature recognizes two constitutional rights: (a) the public's right of access to information concerning the conduct of the public's business; and (b) the right of privacy in relation to personal data gathered by governmental entities. (2) The Legislature also recognizes a public policy interest in allowing a government to restrict access to certain records, as specified in this chapter, for the public good. (3) It is the intent of the Legislature to: (a) promote the public's right of easy and reasonable access to unrestricted public records; (b) specify those conditions under which the public interest in allowing restrictions on access to records may outweigh the public's interest in access; (c) prevent abuse of confidentiality by governmental entities by permitting confidential treatment of records only as provided in this chapter; (d) provide guidelines for both disclosure and restrictions on access to government records, which are based on the equitable weighing of the pertinent interests and which are consistent with nationwide standards of information practices; (e) favor public access when, in the application of this act, countervailing interests are of equal weight; and (f) establish fair and reasonable records management practices.
Vermont	**§ 315. Statement of policy; short title**

	(a) It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution. Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment….
Virginia	**§ 2.2-3700. Short title; policy.** A. This chapter may be cited as "The Virginia Freedom of Information Act." B. By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.
Washington	RCW 42.56.030 Construction. The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern. [2007 c 197 § 2; 2005 c 274 § 283; 1992 c 139 § 2. Formerly RCW 42.17.251.]
West Virginia	**§29B-1-1. Declaration of policy.** Pursuant to the fundamental philosophy of the American Constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments of government they have created. To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.

Wisconsin	19.31 Declaration of policy. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.
Wyoming	"All public records shall be open for inspection by any person at reasonable times, during business hours of the state entity or political subdivision . . . ." W.S. 16-4-202

2024 NELA Spring Seminar
Faculty Biographies

Lynne Bernabei has been litigating employment discrimination, civil rights, and whistleblower protection cases for over thirty years. She is a founding partner of Bernabei & Kabat, PLLC where she handles claims of civil rights violations, discrimination, and other employment and contract disputes. Ms. Bernabei has developed extensive trial experience in federal and local courts in the District of Columbia, Maryland, Virginia, Illinois, New Mexico, New York, Ohio, Oregon, and Pennsylvania, and before administrative agencies. She has brought and argued appeals before the United States Courts of Appeals for the D.C., Third, Fourth, Sixth, Ninth, Tenth, and Federal Circuits. Ms. Bernabei has been included in The Best Lawyers In America since 2006, and in Super Lawyers since 2007. Since 2005, Lawdragon named her as one of 500 Leading Plaintiff Employment Lawyers in America.

Morgan L. Bigelow, a Phoenix native, earned her bachelor's degree in Criminology and Criminal Justice from Arizona State University in 2015 and her Juris Doctorate from the James E. Rogers College of Law at the University of Arizona in 2021. While in law school, Morgan was the Senior Managing Editor of the Arizona Journal for International and Comparative Law and a judicial law extern for Judge David C. Bury at the United States District Court for the District of Arizona. Since graduating, Morgan co-authored the Arizona Chapter of *BNA Wage and Hour Laws, 2022 Edition*, and has participated in several panels and committees. Morgan is now an associate attorney at Lubin & Enoch, P.C., licensed in Arizona and New Mexico. Her practice involves all phases of complex labor and employment law representation, as well as collection law. Morgan is a member of the Arizona Employment Lawyers Association, NELA, and the National Creditors Bar Association.

Felipe Bohnet-Gomez is Partner at Rathod Mohamedbhai LLC in Denver, CO, and has over a decade of experience specializing in employment law and civil rights litigation. He has represented public employee clients in a range of complex legal matters, from discrimination cases to First Amendment retaliation and political affiliation cases. Earlier in his career, Felipe also represented whistleblowers exposing tax, securities, and government contracting fraud, including in cases involving federal employees before the Merit Systems Protection Board. Felipe is a graduate of Harvard Law School and is actively involved in various professional organizations. He currently serves as co-chair of the Colorado Bar Association Labor and Employment Section, as well as Treasurer of the Colorado Hispanic Bar Association. Outside of his legal practice, Felipe enjoys spending time with his family, and is also passionate about community service and frequently volunteers his time to support underserved populations.

Heidi R. Burakiewicz has devoted her career to helping employees and unions navigate the full spectrum of labor and employment issues facing workers, including sexual harassment, workplace discrimination, and wage & hour violations, often in class and collective actions. She is a founding member of Burakiewicz & DePriest, PLLC, in Washington, D.C. The firm practices nationally, with a focus on federal employee representation.

Grace B. Carter is Of Counsel with Gilbert Employment Law providing advice and counsel in Federal employment law matters. She was a MSPB Administrative Judge in the Western Regional Office from 2007 - 2022. She was an Assistant Regional Counsel with the Social Security Administration representing the agency in Federal employment law matters. She also spent 15 years as a solo practitioner in Denver, Colorado. She has trained management, labor relations and human resource personnel as well as advocates, students and representatives on diverse employment law topics including charging and penalties, whistleblower protection and MSPB best practices. She has presented at conferences and in agency and union sponsored training events. She is a member of the Colorado bar and has been admitted to the 9th and 10th circuits, as well as the Districts of Colorado, Hawaii, Washington, and the Central, Eastern and Southern Districts of California. She is the principal in Carter Collaborative Solutions serving clients as a coach, mentor, and facilitator.

Debra D'Agostino is a founding Partner of the Federal Practice Group, LLP, a law firm based in Washington, D.C. Ms. D'Agostino leads the firm's federal employment law team and specializes in nationwide representation of federal employees in matters including discrimination claims, whistleblower retaliation, and adverse action appeals at the U.S. Merit Systems Protection Board. Ms. D'Agostino has

more than 20 years of experience in this complex area of the law and is admitted to practice in Washington, D.C. and New York, and well as courts including the U.S. Court of Appeals for the Federal Circuit where she has prevailed on behalf of clients in complex civil service matters. Ms. D'Agostino is a Board member of the Metropolitan Washington Employment Lawyers Association (MWELA) and a repeat Super Lawyer. Ms. D'Agostino graduated from New York University and the George Washington University School of Law.

Tad Delegal has practiced in Jacksonville for thirty-two years and is the only Florida Bar certified attorney in both Labor & Employment Law and Administrative Law. He has served on, and chaired, the two Florida Bar committees for each of his certifications, as well as a Bar grievance committee. Tad is a former President of the Jacksonville Bar Association, a member of the American Board of Trial Advocates (ABOTA), and a Fellow of the American Bar Foundation. He received the "Twelve Who Care" award for pro bono service to children with disabilities, Jacksonville Area Legal Aid's Kathy Para award for pro bono service and Jacksonville ABOTA's Professionalism and Civility Award. He has served as Board Chair for the Jericho School for Autism and Related Disabilities, President of the San Marco Rotary Club, and Senior Warden for All Saints Episcopal Church.

Sterling L. DeRamus is a sole practitioner in Birmingham, Alabama. He has 30 years of experience in employment related matters and for the last 12 years he has concentrated his practice solely on federal employee rights, including wrongful termination, EEO, whistleblower claims, and security clearance issues. He regularly practices before the EEOC, Merit Systems Protection Board, the Court of Appeals for the Federal Circuit, and U.S. District Courts in Alabama. Mr. DeRamus is also a retired Navy Captain and veteran of Afghanistan. Mr. DeRamus received his undergraduate degree from the University of the South in 1983 and received his Juris Doctorate degree from the University of Alabama in 1992.

Meghan Droste is an Administrative Judge in the EEOC's Washington Field Office. Prior to joining the Commission, Judge Droste was in private practice with two DC-area law firms representing federal and private sector employees who experienced discrimination in the workplace. She also shared her knowledge regarding employment discrimination as an instructor with a legal training organization, presenting information to federal agencies across the country. Judge Droste earned her Juris Doctor with Honors from The George Washington University Law School and received the Phi Delta Phi Award for Excellence in Professional Responsibility, Ethics and Jurisprudence. She also holds a Masters of Science in Justice, Law and Society from American University, and graduated Magna Cum Laude from Boston University. Judge Droste is a member of the Board of Directors for the District of Columbia LGBTQ+ Bar Association.

Brian East graduated from the University of Texas School of Law in 1977. He worked at legal aid for two years, and in private practice for 14 years, before joining Disability Rights Texas, a non-profit corporation advocating for the rights of people with disabilities. Brian has handled a number of disability-discrimination and disability-rights cases in state and federal court, and has written and lectured extensively on these issues. He is a past NELA and TELA Board Member, and is the co-author and editor of the chapter on "Workers with Disabilities" in the *Employee & Union Member Guide to Labor Law* (Thomson Reuters). Brian has frequently been named as a Texas "SuperLawyer," and he received the 2011 J. Chrys Dougherty Legal Services Award from the State Bar of Texas, and the 2015 Lex Frieden Employment Awards Governor's Trophy from the Governor's Committee on People with Disabilities.

David S. Eddy III is the Special Counsel, and the Acting Chief Counsel, to Federal Labor Relations Authority (FLRA) Chairman Susan Tsui Grundmann. At the FLRA, David also has served as: the Special Counsel, and Acting Chief Counsel, to Chairman Ernie DuBester; the Chief Counsel to Chairmen Colleen Duffy Kiko and Carol Waller Pope; a Supervisory Attorney for Chairman Pope; an Attorney-Advisor for then-Member Pope and for Chair Phyllis N. Segal; and a detailee to the FLRA's San Francisco Regional Office. David also worked at the National Labor Relations Board, where he was the Assistant Chief Counsel for Representation Appeals, a Senior Counsel or Attorney-Advisor for several Board members, and a detailee to the Solicitor's Office. He also served as the Assistant General Counsel for

Administrative Law at the U.S. International Trade Commission. David has a BA in Philosophy and Political Science from the University of Rochester; a JD from Cornell Law School; and a Certificate of Public Management from the USDA Graduate School, in conjunction with George Washington University. He also completed the Senior Managers in Government program at Harvard University's Kennedy School of Government.

Jim Eisenmann is an experienced advocate, leader and educator specializing in advising federal and private sector employees and employers on a variety of complex employment issues including investigations, discrimination and retaliation, and whistleblower retaliation claims. Jim joined Alden Law Group (ALG) as a partner in April 2020, bringing with him extensive experience in the private and federal sectors. Jim is a frequent lecturer and speaker regarding issues involving the federal civil service, employment law and leadership. From 1991 to 2005, Jim served as an associate, senior associate and principal in the firm Passman & Kaplan, P.C. Between 2005 and 2010, Jim was a founding member of Kraft Eisenmann Alden, PLLC, a labor, employment, labor and employee benefits law firm established in Washington, DC. In 2010, Jim entered public service when he was appointed General Counsel of the U.S. Merit Systems Protection Board (MSPB). He served in that position until January 2013, when he was appointed MSPB's Executive Director. He served as Executive Director of the MSPB through September 2018. After leaving the MSPB, Jim was Of Counsel with Kalijarvi, Chuzi, Newman & Fitch before joining ALG. Jim is an Adjunct Professor with the American University Washington College of Law where he teaches "Legal Ethics." He also is an Adjunct Professor in American University's Key Executive Leadership Program, where he teaches senior federal leaders in classes entitled "Leading in the Context of a Constitutional Government," "Leading with Integrity," and "Political Savvy: Employing Influence Tactics with Integrity." Jim is also an Adjunct Professor in the Master of Public Administration Program in American University's School of Public Affairs where he teaches "The Legal Basis for Public Administration." In 2020, Jim appeared on 60 Minutes to discuss the then member-less MSPB in "Three Empty Chairs" (air date June 14, 2020). He also has been a guest on Government Matters News, "Merit Systems Protection Board up against leadership vacancies" and "New Covid-19 testing requirements present logistical challenge for federal agencies", and other matters related to the federal workplace. He received his law degree from the Catholic University of America School of Law. He received his Bachelor of Arts from West Virginia University. In July 2011, Jim completed the rigorous Leadership for a Democratic Society program at the Federal Executive Institute in Charlottesville, Virginia.

Rachel E. Ellis of Livelihood Law, LLC is an advocate for workplace fairness and the advancement of employee rights. Ms. Ellis and her firm provide counsel to private sector employees; representative matters include discrimination, retaliation, sexual harassment, unpaid commission and wages, contractual disputes, non-competition agreements, severance negotiations, and unemployment benefits. Additionally, she is fiercely devoted to legislative efforts that increase protections for Colorado workers. Ms. Ellis also helps people who can no longer work get the social security disability benefits they have earned. This process can be long and confusing, but she helps clients through the process from application through appeals. Ms. Ellis regularly appears in front of the Colorado Legislature, Colorado's State and Federal Courts, the Equal Employment Opportunity Commission, the Colorado Civil Rights Commission, and the Colorado Department of Labor & Employment. She is a former Officer and Board Member of the Colorado Plaintiffs Employment Lawyers Association.

Yvette Everhart is a shareholder in the Sass Law Firm, a Tampa, Florida, employee rights law firm. Ms. Everhart is Board Certified in Labor and Employment Law by The Florida Bar. She graduated from Stetson University College of Law. Ms. Everhart has practiced labor & employment primarily representing employees from both the private and public sectors for 17 years. Ms. Everhart's accolades include being rated AV Preeminent® by Martindale-Hubbell, listed by Super Lawyers®, and having a Top Attorney 10.0 rating by Avvo since 2008. Nationally, she is listed in the Best Lawyers in America for Employment Law for Individuals and Lawdragon's 500 Leading Plaintiff Employment & Civil Rights Lawyer. She is the Chair-Elect of the Labor and Employment Law Section for the Florida Bar and has served on the Executive Council in a variety of leadership roles. Additionally, Ms. Everhart is the Employee Co-Chair of

the Treatise Committee of the Section of Labor and Employment Law of the American Bar Association and past President of the Florida Chapter of the National Employment Lawyers Association. Yvette has presented at a variety of employment law educational conferences, is the author of several published articles, and serves as the current Southeast Regional Editor and Florida Chapter co-author of the treatise, *Employment At Will, A State-By-State Survey*, published by the American Bar Association's Section of Labor and Employment Law and Bloomberg.

Madison Fiedler-Carlson is an experienced trial attorney in Des Moines, Iowa where she practices with her partners and associates at Fiedler Law Firm, PLC. She received her B.A. at Simpson College in Indianola, Iowa and her J.D. at the University of New Hampshire School of Law. After law school, Madison worked for two years in Denver, Colorado where she practiced primary employee-side wage and hour law. In her current practice, Madison represents employees dealing with discrimination, harassment, retaliation, and wage and hour issues. She has had enormous success in helping juries and judges understand the value of emotional distress damages and has multiple million-dollar verdicts under her belt. In her spare time, she loves reading fantasy novels, horseback riding, painting, cooking, and writing meticulous to-do lists.

Holly V. Franson is a Partner with The Wick Law Office and a member of The Wick Law Office's Reasonable Accommodation Training Group. The focus of her practice is representing federal government employees in complaints of discrimination before the EEOC and in appeals filed with the MSPB. Ms. Franson has represented employees in complex cases involving sexual harassment, failure to provide reasonable accommodations, pregnancy discrimination, and security clearance issues. Her practice also includes representing private sector and other public sector employees in a variety of employment matters. She writes and speaks frequently on issues of discrimination in the workplace and is the co-author of the *Federal Sector Equal Employment Opportunity Practice Guide*, which is published by LexisNexis and in its seventh edition. Ms. Franson received her Juris Doctorate from the University of Colorado. She currently serves as co-chair of NELA's federal sector practice group.

Gary M. Gilbert is the President of Gilbert Employment Law, P.C., which he established in May 2005. Prior to the opening of his own practice, Mr. Gilbert was "Of Counsel" to the Washington, D.C. employment law firm, Passman & Kaplan, P.C. Immediately prior to this position, Mr. Gilbert served as an Administrative Judge, then Chief Administrative Judge in the Baltimore District Office of the Equal Employment Opportunity Commission (EEOC) for a total of 16 years. During his tenure with the EEOC, he supervised administrative judges and conducted administrative hearings on allegations of unlawful discrimination, harassment, and retaliation. Additionally, Mr. Gilbert served on various committees and workgroups, including those that reformed EEOC regulations and another, in which the workgroup drafted the EEOC's Handbook for Administrative Judges. Prior to his appointment at the EEOC, Mr. Gilbert served as the Acting Chief, Docketing Branch at the Nuclear Regulatory Commission. Mr. Gilbert also worked as the Program Director and Acting Executive Director for Florida Rural Legal Services, Inc, where he litigated a variety of cases including employment matters and directed one of the largest pro bono legal programs in the country. He also served for four years as the legal assistant to the Secretary of the Nuclear Regulatory Commission. Mr. Gilbert received a Bachelor of Arts degree from the University of Maryland, College Park in 1975. He received his J.D. degree from the University of Maryland, School of Law in Baltimore, Maryland and is admitted to the bar in the states of Maryland and Florida. Mr. Gilbert has authored many publications in the area of federal sector employment law, including *Compensatory Damages and Other Remedies in Federal Sector Employment Discrimination Cases*, *Federal Sector Discrimination Law Deskbook*, *Consolidated Federal Sector EEO Update*, and *Conducting Misconduct Inquiries*. Mr. Gilbert has represented thousands of employees, and several employers, before the EEOC, MSPB and in U.S. District Court. He teaches extensively on topics related to EEO law to attorneys, practitioners, EEO investigators and counselors, and managers and launched Gilbert Training Group, which presents Federal HR and EEO Law Training in coordination with cyberFEDS®. During his years with the EEOC he contributed to the Commission's development of implementing regulations and interpretive guidance for the Americans with Disabilities Act (ADA) which prohibits discrimination against

persons with disabilities and, in some circumstances, requires employers to provide reasonable accommodations.

Iris Halpern is a partner at Rathod Mohamedbhai LLC. Iris has been passionately fighting for plaintiffs and their civil rights for her entire legal career. Before entering private practice, Iris was a Senior Trial Attorney and Acting Supervisory Attorney at the Denver office of Equal Employment Opportunity Commission. Iris specializes in employment discrimination and has litigated hundreds of cases against both public and private employers including large class sexual harassment, religious, race, and disability discrimination cases. Her most recent endeavors against public entities include suing library districts across the country for terminating librarians who refuse to accede to book-bans. She has also brought a variety of creative claims against public employers like retaliatory discharge, advocacy, and association claims resulting from politicization of Covid-19 safety policies and support of DEI programs, and LGBTQ+ discrimination in benefits claims. Adding to her knowledge of government entity litigation, Iris frequently litigates First Amendment, Title VI and IX cases against on behalf of students against school districts.

Cathy A. Harris was confirmed by the Senate on May 25, 2022 as Chairman of the MSPB, and sworn into her duties as a member of the Board on June 1, 2022. She was designated Vice Chairman on June 6, 2022, and currently is the Acting Chairman. Prior to that Ms. Harris was co-manager of the firm of Kator, Parks, Weiser & Harris, PLLC, in Washington, DC. She served as the Chair of the firm's Sexual Harassment and LGBT Practice sections. Ms. Harris has practiced employment law, including before the U.S. Merit Systems Protection Board, for over two decades. She has extensive experience in the litigation and settlement of federal sector employment class actions and represented individual employees and federal agencies. Ms. Harris graduated from the George Washington University Law School in Washington, DC with honors in 1997, where she was a member and editor on the George Washington Law Review. She received the Michael D. Cooley award for most successfully maintaining her compassion, vitality, and humanity during law school and was elected to give the salutatory address at commencement. Ms. Harris received her undergraduate degree from Brown University in 1994. Prior to joining Kator, Parks, Weiser & Harris, PLLC, she was an Assistant District Attorney in the New York County District Attorney's Office. Ms. Harris also served as an Adjunct Professor at the George Washington University Law School from 2001 to 2004. She resides in Silver Spring, Maryland with her wife and daughter.

Alicia K. Haynes has been a practicing attorney in Alabama for 36 years, but the last 32 years of her practice have been devoted exclusively to plaintiff's employment discrimination and civil rights litigation. Alicia has tried over 70 jury cases and 20 or more bench trials, and has been involved in scores of employment discrimination and civil rights cases at various stages of litigation. Further, Alicia has appealed, or defended on appeal, numerous employment discrimination cases. She regularly co-counsels with lawyers within the state and outside the state on employment discrimination matters, and has been retained by defense law firms to conduct independent investigations of harassment and discrimination on behalf of their corporate clients. Each year from 2007 to 2023, Alicia has been recognized with Super Lawyers, Best Lawyers in America, and Best Lawyers in Alabama lists in the area of Labor and Employment Law. Alicia has also been included in Alabama Super Lawyers' list of Top 25 Women Lawyers for several years.

Mike Imdieke is an Administrative Judge in the Denver Field Office of the Equal Employment Opportunity Commission (EEOC), where he presides over discrimination complaints brought by employees of the federal government. Previously, Administrative Judge Imdieke was a Senior Trial Attorney with the EEOC, where he litigated employment discrimination cases in federal court on behalf of the EEOC. Administrative Judge Imdieke graduated *magna cum laude* from the University of Colorado at Boulder in 2005, and graduated from the University of Colorado Law School in 2011. After law school, Mr. Imdieke served as a law clerk at the United States District Court for the District of Colorado.

Susan Jewell exclusively represents federal sector employees and applicants. After an early-on year-long attorney stint in the Office of Civil Rights at a federal agency in DC, she decided to focus her efforts

on representing federal employees. Initially, she enjoyed working for many years at Passman & Kaplan, in DC, and co-authoring the first edition of the *Federal Employees' Legal Survival Guide*. Since moving to beautiful Portland, Oregon, in 2002, she has maintained a solo practice to include: prosecuting discrimination and retaliation complaints before the EEOC's administrative judges and in federal court, adverse actions and whistleblowers' rights before the Merit Systems Protection Board and Office of Special Counsel, representing federal employees facing investigations, and counseling employees to empower them in navigating their own claims. When not fighting with the government, she tries to keep up with her kids, lavishes attention on their cat Skittles, and grows loads of garlic and tomatoes each summer.

Ian Kalmanowitz is the managing partner at Cornish & Dell'Olio, P.C., a Colorado Springs law firm handling only employment law and civil rights cases. Ian's practice is focused on the litigation of employment claims on behalf of employees, with an emphasis on employment discrimination, hostile work environment, wage and hour issues, wrongful termination, employment-related torts, First Amendment and other constitutional claims. For most of his career, Ian has placed a special emphasis on the representation of public employees and has litigated cases in the MSPB, the EEOC, the Colorado State Personnel Board, and state and federal court through trial and appeal for numerous public employees.

Lauren A. Khouri is a Partner at Correia & Puth, PLLC, dedicating her practice to the civil rights of individuals in the workplace and in schools. Lauren's work centers gender justice where she focuses on representing women and girls of color and LGBTQI+ people in cases involving sexual harassment and violence, pregnancy and family responsibilities discrimination, and student and employee rights under Title IX. In 2023, NELA awarded Lauren its annual Spotlight Award, an honor bestowed on an attorney who represents leaders who are the future of the field. Best Lawyers has recognized Lauren as a leader in civil rights law since 2019 and Super Lawyers has selected her as a Rising Star in employment law every year since 2019. Lauren is the President of MWELA, the DC area NELA affiliate, and serves on the Board of Teaching for Change, a nonprofit supporting educators who advance social change through classroom instruction.

Martin C. Kuhn, (Marquette Law School, 2004), is a Shareholder with Hawks Quindel, S.C., in Milwaukee, WI where he focuses on labor and employment matters for individual and union clients. Attorney Kuhn's labor practice involves representing public-sector first responder unions along with private sector units as well. Attorney Kuhn also represents individuals in employment-related matters, focusing on discrimination and retaliation claims, restrictive covenant litigation, and public employee due process claims.

Consistently recognized as one of the top employment lawyers in Alabama, **Heather Leonard** has been handling employment law matters for employees since 1998. She has been ranked as one of the Top 25 female attorneys as well as one of the Top 50 overall attorneys in Alabama by Thompson Reuters' SuperLawyers publication. She has an A-V rating through Martindale Hubble. Her firm has also been ranked as a Tier One provider of employment law services by U.S. News and World Report's "Best Law Firms."

Cheri L. McCracken has practiced employment law in Arizona since 1993. She was trained in Federal personnel law while at the Federal Emergency Management Agency (FEMA) as an attorney advisor. She has represented Federal employees since 1983. Ms. McCracken was a founding board member of the Arizona Employment Lawyers Association and has long held a membership in the National Employment Lawyers Association (NELA), where she is co-chair of the NELA Ethics and Sanctions Committee, and a member of the Fundraising Committee.

Chief Administrative Judge Stephen C. Mish joined the U.S. Merit Systems Protection Board as an Administrative Judge in the Denver Field Office in 2006. He was appointed Chief Judge in 2014 and is a certified mediator. Prior to his appointment with the Board, he was an attorney in the Office of the Solicitor, U.S. Department of the Interior, where he focused on labor and employment matters. Before

joining the Federal government, he served as a Law Clerk to the Justices of the Superior Court of Massachusetts. Chief Judge Mish is a cum laude graduate of the University of Massachusetts at Amherst where he earned the Col. Claude R. Shepherd Award in Legal Studies. He received his law degree from Tulane Law School where, in recognition of his achievements, he was inducted into the Order of Barristers upon graduation. Chief Judge Mish is a member of the American Inns of Court.

Mari Newman is a founding member of Newman | McNulty LLC, a civil rights and employment law firm rooted in client-centered advocacy, movement lawyering, pro bono work, and representing marginalized communities. Best Lawyers in America has honored Mari as Denver's top employment lawyer for individuals, and as Denver's top civil rights lawyer. Mari has been inducted into the National College of Labor and Employment lawyers in recognition of her "devoted and distinguished career in the practice of labor and employment law in accordance with the highest ethical and professional standards," and she has been repeatedly recognized as a top labor and employment lawyer by 5280 Magazine. Mari was also voted one of the top ten lawyers in the State of Colorado by Super Lawyers, across all areas of legal practice. Mari has received numerous awards for her work from organizations including the Southern Center for Human Rights, the ACLU of Colorado, the Colorado Trial Lawyers Association, the Colorado Women's Bar Association Foundation, the LGBT Bar Association Foundation, and the Colorado Press Association, to name a few. Mari's work extends outside the courtroom, where she serves on the board of directors for progressive organizations including the Civil Rights Education and Enforcement Center and the Colorado Trial Lawyers Association, advocates in the legislature, writes and lectures, and marches for economic and social justice.

Taryn Wilgus Null is a Senior Trial Attorney with the U.S. Department of Justice, Civil Rights Division, Employment Litigation Section, where she litigates Title VII and USERRA cases. Before coming to DOJ, she was an Associate at Mehri & Skalet, PLLC, a small, public-spirited law firm where she represented plaintiffs in employment, fair housing, and consumer protection cases. Taryn also completed fellowships with Americans United for Separation of Church and State and the National Women's Law Center, and clerked for a judge on the District of Columbia Court of Appeals. She is a graduate of the University of Michigan Law School and Stanford University.

Kevin L. Owen is a partner at Gilbert Employment Law, where he concentrates his practice on federal employee civil service rights, whistleblower retaliation, as well as employment discrimination claims. He regularly practices before the EEOC, Merit Systems Protection Board, as well as U.S. District and Courts of Appeals. Mr. Owen received his J.D. degree, *cum laude*, from the American University, Washington College of Law, where he served as an editor of the American Bar Association's Administrative Law Review. Mr. Owen is the co-author of the *Federal Employment Litigation Field Book* and is a frequent speaker on topics related to litigation before the EEOC and MSPB.

Ricardo J.A. Pitts-Wiley is a partner at the Washington, D.C.-based Federal Practice Group on the firm's federal employment law team. He has over 15 years of experience in the areas of federal sector employment and labor law. He chiefly provides representation to federal employees in a wide range of employment and labor matters, including discrimination, harassment, reasonable accommodation, family and medical leave, performance-based actions, employee benefits, security clearance, whistleblower retaliation and inspector general investigations. Numerous times, he has practiced before and achieved successful outcomes through the U.S. Equal Employment Opportunity Commission, the U.S. Merit Systems Protection Board, the U.S. Office of Special Counsel, as well as before federal district courts.

Rebecca G. Pontikes, the founder of Pontikes Law, LLC, represents employees in all areas of employment law, specializing in gender and family responsibility (caregiver) discrimination, sexual harassment, negotiation of employment contracts and separation agreements, noncompetition agreements, retaliation and whistleblower claims (in all sectors, including the government and financial sectors), violations of the Family and Medical Leave Act, and violations of the wage statutes. Ms. Pontikes regularly speaks on employment law topics for Massachusetts Continuing Legal Education, bar associations, groups representing employees, and organizations that promote women's rights in the

workplace. Ms. Pontikes is an active member of the Massachusetts Women's Bar Association, where she sat on the board of directors for twelve years and chaired the solo and small firm committee for ten years. She is an active member of the Legislative Policy Committee and lobbied for the passage of the Massachusetts Pay Equity law and a Pregnant Workers' Fairness Act. She is an active member of the Massachusetts Employment Lawyer's Association, an association of attorneys who focus on representing employees and currently co-chairs the Amicus Committee. In the past, she has served on the Boards of Directors of Deana's Fund, an organization devoted to educating against dating violence through educational theater, and the Greater Boston Chapter of the National Organization for Women. She has been selected by her peers as a "SuperLawyer" since 2013. Massachusetts Lawyer's Weekly named her a Top Woman of Law in 2012 and one of its Circle of Excellence lawyers in 2017. SuperLawyers named her one of the Top 50 Women SuperLawyers in Massachusetts multiple times since 2014. She graduated from Tufts University, *magna cum laude* in 1994, and from the University of Michigan Law School in 1997. In her free time, she is a political activist, particularly the underprivileged, reads, watches movies, and writes letters to the editor.

Richard R. Renner is the semi-retired principal of Tate & Renner (www.taterenner.com). He previously worked as a Partner at Kalijarvi, Chuzi, Newman & Fitch, P.C., in Washington, DC (www.kcnfdc.com), and as Legal Director of the National Whistleblowers Center. He has served NELA as co-chair of the Whistleblower Committee, a member of NELA's Ethics and Sanctions Committee and as a member of the Executive Board. He co-wrote amicus briefs for NELA in *Lawson v. FMR LLC*, 571 U.S. 429 (2014); *Garner v. Cuyahoga County Juvenile Court*, 554 F.3d 624 (6th Cir. 2009); *Lucas v. Duncan*, 574 F.3d 772 (D.C. Cir. 2009); *and Day v. Department of Homeland Security*, 2013 MSPB 49 (Section 101 of the Whistleblower Protection Enhancement Act has retroactive application). In semi-retirement, he has written additional amicus briefs and regulatory comments, and has volunteered with the Emergency Worker Organizing Committee (EWOC) (workerorganizing.org). He enjoys zumba, BodyPump and unicycling.

Lucila (Lucy) Rosas has worked at the U.S. Equal Employment Opportunity Commission (EEOC) in various capacities for more than 24 years. Currently, she is an Attorney Advisor in the Office of Federal Operations, Federal Sector Division. From 2017 to 2020, Ms. Rosas was the Supervisory Administrative Judge for the Phoenix District, where she oversaw the programmatic and operational work of the hearings unit, supervised a team of judges and clerical staff, and presided over federal sector employment discrimination cases. She has served as an Administrative Judge since 2010 and presided over hundreds of federal sector cases, where she has issued several significant findings of discrimination in favor of complainants. Ms. Rosas has also served as a Senior Attorney Advisor to current EEOC Chair Charlotte A. Burrows, where she provided advice and counsel on various policy and administrative matters impacting the EEOC nationwide. Specifically, Ms. Rosas' portfolio included working on matters related to racial equity, immigrant workers, language access, and Tribal matters. During President Obama's administration, Ms. Rosas served as a Senior Attorney Advisor to the EEOC's General Counsel. In that capacity, she advised the General Counsel on litigation, appeals, and amicus briefs as well as various policy issues related to vulnerable and immigrant workers. From 1999 to 2010, Ms. Rosas was a Senior Trial Attorney with the EEOC's legal units in both Phoenix and San Francisco Districts. Prior to joining the EEOC, Ms. Rosas was Staff Attorney and Program Director with *Organizacion en California de Lideres Campesinas, Inc.* (*Lideres Campesinas*), a grassroots organization dedicated to empowering farmworker women and developing leadership skills. She filed immigration petitions for victims of domestic violence, conducted education and trainings to farmworker women on worker's rights, leadership development and strategic planning. Ms. Rosas obtained her B.A. degree in History and Ethnic Studies from U.C. Berkeley and her J.D. from UCLA School of Law. Ms. Rosas resides in Denver, Colorado. She grew up in Southern California and is a former farmworker.

Bryan Schwartz is the principal of Bryan Schwartz Law, P.C., in Oakland, California, and has represented federal workers for over twenty years before the United States District Court, the United States Courts of Appeals, EEOC, and MSPB, obtaining tens of millions in recovery for employees across the country. Mr. Schwartz's efforts on behalf of whistleblowers and discrimination victims have been

publicized worldwide, from the NY Times to the Washington Post, from NPR to MSNBC, from Voice of America to India's Hindustani Times. Mr. Schwartz recently obtained a $37.5 million settlement for a class of disabled applicants to the U.S. Foreign Service who suffered discrimination under the State Department's "worldwide availability" requirement, obtaining a major overhaul of this decades-old policy and more than 100 new job opportunities for disabled workers immediately. His still-pending class action on behalf of tens of thousands of federal workers denied posts abroad based upon their disabilities by the State Department (*Saba v. Blinken*) is among the largest employment disability discrimination classes ever certified.

Taylor M. Secemski is an associate attorney at Lubin & Enoch, P.C. She provides advice and representation to employees in wage and hour cases, discrimination cases, administrative proceedings, and other employment law matters. In addition, she represents union clients in grievances, arbitrations, and unfair labor practice cases. Prior to joining Lubin & Enoch, P.C., Taylor focused her practice on labor and employment law, first while working for another union-side law firm and, later, providing legal advice and training to employers in Arizona and throughout the Mountain West. Taylor, an Arizona native, earned her bachelor's degree in Sociology from Arizona State University in 2016. She earned her Juris Doctorate *cum laude* from the Sandra Day O'Connor College of Law at Arizona State University in 2019.

Adria Lynn Silva is an attorney at Sass Law Firm with over 25 years of experience in labor and employment law matters, representing employees suffering discrimination and harassment based on age, disability, family status, gender/sex, marital status, national origin, pregnancy, race, religion, and sexual orientation. She has extensive experience representing students and employees in Title IX claims against high schools, vocational schools, and universities, regarding a variety of issues including claims of pregnancy discrimination, access to athletics, equal pay, harassment, and retaliation. She currently serves as a Board Member of the National Employment Lawyers Association. In addition to her employment and Title IX practice, Ms. Silva has represented homeowners and tenants under the Fair Housing Act and customers and patrons in cases of discrimination in places of public accommodation. Before joining Sass Law Firm, Ms. Silva spent years in her own private practice representing students and employees in discrimination, retaliation and harassment cases. She began her legal career with Florida Rural Legal Services, Inc. in Immokalee, Florida, representing migrant farmworkers in employment discrimination cases and cases brought under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) and the Fair Labor Standards Act (FLSA). Most recently, she worked at another employee rights law firm for two years. She is bilingual in English and Spanish, and Ms. Silva has dedicated her career to advocating for individuals affected by discrimination, harassment or retaliation. Ms. Silva graduated from the University of California at Berkeley and the University of Miami School of Law. Ms. Silva previously served on the executive board of the Florida Chapter of the National Employment Lawyers Association (Florida NELA) for seven years and served as the President in 2009-2010. Ms. Silva was the 2012-2013 President of the Thomas S. Biggs American Inn of Court (now Michael R. N. McDonnell American Inn of Court) and is currently serving on the Inn executive board. Ms. Silva often speaks on various topics in employment and Title IX law and contributed to a book, *The Pregnancy Discrimination Act: A Guide for the Plaintiff's Employment Lawyer*, on pregnancy discrimination regarding Title IX and pregnancy.

Sara Snyder is the Regional Director and Chief Administrative Judge of the Merit Systems Protection Board's Western Regional Office in Oakland, California. Before her appointment to this position, she was the Deputy Managing Counsel for the U.S. Postal Service's Pacific Area Law Office in San Francisco. Earlier in her career, she served as agency counsel to the Postal Service in Philadelphia, PA and Washington, D.C., where she litigated employment law matters before the Board, the EEOC, and Federal District Court, and provided legal advice to management clients on issues ranging from Federal employment law to Federal contracting to torts and records management. Judge Snyder is a graduate of the Pennsylvania State University and Temple University's Beasley School of Law.

Harini Srinivasan is an associate in Cohen Milstein's Civil Rights & Employment practice and co-chair of the firm's Hiring & Diversity Committee. She has extensive experience addressing discrimination claims under Title VII, the Age Discrimination Act, Americans with Disabilities Act, and the Pregnancy Discrimination Act. Harini has worked on both individual and class action federal sector discrimination cases before the EEOC. Before joining Cohen Milstein, Harini was an associate at a plaintiff-focused employment litigation firm, where she represented clients in employment discrimination cases.

Alexis N. Tsotakos is an attorney with the Office of Employment Discrimination Complaint Adjudication (OEDCA), U.S. Department of Veterans Affairs. In that role, she adjudicates and issues final agency decisions in cases alleging workplace discrimination. Ms. Tsotakos also serves as a mediator for Federal Alternative Dispute Resolution (ADR) Program with the Equal Employment Opportunity Commission's (EEOC) Philadelphia District Office. Prior to joining OEDCA, Ms. Tsotakos headed a practice group at a civil rights law firm in Silver Spring, Maryland. There, she represented employees and federal agencies in employment discrimination cases, class action matters, adverse actions, disability retirement, arbitrations, and whistleblower complaints at the administrative level and in federal court nationwide.

Marni Willenson has been representing victims of discrimination and wage theft for 27 years. Since founding her own law firm in 2010, she has litigated numerous lawsuits on behalf of firefighters, paramedics, police officers, correctional officers, and applicants for these first responder/public employer jobs. She represented more than 500 women employed at the Cook County Jail (Chicago, Illinois) as corrections officers and in medical positions who were subjected to extreme and vile sexual harassment by inmates. Her firm's successes include a $31 million settlement in that case, *Howard v. Cook County*; as well as *Ernst v. City of Chicago*, *Vasich v. City of Chicago*, and *Godfrey v. City of Chicago*, (N.D. Ill.), all successful challenges to the use of invalid and discriminatory physical fitness tests to exclude women from jobs as firefighters and paramedics.

D. Andrew Winston has been an EEOC Administrative Judge with the Denver Field Office (DFO), Phoenix District Hearings Unit, since July 2015. Prior to assuming his present position, he worked for 8 years as a Senior Trial Attorney in the DFO Legal Unit. Before joining the EEOC in November 2007, Mr. Winston was in private practice as a labor arbitrator and civil litigator practicing labor, employment, civil rights, and entertainment law. Mr. Winston is a graduate of the State University of New York (SUNY) at Buffalo School of Law and the SUNY College at Fredonia (BA, Philosophy).

Zeyen Wu graduated from UCLA School of Law in 2012, and joined the U.S. Attorney's Office for the District of Colorado in 2013. He has been handling affirmative civil rights cases for the office since 2016, which includes evaluating complaints, conducting pre-litigation investigation, negotiating settlements, and litigating cases under a variety of federal civil rights laws, including Title VII, the Americans with Disabilities Act, the Fair Housing Act, the Equal Educational Opportunities Act, Title VI of the Civil Rights Act of 1964, and USERRA. He has also handled False Claims Act cases and defended civil litigation against federal agencies in a variety of areas.